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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1200

Board Organization

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board is republishing its organization and functions statements to reflect the current titles of the principal organizational units of the Board and the primary functions assigned to those units. The Board last updated and published its organization and functions statements on June 16, 1988 (53 FR 22465). Since that time there have been certain title changes and other organizational realignments.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Bentley Roberts, (202) 653–7700.

SUPPLEMENTARY INFORMATION:

List of Subjects in 5 CFR Part 1200

Organization and functions (government agencies).

Therefore, Part 1200 is revised to read as set forth below:

SUBCHAPTER A—ORGANIZATION AND PROCEDURES

PART 1200—BOARD ORGANIZATION

Subpart A—General

Sec.

Subpart B—Offices of the Board

Subpart A—General

Authority: 5 U.S.C. 1201 et seq.

§ 1200.1 What is the Merit Systems Protection Board?

The U.S. Merit Systems Protection Board (the Board) is an independent government agency that operates like a court. The Board was created to ensure that all Federal Government agencies follow Federal merit systems practices, and to allow appellants to appeal certain personnel actions by Federal agencies.

§ 1200.2 Who is on the Board?

(a) The Board has three members whom the President appoints and the Senate confirms. Members of the Board seve seven-year terms.

(b) The President appoints, with the Senate's consent, one member of the Board to serve as Chairman and chief executive officer of the Board. The President also appoints one member of the Board to serve as Vice Chairman. If the Office of the Chairman is vacant or the Chairman cannot perform his or her duties, then the Vice Chairman performs the Chairman's duties. If both the Chairman and the Vice Chairman cannot perform their duties, then the remaining Board Member performs the Chairman's duties.

Subpart B—Offices of the Board

Authority: 5 U.S.C. 1205 (g) and (i).

§ 1200.10 Who assists the Board?

(a) A staff helps the Board carry out its work. The following offices make up the staff:

(1) Offices of the Executive Director, Deputy Executive Director for Management, and Deputy Executive Director for Regional Operations.
(2) Office of Management Analysis.
(3) Office of the Inspector General.
(4) Office of Administration.
(5) Office of the Administrative Law Judge.
(6) Office of the Appeals Counsel.
(7) Office of the Clerk of the Board.
(8) Office of the General Counsel.
(9) Office of Policy and Evaluation.
(10) Regional Offices.

(b) *Office of the Executive Director.* The Executive Director manages the operations and programs of the Board's headquarters and regional offices and reports directly to the Chairman. The Deputy Executive Director for Management manages internal management programs and systems. The Deputy Executive Director for Regional Operations manages the appellate functions of the 11 MSPB regional offices.

(c) *Office of Management Analysis.* The Director, Office of Management Analysis, develops and coordinates internal management programs and projects for the Deputy Executive Director for Management, and prepares information publications including annual reports on the Board's significant actions and its appeals workload.

(d) *Office of the Inspector General.* The Inspector General is the Board's internal auditor and reports directly to the Executive Director. The Inspector General plans and directs audits, investigations, and internal control evaluations.

(e) *Office of Administration.* The Director, Office of Administration, manages the Board's administrative programs. This office has four divisions: Financial and Administrative Management; Equal Employment; Information Resources Management; and Personnel.

(f) *Office of the Administrative Law Judge.* The Administrative Law Judge hears Administrative Procedures Act cases and other cases that the Board assigns. The Administrative Law Judge also rules on discovery motions and subpoena requests.

(g) *Office of Appeals Counsel.* The Director, Office of Appeals Counsel, prepares proposed decisions that recommend appropriate action by the Board in petition for review cases and other cases assigned by the Board.

(h) *Office of the Clerk of the Board.* The Clerk of the Board enters petitions for review and original jurisdiction cases onto the Board's docket and monitors their processing. The Clerk of the Board also does the following:

(1) Gives information on the status of cases;

(2) Manages the Board's records, reports, and correspondence style and control programs; and

(3) Answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters.

(i) *Office of the General Counsel.* The General Counsel provides legal advice to the Board and its headquarters and regional offices, represents the Board in court proceedings, manages legislative policy, and performs congressional and media liaison.

(j) *Office of Policy and Evaluation.* The Director, Policy and Evaluation, conducts special reviews and studies of Federal merit systems, including actions of the Office of Personnel Management under 5 U.S.C. 1209(b).

(k) *Regional Offices.* The Board has 11 regional offices located throughout the country. (Appendix II to 5 CFR Part 1201 contains a list of the regional offices.) The regional offices enter initial appeals onto their docket and make decisions on initial appeals according to Board regulations under 5 CFR Part 1201 and 5 CFR 1201.111.

Date: November 16, 1988.

Shannon McCarthy,

Deputy Clerk of the Board.

[FR Doc. 88-26861 Filed 11-18-88; 8:45 am]

BILLING CODE 7400-01-M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 88-169]

Mediterranean Fruit Fly; Removal of Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the Mediterranean fruit fly regulations by removing a portion of Los Angeles County in California, near Van Nuys, as a quarantined area. The Mediterranean fruit fly regulations imposed restrictions on the interstate movement of regulated articles from this area, and were established to prevent the spread of the Mediterranean fruit fly into noninfested areas of the United States. We have determined that the Mediterranean fruit fly has been eradicated from a portion of Los Angeles County in California, near Van Nuys, and that the regulations are no longer necessary. This rule relieves restrictions on the interstate movement of regulated articles from this area.

DATES: Interim rule effective November 14, 1988. Consideration will be given only to comments postmarked or received on or before January 23, 1989.

ADDRESSES: Send an original and two copies of written comments to Regulatory Analysis and Development, APHIS, USDA, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 88-169. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Eddie Elder, Chief Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, USDA, Room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-6365.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule published in the **Federal Register** on August 8, 1988 (53 FR 29633-29639, Docket Number 88-127), and effective August 2, 1988, we established the Mediterranean fruit fly regulations and quarantined an area in Los Angeles County in California, near Van Nuys. In another interim rule, published in the **Federal Register** on October 19, 1988 (53 FR 40865-40866, Docket Number 88-159), and effective October 14, 1988, we amended the Mediterranean fruit fly regulations by adding another portion of Los Angeles County in California, near Culver City, to the list of quarantined areas.

The regulations impose restrictions on the interstate movement of regulated articles from quarantined areas in order to prevent the spread of the Mediterranean fruit fly to noninfested areas of the United States. The regulations also designate soil, and a large number of fruits, nuts, vegetables, and berries, as regulated articles.

Based on trapping surveys conducted by inspectors of California state and county agencies and by inspectors of Plant Protection and Quarantine, a unit within the Animal and Plant Health Inspection Service, we have determined that the Mediterranean fruit fly has been eradicated from the quarantined area in Los Angeles County in California, near Van Nuys. The last finding of Mediterranean fruit fly in the Van Nuys area was made on July 31, 1988. Since then, no evidence of infestations has been found in that area. We have determined that infestations no longer exist in the quarantined area of Los Angeles County in California, near Van Nuys.

The quarantined area in Los Angeles County in California, near Culver City, remains infested with Mediterranean fruit fly.

Immediate Action

James W. Glosser, Administrator of the Animal and Plant Health Inspection Service, has determined that a situation exists that warrants publication of this interim rule without prior opportunity for public comment. The area in Los Angeles County in California, near Van Nuys, was quarantined due to the possibility that the Mediterranean fruit fly could be spread from this area to noninfested areas of the United States. Since this situation no longer exists, and because the quarantined status of this portion of Los Angeles County imposes unnecessary regulatory restrictions on the public, we have taken immediate action to remove these restrictions.

Since prior notice and other public procedures with respect to this rule are impracticable and contrary to the public interest under these conditions, and because this rule relieves a regulatory restriction, there is good cause under 5 U.S.C. 553 to make it effective upon signature. We will consider comments postmarked or received within 60 days of publication of this rule in the **Federal Register**. Any amendments we make to this rule as a result of these comments will be published in the **Federal Register** following the close of the comment period.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

This regulation affects the interstate movement of regulated articles from a portion of Los Angeles County in California, near Van Nuys. It appears that there is very little commercial activity that may be affected by this rule in the quarantined area. The small entities that may be affected by this regulation appear to consist of approximately 80 nurseries, 5 open fruit stands, 2 community gardens, 2 regularly scheduled swap meets (flea markets), 3 caterers who send lunch "chuckwagons" to job sites in the quarantined area, 1 airport with no scheduled passenger

flights, 1 tomato and pepper grower with approximately 4000 plants on a ½-acre field, and 1 tomato grower with a 3-acre field. Both growers sell their products locally at roadside stands.

The effect of this rule on these entities should be insignificant, since it appears that most of their sales are for local intrastate markets, not interstate markets, and are therefore not affected by the regulatory provisions we are removing.

Those sales that were affected were generally of articles that could be moved, without significant added costs, after compliance with treatments in the Plant Protection and Quarantine Treatment Manual, incorporated by reference in the regulations.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (see 7 CFR 3015, Subpart V).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation, Mediterranean fruit fly, Incorporation by reference.

Accordingly, 7 CFR Part 301 is amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for 7 CFR Part 301 continues to read as follows:

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff; 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

§ 301.78–3 [Amended]

2. In § 301.78–3(c), the first paragraph under "Los Angeles County" is removed.

Done at Washington, DC, this 14th day of November 1988.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 88–26823 Filed 11–18–88; 8:45 am]

BILLING CODE 3410–34–M

Federal Crop Insurance Corporation

7 CFR Part 405

[Amdt. No. 2; Doc. No. 5950S]

Apple Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Apple Crop Insurance Regulations, effective for the 1989 and succeeding crop years, by revising and reissuing the Apple Fresh Fruit Option and the Pilot Apple Sunburn Option. The intended effect of this final rule is to: (1) Reduce the add back percentage of cull production to be counted as production for the purposes of loss adjustment, and to incorporate minor grammatical changes in the Fresh Fruit Option; and (2) replace the Pilot Apple Sunburn Option, previously only available in Washington State, with a revised Apple Sunburn Option.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC, 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512–1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date for these regulations is April 1, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith amends the Apple Crop Insurance Regulations (7 CFR Part 405), to: (1) Revise and reissue the Apple Fresh Fruit Option (7 CFR 405.8(c)) to reduce the percentage of cull production added back to production to count for purposes of loss adjustment from 30 percent to 15 percent, and to incorporate minor grammatical changes; and (2) replace the Pilot Apple Sunburn Option (7 CFR 405.9), previously only available in Washington State, with a revised Apple Sunburn Option available over a wider area.

Under the present provisions of § 405.8(c), the Apple Fresh Fruit Option, apples which are knocked to the ground by wind, or frozen to the extent that they can be harvested but not packed or marketed as fresh apples, are considered 100 percent cull production. Thirty (30) percent of all such cull production is added back as production to count for loss adjustment purposes.

FCIC herein reduces the percentage of cull production add back from 30 percent to 15 percent to provide a more equitable determination in loss adjustment by more nearly reflecting the normal percentage of cull production.

FCIC issues a new § 405.9 Apple Sunburn Option, replacing the Pilot Apple Sunburn Option, published in the **Federal Register** at 52 FR 1467, January 20, 1988. These programs are designed to blend together to provide a broader base of protection for insured apple producers.

On Monday, August 22, 1988, FCIC published a notice of proposed rulemaking in the **Federal Register** at 53 FR 31875, to revise and reissue the Apple Fresh Fruit Option and the Pilot

Apple Sunburn Option for the 1989 and succeeding crop years. The public was given 30 days in which to submit written comment, data, and opinions on the proposed rule, but none were received. Therefore, the rule published at 53 FR 31875 in herewith adopted as final.

In order to make the insured aware of this beneficial amendment as quickly as possible, good cause is shown for making this rule effective in less than 30 days.

List of Subjects in 7 CFR Part 405

Apple crop insurance regulations.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation hereby amends the Apple Crop Insurance Regulations (7 CFR Part 405), effective for the 1989 and succeeding crop years, as follows:

PART 405—[AMENDED]

1. The authority citation for 7 CFR Part 405 is revised to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. Section 405.8 is amended by revising the section heading and paragraph (c) to read as follows:

§ 405.8 Apple fresh fruit option.

* * * * *

(c) The Option reads as follows:

U.S. DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Apple Fresh Fruit Option

This is a continuous amendment (see section 15 of the basic policy).
Insured's Name _____
Contract No. _____
Address _____
Crop Year _____
Identification No. _____
SSN _____
Tax _____

It is hereby agreed to amend the basic Federal Crop Insurance Apple Policy under the following terms and conditons:

1. This Option must be submitted to us on or before the final date for accepting applications for the initial crop year in which you wish to insure your applies under this Option.

2. You must have an apple policy in force.

3. You must insure all the acreage of applies in the county in which you have a share regardless of the intended use (fresh-market or processing).

4. In addition to section 8 of the apple policy, inspection and grading of the fruit must be done by us prior to harvest or no quality adjustment will be made.

5. Separate line entries according to intended use (fresh-market or processing) must be included on the acreage report required under section 3 of the apple policy.

6. Your apples intended for processing will be insured under the quality provisons of A only (See below).

7. Your apples intended for fresh-market will be insured under the quality provisions of either A or B, whichever you select.

8. If you select A only, A will apply to all of your apples intended for processing and fresh-market.

9. If you select B, those provisions will apply to all of your apples intended for fresh-market and the provisions of A will apply to all of your apples intended for processing.

10.a. You must select either A or B by marking the appropriate space below.

A—

In addition to section 9.e. and in lieu of 17.q. of the Apple Policy, your production to count for any acreage designated for processing or fresh-market will be adjusted when your apples are damaged by hail to the extent that such apples will not grade U.S. No. 1 (processing) (7 CFR 51.430 *et seq.*)). The adjustment factor (not to exceed 1) will be the ratio of the average market price (received by you or determined by us, whichever is larger) for your damaged production to the average market price for U.S. No. 1 (processing) apples. There will be no adjustment for quality if the apples do not grade U.S. No. 1 because of size, color, or russeting.

B—

In lieu of sections 9.e.(1), 9.e.(2), 17.1, and 17.q of the Apple Policy, the total production to be counted for a unit must include all harvested and appraised production. Harvested apple production which, due to hail damage, does not grade 80 percent U.S. Fancy or better, in accordance with applicable USDA Standards (7 CFR 51.300 *et seq.*), will be adjusted as follows:

(1) Production with 21 through 40 percent not grading U.S. Fancy or better due to hail damage will be reduced 2 percent for each percent in excess of 20 percent. The difference between the reduced production and the total production will be considered cull production.

(2) Production with 41 through 50 percent not grading U.S. Fancy or better due to hail damage will be reduced 40 percent plus an additonal 3 percent for each percent in excess of 40 percent. The difference between the reduced production and the total production will be considered cull production.

(3) Production with 51 through 64 percent not grading U.S. Fancy or better due to hail damage will be reduced 70 percent plus an additional 2 percent for each percent in excess of 50 percent. The difference between the reduced production and the total production will be considered cull production.

(4) Production with 65 percent or more not grading U.S. Fancy or better due to hail damage will be considered 100 percent cull production.

b. Apples which are knocked to the ground by wind or frozen to the extent that they can be harvested but not packed or marketed as fresh apples will be considered 100 percent cull production.

c. Fifteen (15) percent of all cull production will be counted as production.

d. No reduction in grade will be applied to any apple grading less than U.S. Fancy due solely to shape, russeting, or color.

e. Appraised production to be counted must include:

(1) Potential production lost due to uninsured causes and failure to follow recognized good apple management practices; and

(2) Not less than the guarantee for any acreage which is abandoned, damaged solely by an uninsured cause, or destroyed without our consent.

f. Any appraisal we have made on insured acreage will be considered production to count unless such appraised production is:

(1) Harvested;

(2) Further damaged by an insured cause and reappraised by us; or

(3) In whole or part knocked to the ground by wind or hail or frozen on the tree to the extent that harvest is not practical.

11. Your premium rate for Apples under either A or B, as elected by you, will be established by the actuarial table.

12. All provisions of the apple policy not in conflict with this option are applicable.

13. All determinations under this option will be made by us.

14. This Option may be canceled by either you or us for any succeeding crop year by giving written notice on or before the cancellation date provided by the policy, preceding such crop year.

Insured's Signature _____
Date _____
Corporation representative's signature and Code Number _____
Date _____

3. Section 405.9 is revised to read as follows:

§ 405.9 Apple sunburn option.

U.S. DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

Apple Sunburn Option.

This is not a continuous option. Applications for this option must be made prior to the sale closing date if you want this optional coverage. Upon our approval this option is applicable *only* for the 19___ crop year.

Insured's name _____
Contract No. _____
Address _____
Crop Year _____
Identification No. _____
SSN _____
Tax _____

It is hereby agreed to amend the Federal Crop Insurance Apple Policy in accordance with the following terms and conditions:

1. This option must be submitted to us on or before the final date for accepting applications for each crop year in which you wish to insure apples under this option.

2. You must have an apple policy and the Apple Fresh Fruit Option B in force.

3. You must insure all the acreage of apples in the county to which the Apple Fresh Fruit Option B applies and in which you have a share.

4. In addition to the causes of loss specified in paragraph 1.a. of the Apple Crop Insurance

policy, excess sun is an insurable cause of loss.

5. In lieu of sections 9.e.(1), 9.e.(2), 17.l, and 17.q. of the Apple Policy, the total production to be counted for a unit must include all harvested and appraised production. Harvested apple production which, due to excessive sun damage, does not grade 80 percent U.S. Fancy or better, in accordance with applicable USDA Standards, will be adjusted as follows:

a. Production with 21 thru 40 percent not grading U.S. Fancy or better due to excessive sun damage will reduced 2 percent for each percent in excess of 20 percent. The difference between the reduced production and the total production will be considered cull production.

b. Production with 41 thru 50 percent not grading U.S. Fancy or better due to excessive sun damage will be reduced 40 percent plus an additional 3 percent for each percent in excess of 40 percent. The difference between the reduced production and the total production will be considered cull production.

c. Production with 51 thru 64 percent not grading U.S. Fancy or better due to excessive sun damage will be reduced 70 percent plus an additional 2 percent for each percent in excess of 50 percent. The difference between the reduced production and the total production will be considered cull production.

d. Production with 65 percent or more not grading U.S. Fancy or better due to excessive sun damage will be considered 100 percent cull production.

Fifteen (15) percent of all cull production, will be counted as production.

6. The premium for this sunburn option will be established by the actuarial table.

7. All provisions of the apple policy and the Fresh Fruit Option–B not in conflict with this option are applicable.

8. All determinations under this option will be made by us.

9. a. *"Excessive sun"* is defined as the exposure of the unharvested apples to direct or indirect sun sufficient to cause the apples to grade less than U.S. Fancy due to sunburn.

b. *"Sunburn"* is defined in accordance with applicable U.S.D.A. Standards.

Insured's Signature _____

Date _____

Corporation representative's Signature and Code Number _____

Date _____

Done in Washington, DC, on November 7, 1988.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 88–26854 Filed 11–18–88; 8:45 am]

BILLING CODE 3410–08–M

7 CFR Part 440

[Amendment No. 2; Doc. No. 6046S]

Texas Citrus Tree Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) hereby adopts, as a final rule, an interim rule which was published in the **Federal Register** on Monday, March 21, 1988, at 53 FR 9104. The interim rule amended the Texas Citrus Tree Crop Insurance Regulations (7 CFR Part 440), by extending the date for filing contract changes specified in the policy for insuring citrus trees.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, D.C., 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512–1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date for these regulations is November 1, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

On Monday, March 21, 1988, FCIC published an interim rule, in the **Federal Register** at 53 FR 9104, amending the Texas Citrus Tree Crop Insurance Regulations (7 CFR Part 440), by extending the date for filing contract changes specified in the policy for insuring citrus trees to allow additional time for FCIC to file actuarial data on this program in the service offices prior to issuing the provisions of crop insurance protection on citrus trees as an endorsement to the general crop insurance policy.

Written comments on the interim rule were solicited by FCIC for 60 days after publication of the rule in the **Federal Register**, and the rule was scheduled for review.

No comments were received, therefore, the interim rule published at 53 FR 9104 is hereby adopted as final.

List of Subjects in 7 CFR Part 440

Crop insurance, Texas citrus tree crop insurance regulations.

Final Rule

Accordingly, the Interim Rule published in the **Federal Register** on Monday, March 21, 1988, at 53 FR 9104, is hereby adopted as final.

Authority: 7 U.S.C. 1506, 1516.

Done in Washington, DC, on November 7, 1988.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 88–26855 Filed 11–18–88; 8:45 am]

BILLING CODE 3410–08–M

7 CFR Part 441

[Amdt. No. 1; Doc. No. 6034S]

Table Grape Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Table Grape Crop Insurance Regulations (7 CFR Part 441), effective for the 1989 and succeeding crop years, by adding a calendar date for the end of the insurance period for Arizona grape producing counties. The intended effect of this rule is to add the calendar date for the end of the insurance period for those counties in Arizona recently approved for table grape crop insurance.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop

Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA Procedures established by Departmental Regulation 1512–1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is established as May 1, 1991.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Supart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

FCIC herewith amends the Table Grape Crop Insurance Regulations (7 CFR Part 441), by adding a calendar date for the end of the insurance period for table grape crop insurance in Arizona (7 CFR 441.7.g.).

The Board of Directors, at a meeting held on June 8, 1988, approved the expansion of table grape crop insurance to include Arizona. This action makes it possible to carry out that directive.

On Monday, August 22, 1988, FCIC published a notice of proposed rulemaking in the **Federal Register** at 53 FR 31877 to amend the Table Grape Crop Insurance Regulations (7 CFR Part 441), effective for the 1989 and succeeding crop years, to add the calendar date for the end of the insurance period for those counties in Arizona recently approved for table grape crop insurance. The public was given 30 days in which to submit written comments, data, and opinions on the proposed rule, but none were received. Therefore, FCIC herewith adopts the rule published at 53 FR 31877 was a final rule without change.

It is necessary that the end of the insurance period for Table Grapes produced in Arizona be known to policyholders as quickly as possible. Therefore, good cause is shown for making this rule effective in less than 30 days.

List of Subjects in 7 CFR Part 441

Crop insurance, Table grapes.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Table Grape Crop Insurance Regulations (7 CFR Part 441), effective for the 1989 and succeeding crop years, as follows:

PART 441—[AMENDED]

1. The authority citation for 7 CFR Part 441 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR 441.7(d)7.g. is revised to read as follows:

§441.7 The application and policy.

* * * * *

(d) * * *

7. Insurance Period.

* * * * *

g. The following applicable date of the calendar year in which the grapes are normally harvested:

State and county(ies)	Variety	Date
Arizona:		
All counties.	Perlette	June 15.
	Flame Seedless	July 15.
	All others	July 31.
California:		
Fresno, Kern, Kings, Madera, and Tulare.	Perlette	August 15.
	Cardinal	August 15.
	Exotic	August 31.
	Flame Seedless	August 31.
	Superior Seedless.	August 31.
	Red Malaga	September 15.
	Queen	September 15.
	Thompson Seedless.	September 15.
	Black Rose	September 30.
	Italia	September 30.
	White Malaga	October 15.
	Ribier	October 15.
	Ruby Seedless	October 15.
	All others	October 31.
Merced, Stanislaus, and San Joaquin.	Flame Seedless	September 15.
	Thompson Seedless.	September 30.
	Ribier	October 15.
	Flame Tokay	October 15.
	All others	October 31.
Riverside, and San Bernadino.	Beauty Seedless	July 15
	Perlette	July 15
	All others	July 31.

Done in Washington, DC on November 7, 1988.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 88–26857 Filed 11–18–88 8:45 am]

BILLING CODE 3410-08-M

7 CFR Part 451

[Amendment No. 1; Doc. No. 6042S]

Canning and Processing Peach Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Canning and Processing Peach Crop Insurance Regulations, effective for the 1988 crop year. The intended effect of this rule is to maintain the effectiveness of the present Canning and Processing Peach Crop Insurance Regulations only through the 1987 crop year. The provisions currently contained in this Part have been issued as the Stonefruit Endorsement under the General Crop Insurance Regulations, effective for the 1988 and succeeding crop years. The General Crop Insurance Regulations are a standard set of regulations and a master policy for insuring most crops which substantially reduce: (1) The time involved in amendment or revision; (2) the necessity of the present repetitious review process; and (3) the volume of paperwork processed by FCIC.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447–3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512–1. This action does not

constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is May 15, 1990.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) An annual effects on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Background

FCIC has published over 40 policies to cover insurance on that many different crops. Many of the regulations and policies contain identical language, which, if changed requires that over 40 different policies be changed, both in the Code of Federal Regulations (CFR) and the printed policy language. This repetition of effort is both inefficient and expensive. FCIC, therefore, has published in 7 CFR Part 401, one set of regulations and one master policy to contain that language which is identical in most of the policies and regulations.

As revisions on individual policies are necessary, FCIC proposes to publish a "crop endorsement" which will contain the language of the policy unique to that crop, and any exceptions to the master policy language necessary for that crop. When an endorsement is published as a section to Part 401, effective for a subsequent crop year, the present policy contained in a separate part of Chapter IV will be terminated at the end of the crop year then in effect. The new Stonefruit Endorsement was published on Wednesday, February 2, 1988, at 53 FR 6561 (7 CFR 401.122, Stonefruit Endorsement), and became effective for the 1988 and succeeding crop years. The provisions of the Canning and Processing Peach Crop Insurance Regulations contained in 7 CFR Part 451 have been superseded.

In order to clearly establish that 7 CFR Part 451 will be effective only through the end of the 1987 crop year, FCIC herein amends the subpart heading to specify that such will be the case.

Therefore, FCIC amends the subpart heading to provide that 7 CFR Part 451 be effective for the 1986 and 1987 crop years only.

List of Subjects in 7 CFR Part 451

Crop insurance; Canning and processing peach.

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Subpart heading to the Canning and Processing Peach Crop Insurance Regulations (7 CFR Part 451), as follows:

PART 451—[AMENDED]

1. The Authority citation for 7 CFR Part 451 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. The Subpart heading in 7 CFR Part 451 is revised to read as follows:

Subpart—Regulations for the 1986 and 1987 Crop Years.

Done in Washington, DC on November 7, 1988.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 88-26856 Filed 11-18-88; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 451

[Docket No. 6039S]

Canning and Processing; Peach Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) hereby adopts, as a final rule, an interim rule which amended the Canning and Processing Peach Crop Insurance Regulations, by extending the date for filing contract changes specified in the policy for insuring canning and processing peaches in order to provide additional time in which to complete the actuarial transition form existing canning and processing peaches (Clingstone Peaches) in California to type IV under the Stonefruit Endorsement, published in a separate document.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established by Departmental Regulation 1512-1. This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is May 15, 1989.

John Marshall, Manager, FCIC, (1) has determined that this action is not a major rule as defined by Executive Order 12291 because it will not result in: (a) an annual effect on the economy of $100 million or more; (b) major increases in costs or prices for consumers, individual industries, federal, State, or local governments, or a geographical region; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets; and (2) certifies that this action will not increase the federal paperwork burden for individuals, small businesses, and other persons and will not have a significant economic impact on a substantial number of small entities.

This action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Flexibility Analysis was prepared.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR

Part 3015, Subpart V, published at 48 FR 29115, June 24, 1983.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an environmental Impact Statement is needed.

On Friday, October 30, 1987, FCIC published an interim rule in the **Federal Register** at 52 FR 41691, amending the Canning and Processing Peach Crop Insurance regulations (7 CFR Part 451) by extending the date for filing contract changes specified in the policy for insuring canning and processing peaches in order to provide additional time in which to complete the actuarial transition for existing canning and processing peaches (Clingstone Peaches) in California to type IV under the Stonefruit Endorsement (7 CFR 401.122).

Written comments on the interim rule were solicited by FCIC for 60 days after publication in the **Federal Register**, and the rule was scheduled for review.

No comments were received, therefore, the interim rule published at 52 FR 41691 is hereby adopted as final.

List of Subjects in 7 CFR Part 451

Crop Insurance, Canning and processing peaches.

Final Rule

PART 451—[AMENDED]

§ 451.7 [Amended]

Accordingly, the interim rule revising § 451.7(d) 16 published in the **Federal Register** on Friday, October 30, 1987, at 52 FR 41691, is hereby adopted as final.

Authority: 7 U.S.C. 1506, 1516.

Done in Washington, DC, on November 7, 1988.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 88-26859 Filed 11-18-88; 8:45 am]

BILLING CODE 3410-08-M

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7 CFR Part 454

[Amdt. No. 1; Doc. No. 6072S]

Fresh Market Tomato (Guaranteed Production Plan) Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Fresh Market Tomato (Guaranteed Production Plan) Insurance Regulation (7 CFR Part 454) to include tomato producers in Maryland and Virginia under the guaranteed production plan of tomato insurance. The intended effect of this rule is to provide the regulations for crop insurance protection on tomatoes grown under the guaranteed production plan to Maryland and Virginia in order to implement a decision by the Board of Directors to expand into those states.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 447-3325.

SUPPLEMENTARY INFORMATION: This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, it is found upon good cause that notice and public comment are impracticable and contrary to the public interest, and good cause is found for making this rule effective in less than thirty days.

Further, since this rule relates to internal agency management it is exempt from the provisions of Executive Order 12291. Lastly, this action is not a major rule as defined in Pub. L. 96-354, the Regulatory Flexibility Act, and thus is exempt from the provisions of the Act.

The Board of Directors of FCIC recently approved the expansion of the fresh market tomato (guaranteed production) crop insurance program into the States of Maryland and Virginia. This action is designed to carry out that directive.

John Marshall, Manager, FCIC, has determined that this action is appropriate to implement the Board of Directors approval of tomato insurance in Maryland and Virginia. All actuarial data is currently in place in the service offices and, since this is a first time offer of such crop insurance in those states, there are no producers adversely affected by this rule. This action provides a benefit to Maryland and Virginia tomato growers by offering crop insurance protection against damage or loss of their crops due to conditions beyond their control.

For this reason, it has been determined to make this program available in Maryland and Virginia without notice and comment normally allowed for implementing regulations.

List of Subjects in 7 CFR Part 454

Crop insurance, Fresh market tomato (Guaranteed production plan).

Final Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation amends the Fresh Market Tomato (Guaranteed Production Plan) Crop Insurance Regulations (7 CFR Part 454), as follows:

PART 454—[AMENDED]

1. The authority citation for 7 CFR Part 454 continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

2. 7 CFR 454.7(d)15.d. is revised to read as follows:

§ 454.7 The application and policy.

* * * * *

(d) * * *

15. * * *

d. The cancellation and terminations dates are:

State	Cancellation and termination dates
Florida, Georgia, and South Carolina.	February 15.
Maryland, Pennsylvania, and Virginia.	April 15.

* * * * *

Done in Washington, DC, on November 7, 1988.

John Marshall,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 88-26858 Filed 11-18-88; 8:45 am]

BILLING CODE 3410-08-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 214 and 274a

[INS Number: 1125-88]

Nonimmigrant Classes; Special Requirements for Admission, Extension and Maintenance of Status, Control of Employment of Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule revises the regulations of the Immigration and Naturalization Service ("Service") relating to employment authorization for dependents of certain foreign government and international organization officials classified as A-1, A-2 and G-4 nonimmigrants. It also allows employment authorization for dependents of certain foreign officials classified as G-1 nonimmigrants. These actions are being taken in order to improve employment opportunities for

dependents of United States officials stationed abroad by making bilateral agreements more attractive for dependents of foreign officials stationed in the United States and to provide a regulatory basis for G–1 dependent employment authorization. This rule balances international obligations, administrative requirements and proper enforcement concerns.

DATES: This interim rule is effective November 21, 1988. Written comments must be received on or before December 21, 1988.

ADDRESS: Please submit comments in triplicate to the Director, Office of Policy Directives and Instructions, Immigration and Naturalization Service, Room 2011, 425 I St., NW., Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Jack Tabaka, Senior Immigration Examiner, Immigration and Naturalization Service, 425 I St., NW., Room 7122, Washington, DC 20536, Telephone (202) 633–3240.

SUPPLEMENTARY INFORMATION:

Employment authorization for dependents of foreign government officials is based on reciprocity which takes two forms: Formal bilateral agreements or informal de facto arrangements. A bilateral agreement is a signed, written agreement which has been negotiated by both parties, that is, the United States and a foreign country. A bilateral agreement virtually guarantees employment authorization for dependents of certain United States government officials assigned to duty in the foreign country which signed the agreement. In turn it virtually guarantees employment authorization for dependents of certain officials of that foreign country who are assigned to duty in the United States. A de facto arrangement takes effect when the Department of State determines that a foreign country allows appropriate employment on the local economy for dependents of certain United States officials assigned to duty in that foreign country. Based on that determination, dependents of certain government officials of that foreign country assigned to duty in the United States may apply for employment authorization.

Dependent employment authorization based on a de facto arrangement is more tenuous than authorization based on a bilateral agreement. This is because a de facto arrangement is based on current practices and policies rather than mutually negotiated, well-defined obligations. The virtual assurance of dependent employment authorization in a foreign country contributes to making duty there more attractive to a United States government official whose dependents wish to work while abroad or whose spouse wishes to pursue his/her career. Recognizing the benefits, Congress has commissioned the Department of State to increase the number of bilateral agreements. (Foreign Relations Authorization Act, Fiscal Year 1979.)

As a result these regulations were drafted in cooperation with the Department of State to make bilateral agreements clearly more advantageous to foreign countries than de facto arrangements. This is accomplished principally through the following steps:

(1) Modifying the definition of dependent, which was only applicable to bilateral agreements, to better reflect international obligations and practices. The new definition has been extended to apply to de facto arrangements. This extension eliminates the anomaly that has allowed unmarried children of any age to be considered as dependents under de facto arrangements while limiting unmarried children to a definite age under bilateral agreements. The new definition applies to dependent employment authorization only and not to matters of visa issuance.

(2) Clarifying that the applicability of bilateral agreements and de facto arrangements is based on the foreign state which employs the principal alien and not the nationality of the dependent. Based on a recommendation by the Department of State, the regulations require that under de facto arrangement, the principal alien also must have the same nationality as the country he or she represents. This precludes employment authorization under de facto arrangements for dependents of principal aliens who are third country nationals.

These regulations allow dependents of certain G–1 principal aliens, a class not covered by prior regulations, to apply for employment authorization. On the basis of reciprocity, the Congressional intent to increase the number of bilateral agreements, equity and administrative considerations, it was decided to have the regulations governing G–1 dependents parallel the regulations governing other dependents of foreign government officials in A–1 and A–2 status.

There has been no regulatory basis for granting employment authorization to dependents of G–1 principal aliens. However, on the basis of bilateral agreements, de facto arrangements and other international considerations, G–1 dependents were granted employment authorization. The enactment of the Immigration Reform and Control Act ("IRCA") with its strict documentary requirements has necessitated a review of this procedure and has resulted in the G–1 regulations. With the provisions of IRCA in force, the issuance of G–1 dependent employment authorization has been suspended. The Department of State has advised the Service that the situation is straining the United States' relationship with a number of countries and could affect the United States' relations with more than 80 countries. The situation requires that these regulations, which allow for the employment of dependents of certain G–1 principal aliens, take effect immediately, a course of action with which the Department of State has expressed agreement. More than twenty countries have entered into bilateral agreements with the United States which permit G–1 dependents to work in the United States. The suspension of work authorizations for G–1 dependents from these countries violates formal international obligations of the United States and has developed into a significant issue for some of these countries which are traditional allies. In addition, approximately 60 other countries have previously enjoyed the possibility of their G–1 dependents obtaining employment in the United States under de facto arrangements. The cessation of issuance of work authorization to G–1 dependents jeopardizes the employment of dependents of United States officials stationed abroad, the very individuals that the program of dependent employment authorization is designed to assist. In order to avoid damage to United States foreign relations and to take United States dependents out of jeopardy, it is imperative that these regulations be implemented immediately.

It is recognized that these regulations affect individuals who qualify as dependents of G–1 officials but are not covered by terms of a bilateral agreement or de facto arrangement. In order not to penalize these individuals who meet the new definition of dependent, the interim regulations include a limited savings clause which will expire on or before December 31, 1989.

Because new G–1 regulations are closely tied to and were developed in conjunction with the regulations permitting work authorization for dependents of certain A–1, A–2 and G–4 principal aliens, the Department of State and the Service believe that all the new regulations on employment authorization for the dependents of certain A–1, A–2, G–1 and G–4 principal aliens should take effect at the same time.

These regulations follow the long-standing policy of having regulations governing employment authorization for dependents of G–4 principal aliens (employees of international organizations) parallel the provisions of de facto arrangements. Additionally, these regulations allow a very limited test of reciprocity in considering employment authorization for dependents of certain G–4 principal aliens.

These regulations give the Director of the Eastern Regional Service Center authority to adjudicate applications for employment authorization under de facto arrangements along with the District Directors at New York and Washington, DC. This will allow the Service more flexibility in adjudicating such employment applications. The proposed regulations also clarify a dependent's tax liability.

As stated earlier, foreign policy considerations mandate that this rule be effective upon publication. It is recognized that immediate implementation will cause some individuals to be unknowingly in violation of these regulations. To preclude this, to provide adequate notice to individuals who are no longer eligible for employment authorization as a dependent, and to deal fairly with their employers, the following Service policy is set forth: An individual (1) who was considered a dependent of an A–1, A–2, G–1 or G–4 principal alien under the prior regulations or practices, and (2) who had employment authorization under the prior regulations or practices, and (3) who is not eligible for employment authorization as a dependent under the new regulation, will be allowed to work until February 20, 1989, or until the end of his/her employment authorization period, whichever comes first. Such employment by such an individual for the stated period of time shall not in any way be considered or construed to be a violation of nonimmigrant status.

In accordance with 5 U.S.C. 605(b), the Commissioner of Immigration and Naturalization certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

The Information Collection Requirements contained in this regulation have been approved by the Office of Management and Budget, under the provisions of the Paperwork Reduction Act, under control number 1115–0090.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment.

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for Part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1186a, 1187.

2. Section 214.2 is amended by revising paragraphs (a)(2) and (a)(3), and adding paragraphs (a)(4) through (a)(10), to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(a) * * *

(2) *Definition of A–1 or A–2 dependent.* For purposes of employment in the United States, the term "dependent" of an A–1 or A–2 principal alien, as used in § 214.2(a), means any of the following immediate members of the family habitually residing in the same household as the principal alien who is an officer or employee assigned to a diplomatic or consular office in the United States:

(i) Spouse;

(ii) Unmarried children under the age of 21;

(iii) Unmarried sons or daughters under the age of 23 who are in full-time attendance as students at post-secondary educational institutions;

(iv) Unmarried sons or daughters under the age of 25 who are in full-time attendance as students at post-secondary educational institutions if a formal bilateral employment agreement permitting their employment in the United States was signed prior to November 21, 1988, and such bilateral employment agreement does not specify 23 as the maximum age for employment of such sons and daughters. The Office of Protocol of the Department of State shall maintain a listing of foreign states with which the United States has such bilateral employment agreements;

(v) Unmarried sons or daughters who are physically or mentally disabled to the extent that they cannot adequately care for themselves or cannot establish, maintain or re-establish their own households. The Department of State or the Service may require certification(s) as it deems sufficient to document such mental or physical disability.

(3) *Applicability of a formal bilateral agreement or an informal de facto arrangement for A–1 or A–2 dependents.* The applicability of a formal bilateral agreement shall be based on the foreign state which employs the principal alien and not on the nationality of the principal alien or dependent. The applicability of an informal de facto arrangement shall be based on the foreign state which employs the principal alien, but under a de facto arrangement the principal alien also must be a national of the foreign state which employs him/her in the United States.

(4) *Income tax, Social Security liability; non-applicability of certain immunities.* Dependents who are granted employment authorization under this section are responsible for payment of all federal, state and local income, employment and related taxes and Social Security contributions on any remuneration received. In addition, immunity from civil or administrative jurisdiction in accordance with Article 37 of the Vienna Convention on Diplomatic Relations or other international agreements does not apply to these dependents with respect to matters arising out of their employment.

(5) *Dependent employment pursuant to formal bilateral employment agreements.* The Office of Protocol shall maintain a listing of foreign states which have entered into formal bilateral employment agreements. Dependents of an A–1 or A–2 principal alien assigned to official duty in the United States may accept unrestricted employment based on such formal bilateral agreements between the Department of State and foreign states if the following conditions are met:

(i) The embassy of the foreign state employing the official makes an official request to the Office of Protocol;

(ii) The Office of Protocol recognizes the person as a dependent, as defined in this section, of an official A–1 or A–2 employee; and

(iii) The Office of Protocol informs the embassy of the foreign state that the dependent has permission to accept employment upon receipt of employment authorization documentation issued by the Service in accordance with 8 CFR 274a.

(6) *Dependent employment pursuant to informal de facto reciprocal arrangements.* For purposes of this section, an informal de facto reciprocal arrangement exists when the Department of State determines that a foreign state allows appropriate

employment on the local economy for dependents of certain United States officials assigned to duty in that foreign state. The Office of Protocol shall maintain a listing of countries with which such reciprocity exists. Dependents of an A–1 or A–2 principal alien assigned to official duty in the United States may be granted permission to accept or continue in employment based upon informal de facto arrangements if the following conditions are met:

(i) The dependent submits Form I–566 to the Office of Protocol for transmission to the Visa Office. This application shall include a certification by the diplomatic mission of the foreign state employing the principal alien that the applicant is the dependent, as defined in this section, of an official of that foreign state whose assignment in the United States is expected to last more than six months;

(ii) The dependent submits with the application a statement from the prospective employer describing the position and the salary offered, the duties of the position and verification that the dependent possesses the necessary qualifications for the position; and

(iii) Both the authorized representative of the Department of State and the District Director of the Service at Washington, DC, or the Director of the Service's Eastern Regional Service Center are satisfied that:

(A) Both the principal alien and the dependent desiring employment are maintaining A–1 or A–2 status as appropriate;

(B) Employment of a similar nature for dependents of United States Government officials assigned to official duty in the foreign state employing the principal alien is not prohibited by that foreign state's government;

(C) The proposed employment is not in an occupation listed in the Department of Labor Schedule B (20 CFR Part 656), or otherwise determined by the Department of Labor to be one for which there is an oversupply of qualified U.S. workers in the area of proposed employment. This Schedule B restriction does not apply to a dependent child, son or daughter who is a full-time student if the employment is part-time, consisting of not more than 20 hours per week and/or if it is temporary employment of not more than 12 weeks during school holiday periods; and

(D) The proposed employment is not contrary to the interests of the United States including, but not limited to, the public welfare and national security interests. Other situations which may be considered contrary to the interests of the United States include, but are not limited to: employment of A–1 or A–2 dependents who have criminal records, or who have violated the Immigration and Nationality Act, visa laws or regulations, or who have worked illegally in the United States, or who cannot establish that they have paid taxes and Social Security on income from previous United States employment.

(7) *Period of time for which employment may be authorized.* If approved, an application to accept or continue employment under this section shall be granted in increments of not more than two years each. The Service shall notify the Internal Revenue Service and the Department of Labor upon such approval.

(8) *No appeal.* There shall be no appeal from a denial of permission to accept or continue employment under this section.

(9) *Dependents or family members of principal aliens classified A–3.* A dependent or family member of a principal alien classified A–3 may not be employed in the United States under this section.

(10) *Unauthorized employment.* An alien classified under section 101(a)(15)(A) of the Act who is not a principal alien and who engages in employment outside the scope of, or in a manner contrary to this section, may be considered in violation of section 241(a)(9)(A) of the Act. An alien who is classified under section 101(a)(15)(A) of the Act who is a principal alien and who engages in employment outside the scope of his/her official position may be considered in violation of section 241(a)(9)(A) of the Act.

* * * * *

3. Section 214.2 is amended by revising paragraph (g)(2) and adding paragraphs (g)(3) through (g)(11) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(g) * * *

(2) *Definition of G–1 or G–4 dependent.* For purposes of employment in the United States, the term "dependent" of a G–1 or G–4 principal alien, as used in § 214.2(g), means any of the following immediate members of the family habitually residing in the same household as the principal alien who is an officer or employee assigned to a mission to an international organization or is employed by an international organization in the United States:

(i) Spouse;

(ii) Unmarried children under the age of 21;

(iii) Unmarried sons or daughters under the age of 23 who are in full-time attendance as students at post-secondary educational institutions;

(iv) Unmarried sons or daughters under the age of 25 who are in full-time attendance as students at post-secondary educational institutions if a formal bilateral employment agreement permitting their employment in the United States was signed prior to November 21, 1988, and such bilateral employment agreement does not specify 23 as the maximum age for employment of such sons and daughters. The Office of Protocol of the Department of State shall maintain a listing of foreign states with which the United States has such bilateral employment agreements. The provisions of this paragraph apply only to G–1 dependents under certain bilateral agreements and are not applicable to G–4 dependents;

(v) Unmarried sons or daughters who are physically or mentally disabled to the extent that they cannot adequately care for themselves or cannot establish, maintain or re-establish their own households. The Department of State or the Service may require certification(s) as it deems sufficient to document such mental or physical disability.

(3) *Applicability of a formal bilateral agreement or an informal de facto arrangement for G–1 dependents.* The applicability of a formal bilateral agreement shall be based on the foreign state which employs the principal alien and not on the nationality of the principal alien or dependent. The applicability of an informal de facto arrangement shall be based on the foreign state which employs the principal alien, but under a de facto arrangement the principal alien also must be a national of the foreign state which employs him/her in the United States.

(4) *Income tax, Social Security liability; non-applicability of certain immunities.* Dependents who are granted employment authorization under this section are responsible for payment of all federal, state and local income, employment and related taxes and Social Security contributions on any remuneration received. In addition, immunity from civil or administrative jurisdiction in accordance with Article 37 of the Vienna Convention on Diplomatic Relations or other international agreements does not apply to these dependents with respect to matters arising out of their employment.

(5) *G–1 dependent employment pursuant to formal bilateral employment*

agreements. The Office of Protocol shall maintain a listing of foreign states which have entered into formal bilateral employment agreements. Dependents of a G–1 principal alien assigned to official duty in the United States may accept unrestricted employment based on such formal bilateral agreements between the Department of State and foreign states if the applicable agreement includes persons in G–1 visa status and if the following conditions are met:

(i) The mission of the foreign state employing the official makes an official request to the Office of Protocol, or to the Office of Host Country Affairs of the United States Mission to the United Nations if the principal G–1 alien is a representative to the United Nations;

(ii) The Office of Protocol or the Office of Host Country Affairs recognizes the person as a dependent, as defined in this section, of an official G–1 employee; and

(iii) The Office of Protocol or the Office of Host Country Affairs informs the mission of the foreign state that the dependent has permission to accept employment upon receipt of employment authorization documentation issued by the Service in accordance with 8 CFR 274a.

(6) *G–1 dependent employment pursuant to informal de facto reciprocal arrangements and G–4 dependent employment.* For purposes of this section an informal de facto reciprocal arrangement exists when the Department of State determines that a foreign state allows appropriate employment on the local economy for dependents of certain United States officials assigned to duty in that foreign state. The Office of Protocol shall maintain a listing of countries with which such reciprocity exists. Dependents of a G–1 principal alien assigned to official duty in the United States may be granted permission to accept or continue in employment based upon informal de facto arrangements. Additionally, the following conditions must be met in the case of such G–1 dependents and in the case of all G–4 dependents:

(i) The dependent submits Form I–566 to the Office of Protocol for transmission to the Visa Office or to the United States Mission to the United Nations if the principal alien is employed by the United Nations. This application shall include a certification by the mission of the foreign state or by the international organization employing the principal alien that the applicant is the dependent, as defined in this section, of an official of that foreign state or organization whose assignment in the United States is expected to last more than six months;

(ii) The dependent submits with the application a statement from the prospective employer describing the position and the salary offered, the duties of the position, and verification that the dependent possesses the necessary qualifications for the position; and

(iii) Both the authorized representative of the Department of State and the District Director of the Service at New York (if the principal alien is a representation to the United Nations) or the District Director of the Service at Washington, DC, or the Director of the Service's Eastern Regional Service Center are satisfied that:

(A) Both the principal alien and the dependent desiring employment are maintaining G–1 or G–4 status as appropriate;

(B) Employment of a similar nature for dependents of United States Government officials assigned to official duty in the foreign state employing the principal alien is not prohibited by that foreign government. The provisions of this paragraph apply only to G–1 dependents;

(C) The proposed employment is not in an occupation listed in the Department of Labor Schedule B (20 CFR Part 656), or otherwise determined by the Department of Labor to be one for which there is an oversupply of qualified U.S. workers in the area of proposed employment. This Schedule B restriction does not apply to a dependent child, son or daughter who is a full-time student if the employment is part-time; consisting of not more than 20 hours per week, and/or if it is temporary employment of not more than 12 weeks during school holiday periods; and

(D) The proposed employment is not contrary to the interests of the United States including, but not limited to, the public welfare and national security interests. Other situations which may be considered contrary to the interests of the United States include, but are not limited to: employment of G–1 or G–4 dependents who have criminal records, or who have violated the Immigration and Nationality Act, visa laws or regulations, or who have worked illegally in the United States, or who cannot establish that they have paid taxes and Social Security on income from previous United States employment. Additionally, the Department of State may determine a G–4 dependent's employment is contrary to the interest of the United States when the principal alien's country of nationality has one or more components of an international organization or international organizations within its borders and does not allow the employment of dependents of United States citizens employed by such component(s) or organization(s).

(7) *Period of time for which employment may be authorized.* If approved, an application to accept or continue employment under this section shall be granted in increments of not more than two years each. The Service shall notify the Internal Revenue Service and the Department of Labor upon such approval.

(8) *No appeal.* There shall be no appeal from a denial of permission to accept or continue employment under this section.

(9) *Dependents or family members of principal aliens classified G–2, G–3 and G–5.* A dependent or family member of a principal alien classified G–2, G–3 and G–5 may not be employed in the United States under this section.

(10) *Unauthorized employment.* An alien classified under section 101(a)(15)(G) of the Act who is not a principal alien and who engages in employment outside the scope of, or in a manner contrary to this section, may be considered in violation of section 241(a)(9)(A) of the Act. An alien who is classified under section 101(a)(15)(G) of the Act who is a principal alien and who engages in employment outside the scope of his/her official position may be considered in violation of section 241(a)(9)(A) of the Act.

(11) *Special provision.* As of November 21, 1988, no new employment authorization will be granted and no pre-existing employment authorization will be extended for a G–1 dependent absent an appropriate bilateral agreement or de facto arrangement. However, a G–1 dependent who has been granted employment authorization by the Department of State prior to the effective date of this section and who meets the definition of dependent under § 214.2(g)(2) (i), (ii), (iii) or (v) of this part but is not covered by the terms of a formal bilateral agreement or by an informal de facto reciprocal employment arrangement may be allowed to continue in employment until whichever of the following occurs first:

(i) The employment authorization by the Department of State expires; or

(ii) He or she no longer qualifies as a dependent as that term is defined in this section; or

(iii) December 31, 1989.

This transition period is granted so that the Department of State may negotiate additional bilateral agreements or establish de facto reciprocity with

foreign states without unduly affecting individuals while the negotiations are underway.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

4. The authority citation for Part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a.

§ 274a.12 [Amended]

5. Section 274a.12(c)(1) is amended by inserting "child," after "dependent" and before "son".

6. Section 274a.12(c)(4) is amended by inserting "child," after "dependent" and before "son", and by changing the term "(G–4)" to "(G–1 or G–4)".

Dated: September 30, 1988.

Richard E. Norton,

Associate Commissioner, Examinations, Immigration and Naturalization Service.

[FR Doc. 88–26851 Filed 11–18–88; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 381

[Docket No. 85–035F]

Streamlined Inspection System for Broilers and Cornish Game Hens

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule; confirmation of interim rule with minor revisions and correction.

SUMMARY: On January 29, 1986, the Food Safety and Inspection Service published an interim rule with request for comments to establish a new method of post-mortem inspection known as the "Streamlined Inspection System" (SIS) for broilers and cornish game hens. The new system has been implemented in establishments previously operating under Modified Traditional Inspection. SIS incorporates new post-mortem inspection procedures requiring one or two inspectors and a Finished Product Standards (FPS) program for evaluating the wholesomeness and acceptability of finished product. Establishments are responsible for performing the necessary trim of designated defects on passed carcasses and for operating the FPS program. The new system allows increased efficiency in the use of FSIS resources and those of the poultry industry, while still providing consumers with wholesome and unadulterated products. FSIS is adopting the interim rule as a final rule with minor revisions based on the comments received.

EFFECTIVE DATE: December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Dr. Douglas L. Berndt, Director, Slaughter Inspection Standards and Procedures Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447–3219.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Agency has made a determination that this final rule is not a major rule under Executive Order 12291. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The principal effect of this final rule is to establish a new inspection system for broilers and cornish game hens in response to increased demands on Agency resources. It provides FSIS and the poultry industry with an inspection procedure that meets the requirements for inspection within available resources.

Effect on Small Entities

The Administrator, FSIS, has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act, Pub. L. 96–354 (5 U.S.C. 601). Certain changes in plant facilities are required of establishments that operate under SIS; however, these changes, which were published in the October 21, 1987, issue of the **Federal Register**, will result only in minor expenditures. The industry will realize some gains through reduced charges for overtime inspection because there will be fewer inspectors per line, reduced workspace requirements for inspection teams, and increased productivity by maintaining optimal line speeds.

Background

The Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) requires, among other things, that the Secretary of Agriculture, through appointed inspectors, conduct a post-mortem inspection of the carcass of each bird processed in every official establishment that processes poultry for commerce or that is otherwise subject to the Act and condemn all product found to be adulterated. The post-mortem inspection is performed by veterinarians or trained food inspectors under veterinary supervision. Working at a moving production line, inspectors view the exterior, interior, and viscera (internal organs) of each bird slaughtered for the purpose of detecting disease or other conditions that might render the carcass or any part thereof unfit for human food or otherwise adulterated. In carrying out the examination, the inspectors follow standardized inspection procedures and initiate actions consistent with their findings. The procedures are designed to assure that only wholesome and unadulterated carcasses and carcass parts are passed for human food.

Post-mortem inspection of livestock and poultry accounts for the largest portion of the Department's expenditures for meat and poultry inspection. Therefore, use of the most efficient and effective post-mortem inspection procedures and staffing standards is essential to minimizing costs while protecting the public health.

The responsibility of the Department to make the most efficient use of its resources is now more important than ever because FSIS's resources are decreasing at the same time that demands for inspection services have been increasing. On September 19, 1985, a hiring freeze on permanent full-time (PFT) employment by FSIS was ordered to reflect a fiscal year (FY) 1986 operating budget that was less than necessary to support current employment.

In addition to freezing PFT employment, the hiring freeze restricted the conversion of temporary, intermittent, or part-time employees to PFT status. Also, use of part-time and other employment was held at 1985 levels. Personnel actions that involved moving employees between major program areas, from the field to headquarters, and from line to staff positions were also frozen.

On November 15, 1985, FSIS found it necessary to order additional cost-saving measures beyond those then in place to be able to operate within available funding levels. These measures included a continuation of the freeze on PFT employment, a one-third reduction in non-inspection-related travel, suspension of all non-technical training, and reductions in various contracts. All other costs were limited to the 1986 base level or below (1985 level less any non-recurring activities). FSIS's funding level necessitated a

continuation of the hiring freeze and consequent reduction in employment. This reduction was influenced by such economic factors as inflation and rising employee benefit costs. However, even if FSIS were able to maintain the previous year's employment level, it would still have been unable to meet the rising industry demands for inspection service.

Besides the budget short fall, the Agency faces long-term constraints on its operations. The passage of the Gramm-Rudman-Hollings Balanced Budget Amendment of 1985 makes it likely that FSIS will be compelled to economize much further in the coming years. Appropriations for FY 1986 were subject to reductions of 4.3 percent to meet the requirements of Gramm-Rudman-Hollings, and increasingly larger cuts are mandated for the following fiscal years.

FSIS spends about 85 percent of its operating budget on employee salaries and benefits. This makes it impossible to absorb funding reductions or accommodate increased costs except through personnel reductions. The great majority of FSIS staff are field inspectors and veterinarians. Thus, any budgetary reductions are almost immediately felt in day-to-day inspection operations.

Even though FSIS continues to operate under certain budgetary constraints, it must fulfill its responsibilities under the law. A House-Senate Conference deliberating on one of the Continuing Resolutions recently took the position that "in administering the Federal Meat Inspection Act and the Poultry Products Inspection Act, the Administrator of FSIS is expected to take whatever action is necessary to ensure that requests for inspection service required by law are promptly accommodated. On-site inspection should receive priority over some other Agency functions".

At the same time that the Agency has been confronted with new budgetary limits, the poultry industry has been demanding increased inspection service. The operators of federally inspected poultry processing establishments have requested inspectional coverage for new production lines and expanded operations. Many establishments that have previously operated single-working shifts have expanded to two shifts or are planning to do so in the near future. The growth of the poultry products industry is accelerating. Production in FY 1985 was increased 5.5 percent over production in FY 1984 and increased by a similar percentage in FY 1986. In terms of per capita consumption, poultry is now second only to beef among all meat and poultry food products.

To accommodate the demands of increasing consumption and production and to absorb workforce reductions without denying inspection service, FSIS took immediate action to revise its poultry inspection procedures. On January 29, 1986, FSIS published an interim rule in the **Federal Register** (51 FR 3569) establishing the "Streamlined Inspection System" (SIS), a new post-mortem inspection system to be implemented in establishments that slaughter broilers and cornish game hens. These establishments constitute the largest section of the poultry industry in terms of output. The revision of inspection procedures in these establishments enabled FSIS to shift qualified inspection personnel to areas where their services were more efficiently and productively employed. This change became possible not merely because of the exigencies of present and future budgets, but because of the experience FSIS has gained over recent years in operating several types of poultry inspection systems.

Prior to the interim rule, there were three systems used for the inspection of broilers and cornish game hens, namely traditional inspection, modified traditional inspection, and the "New Line Speed" (NELS) inspection system. Also, a New Turkey Inspection (NTI) system was implemented in turkey slaughter establishments. SIS is a new method that has been developed on the basis of experience gained in operating the previous inspection systems.

A. Traditional Inspection

Under traditional inspection, one inspector examines a whole bird and is responsible for the proper disposition of the bird, including the identification and verification of any required trimming, before it leaves the inspection station. Traditional inspection was satisfactory to FSIS and the poultry industry for many years and is still performed in some slaughter establishments.

B. Modified Traditional Inspection (MTI)

In the middle 1970's, the development of automated evisceration equipment, as well as improvements in genetics, nutrition, health, and flock management, allowed the poultry industry to present uniform lots of birds to inspectors faster than inspectors could properly inspect the birds under the traditional methods. Therefore, a new inspection procedure known as "Modified Traditional Inspection" was developed in 1978 which allowed better use of inspection resources and permitted the poultry industry to take advantage of these new technologies and production improvements. MTI allowed industry to run an eviscerating line at speeds of up to 70 birds per minute.

MTI reduced the number of motions required for each of three inspectors on the line by splitting post-mortem inspection into two functional tasks. One task (performed by one inspector) was the outside inspection of each uneviscerated prepositioned carcass, using a mirror to observe surfaces not directly visible. The second task (performed by two inspectors), inside/viscera inspection, was performed after the bird was eviscerated and establishment personnel repositioned the carcass and its attached viscera. The trimming of carcass defects was performed by establishment employees, known as helpers or trimmers, who were positioned next to and acted under the direction of the inspectors.

C. New Line Speed (NELS) Inspection System

After the implementation of MTI, the poultry industry continued to make significant technological advances. Consequently, many establishments were able to present uniform lots of birds to inspectors faster than the 70 birds per minute allowed with MTI. This advance was made possible by improved automated equipment and better control of the production process. In these establishments, the inspection process again became a limiting factor in establishment productivity and restricted the return-on-investment for the development and installation of modern, innovative equipment and facilities. It became apparent to the Agency that these restraints could not be overcome through expanded use of MTI. Also, various studies had shown that Federal inspection was more efficient and effective in establishments where quality control was emphasized.

Establishments without the facilities, personnel, or procedures necessary to ensure the highest practicable degree of quality control sometimes tended to rely on Federal inspection as a substitute for the proper control of their own operations. In those establishments, Federal inspectors were sometimes placed in a burdensome, quasi-supervisory role not appropriate under the PPIA.

The NELS system eliminated much of the need for post-mortem inspectors to act in such a role. It required that participating establishments have and maintain good control of their facilities, personnel, and processing procedures, as spelled out in a written partial quality

control agreement with FSIS. This agreement assures the inspector-in-charge that all functions critical to the processing of an acceptable product are being effectively performed by the establishment.

The NELS inspection system uses three post-mortem inspectors on each eviscreating line. Each inspects the outside (with the aid of a mirror), the inside, and the viscera of every third bird presented. The inspectors determine whether the birds should be condemned, salvaged, retained for disposition by a veterinarian, reprocessed, or permitted to move down the line as a passed bird subject to trim and reinspection. After post-mortem inspection is completed at the inspection station, establishment employees perform any necessary trim on all passed carcasses after the giblets are harvested.

The complete NELS inspection system consists of three inspectors performing the NELS inspection procedure and one inspector monitoring the application of an approved partial quality control (PQC) program designed to assure that the production process is under control and producing acceptable product. This program—the Poultry Carcass On-Line Quality Control (PCOLQC) Program—is a statistically based sampling system designed to assure the control of an establishment's processing operations. It is the basis for the approval of the use of the NELS inspection system in any establishment.

The maximum line speed achievable under NELS is 91 birds per minute. This speed may be reached when all plant conditions are optimal. The inspector-in-charge is responsible for reducing the line speed when, in his or her judgment, the existing NELS system does not permit adequate inspection because the birds are not presented properly or the health conditions of a particular flock dictate a need for a more extended inspection procedure.

D. New Turkey Inspection (NTI) System

For many years, the traditional inspection procedure was the only inspection procedure available to turkey processors, and was satisfactory to both FSIS and the turkey industry. As in the traditional procedure applied to broilers and cornish game hens, traditional turkey inspection involved the examination of the whole bird by one inspector who was responsible for proper disposition of the bird, including the identification and verification of any required trim, before the bird left the inspection station. In the last several years, the turkey industry has grown and matured to the point that merely expanding the use of the traditional inspection procedure would be impractical, inefficient, and place demands on resources that would be difficult for the Agency to meet. Therefore, in September of 1985, FSIS established the NTI system.

As in NELS, the NTI system places upon establishments the responsibility of developing and maintaining good control of their facilities, personnel, and processing procedures. A written partial quality control program, approved by FSIS assures the inspector-in-charge that critical processing functions are being effectively performed by the establishment. Depending on required plant line speeds, the NTI system requires one or two inspectors on each eviscerating line. The inspector inspects the outside, inside, and viscera of every bird presented. The inspector determines whether the bird should be condemned, salvaged, retained for disposition by a veterinarian, reprocessed or permitted to move down the line as a passed bird subject to trim and reinspection.

After post-mortem inspection has been completed at the inspection station(s), establishment employees perform any necessary outside trim on all passed carcasses after the giblets are harvested. Under traditional inspection, the inspector is responsible for identifying those carcases that must be trimmed, directing the establishment employee to trim the defects, and verifying that the bird has been properly trimmed. However, NTI shifts the responsibility of performing specific outside trim to the establishment employees.

The complete NTI system is like NELS in that it consists of one or two inspectors performing whole bird inspection, and one inspector monitoring the application of an approved PQC program to assure that the program is being followed. As in NELS, an acceptable PCOLQC program is the basis for approving use of the NTI system in any establishment. Under NTI, FSIS inspectors are responsible for inspecting the carcasses, monitoring the establishment's application of the PQC program, and conducting regular verification and evaluation sampling and observations to assure that the establishment's data are accurate and truthful, thus assuring that the ready-to-cook poultry conforms to all applicable regulatory requirements.

The NELS and NTI systems were subject to effectiveness studies comparing them with previously existing inspection procedures. NELS was operationally tested in three establishments and compared with both MTI and traditional inspection. Similarly, effectiveness studies to test the NTI system and compare it with the traditional inspection procedure were conducted in three establishments. The effectiveness test results indicated that there were no significant differences between NELS, MTI, and traditional inspection for broilers and cornish game hens, or between NTI and traditional inspection for turkeys.

The NELS and NTI systems represent notable advances in the development of efficient, scientifically-based inspection systems. The tests conducted on these systems were the most exhaustive ever performed on new inspection procedures. The valuable lessons gained from the development and application of the systems have enabled FSIS to prepare for future inspection systems that will rely extensively on automated equipment and the analysis of computerized data for objective monitoring of inspection performance and the incidence of carcass defects and disease conditions. Moreover, the experience gained by FSIS in operating NELS and NTI has provided the basis for developing SIS.

Development of SIS

Since the inception of NELS and NTI, top FSIS veterinarians and technical specialists have devoted many hours to the analysis of work measurement studies, disposition data, and other information from tests of the systems and from inplant operations. The specialists found that a new sequence of hand-eye movements would provide the most efficient and effective inspection procedures.

The analysis of technical information from the NELS and NTI tests, including the new work measurement findings, enabled FSIS to begin preliminary work on a two-inspector NELS system in May 1984. Since that time, FSIS has explored other one- and two-inspector procedures. Work measurement studies on the two-inspector NELS procedure were begun last year and were carried out over several months. On the basis of these studies, FSIS informed the broiler industry of the potential availability of one- or two-inspector NELS systems. The implementation of these systems would have permitted additional establishments operating under the older MTI procedure to convert to the NELS system. In addition to permitting increased productivity in the poultry industry, FSIS would be able to fulfill its inspection responsibilities in a more uniform manner within NELS establishments and from establishment to establishment.

The two-inspector NELS system was not formally proposed or implemented because of a few unresolved problems in establishing uniform approaches to inspection in various settings. Also, during the short time in which the system had been under development, there had been no opportunity to demonstrate the two-inspector system under operational conditions.

Nevertheless, the experience gained in developing this system enabled FSIS to conceive an innovative approach to poultry inspection. Rather than being implemented in the NELS setting, however, SIS was applied in MTI establishments. In those MTI establishments, FSIS had accumulated vast inspection experience and has been able to sustain a uniform approach to inspection.

SIS includes an inspection procedure that involves whole bird disposition in which each inspector examines the viscera, the inside, and outside surfaces of the carcass. The innovation represented by SIS, besides enhancing inspection productivity in old MTI establishments, also provides some incentive to establishments now operating under traditional inspection to convert to a system that can permit them to increase their output.

After post-mortem inspection under SIS has been completed at the inspection station(s), establishment employees perform any necessary outside trim on all passed carcasses after all the giblets are harvested. The inspector's helper may perform some trim if time permits.

SIS was implemented in official establishments once processing broilers and cornish game hens under the MTI procedure. While SIS is an alternate inspection method, its use is not voluntary in those establishments; the new system was implemented in existing MTI establishments on the basis of the Administrator's determination that SIS increases inspector efficiency. Establishments not operating under MTI may request the implementation of SIS; the request is approved if the Administrator determines that the system will result in no loss of inspector efficiency.

The chief difference between SIS and MTI is that under the new system there is no mirror inspection system. Rather, there are one or two inspection stations located on the processing line after the birds have been eviscerated. Each inspector examines the outside, inside, and viscera of the birds presented for inspection. The one-inspector form of SIS is known as SIS–1; the two-inspector configuration is known as SIS–2. Inspection under both SIS–1 and SIS–2 is conducted in two phases—a post-mortem inspection phase and a reinspection phase. Under SIS–1, every bird on each production line is presented to a single inspector for examination. Under SIS–2, there are two inspection stations at which each inspector examines the outside, inside, and viscera. Every other bird on the moving production line is presented to each inspector with the back side of the carcass toward the inspector and the viscera uniformly trailing or leading. In both SIS–1 and SIS–2, an establishment employee (termed a helper) is positioned next to each inspector. The maximum inspection rate for SIS–1 is 35 birds per minute; the maximum inspection rate for SIS–2 is 70 birds per minute per inspector team—the same maximum rate as that once permitted under MTI.

The inspection rates, or line speeds, are determined by the inspector-in-charge of an official establishment on the basis of his or her professional judgment. Line speeds are dependent on the appropriate presentation of carcasses for inspection. The adequacy of carcass presentation, in turn, depends on such factors as disease conditions in poultry flocks, plant operating conditions, lighting, and facilities. FSIS has developed guidelines for the presentation of carcasses in official poultry slaughter establishments.[1] These guidelines provide objective criteria for determining acceptance presentation and for reducing the line speeds when presentation is less than acceptable for inspecting birds at 70 birds per minute. These guidelines are applied by FSIS as a part of SIS.

In the inspection phase of SIS, inspectors determine which birds must be salvaged, reprocessed, condemned, retained for disposition by the veterinarian, or allowed to be moved down the line as a passed bird subject to reinspection. If an inspector finds that some poultry carcasses have certain defects not requiring condemnation of the whole carcass, the inspector may pass the carcass, which is then subject to reinspection to assure that the defects are physically removed. The helper, at the inspector's direction, marks these carcasses for trim unless the defects are obvious. Trimming of birds passed subject to reinspection is performed by establishment employees after all giblets have been harvested. The inspector's helper may perform some trim if time permits.

The reinspection station or stations are located at the end of the processing lines and after each chiller. At the prechill station, inspectors examine carcasses that have been passed subject to reinspection by visually monitoring, checking data, and/or gathering samples at the station. SIS incorporates a Finished Product Standards (FPS) program which is analogous to the Acceptable Quality Limits (AQL) program in the traditional and modified traditional systems and to the FPS in the NELS system. The FPS for SIS is applied in two phases—before and after the carcass chilling process. In the prechill phase, the carcasses are checked for processing and trimming defects; in the postchill phase, the birds are checked for defects caused by the chilling operation.

The AQL program used in the traditional inspection system was designed to be applied either before or after the chilling process. In practice, the AQL has been applied almost exclusively after the chill. (Some turkey processing establishments conduct prechill AQL checks.) The poultry industry has chosen to have AQL checks made after chilling because of production line configurations and space availability. Under the traditional systems, the trimming of carcasses was not the responsibility of the establishment, and the performance of AQL checks after the chilling process was therefore acceptable to FSIS. Under this arrangement, however, problems that necessitated a large amount of reworking of product occasionally developed because the finished products were found not to be in compliance with AQL standards.

With the advent of NELS and NTI, the responsibility for trimming carcasses was shifted from FSIS inspectors to the establishment. FSIS's experience in developing the FPS for NELS and NTI and in applying the PCOLQC program for those systems led to the conclusion that a more responsive system is now available. Data collected during the development of the FPS showed that the poultry chilling system itself contributes to carcass defects. The postchill AQL program applied under the traditional systems checks for defects that occur during processing and chilling. It was found that applying the PCOLQC and the FPS for NELS and NTI involved the use of two product-checking systems—a prechill system and a postchill system. The prechill system measures the degree of product nonconformance with processing and trimming standards.

[1] These guidelines are available for public inspection in the office of the FSIS Hearing Clerk. Copies may be obtained free upon request from the Slaughter Inspection Standards and Procedures Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

while the postchill system measures product nonconformance in terms of extraneous material present on birds exiting the chiller. The prechill and postchill testing systems developed for NELS and NTI were designed to allow the industry to enhance its responsiveness to process changes to minimize the amount of rework. As in NELS and NTI, the FPS program for SIS includes a prechill test that measures the effectiveness of processing controls and postchill test that reflects changes taking place during the chilling process.

Products not complying with the FPS are determined by FSIS to be adulterated. FSIS has determined that defects on carcasses or parts of carcasses below the action levels specified in the regulations do not render the carcasses or parts adulterated.

The standards for nonconformance used in the FPS program for SIS are adapted from those applied in the NELS system. These standards were based on data collected on passed birds in a group of 15 randomly selected broiler establishments. In developing the standards, all defects and trimming errors found on the passed birds were recorded. These same birds were then passed through the chilling process, recovered, and reexamined for all defects and trimming errors. Data from observations of the processed birds were compared with data used to set the AQL standards for the traditional inspection systems. The FPS under NELS were then provisionally established, after consultation with industry, using criteria similar to those used for the existing AQL. The standards were compared under plant operating conditions with the existing AQL standards and found to be valid. Product evaulated under the new FPS was equivalent in quality to product evaluated according to the old AQL standards. Thus, the specific values in the FPS and the list of nonconformances for SIS are the same as those already in use in the NELS system, and are based on studies and experience with that system over the last 2 years.

When SIS was implemented, certain establishments in the Southwest United States, principally in Arkansas and East Texas, experienced an unexpected problem with meeting the postchill FPS. These establishments advised the Agency that they were unique and either used water containing high levels of minerals and/or killed birds fed milo instead of corn.

The milo, like any feed, occasionally contaminated some carcasses. The problem was that the specks of milo contamination were small, numerous, and seemed to adhere to the carcass, making washing or reprocessing of the carcass difficult, if not impossible. Considerable time and Agency resources were spent attempting to solve this problem. Working with several leading industry representatives, the Agency concluded that establishments controlling their manufacturing processes has little or no problems meeting the postchill FPS.

The operation of the FPS program is the responsibility of the official establishment. Under SIS, data on the finished product standard evaluations are recorded using the cumulative sum (CUSUM) concept. In the CUSUM statistical method, the data collected on a given day are compared with previously collected data to determine the establishment's ability to control its processing operation and conform with product standards. Guidelines on the FPS program are available upon request from the Slaughter Inspection Standards and Procedures Division at the address given in footnote 1. These guidelines include information on form preparation and CUSUM calculations, and provide examples to clarify the application of the FPS program.

SIS–1 requires that the establishment provide one inspection station for each line and reinspection facilities adequate for the removal and examination of carcasses from each line for evaluation. SIS–2 requires the establishment to provide two inspection stations for each line and similarly adequate reinspection facilities. The implementation of SIS thus entails certain facility changes in the affected establishments. The SIS requirements for facilities at the inspection and reinspection stations were published as a final rule in the **Federal Register** on October 21, 1987 (52 FR 39207).

Comments and FSIS's responses on the proposed rule for Facility and Equipment Requirements for the Streamlined Inspection System for Broilers and Cornish Game Hens were published with the final rule in the **Federal Register** on October 21, 1987 (52 FR 39207).

Discussion of Comments

Comments on the interim rule were solicited from interested parties in the January 29, 1986, **Federal Register** (51 FR 3569). FSIS received 28 comments—20 from poultry processors, 4 from meat and poultry industry associations, 2 from FSIS poultry inspectors, and 2 from USDA employee associations. The following are summaries of those comments and FSIS's responses to each issue.

A. Poultry Processors

Many of the comments from poultry processors regarding SIS were favorable. The processors pronounced themselves ready to accept responsibilities for trimming of defects on the carcasses and for presentation of the birds for inspection. The processors expressed confidence in their ability to meet the prechill FPS; however, the postchill FPS is troublesome in some establishments.

1. *Comment:* The postchill FPS is unreasonably tight, of no benefit to the public, and is subject to wide application variations.

Response: The postchill FPS focuses on extraneous material and is designed to control defects that might be placed on the carcass as it moves through the chiller. These kinds of defects are essentially extraneous material caused by minute pieces of debris redistributed by the chiller during the course of the day or bits of mineral that might be a part of the entire potable water supplies.

As discussed earlier, some establishments experienced unexpected problems in meeting the postchill FPS. However, extensive research by the Agency found the postchill FPS to be reasonable and achievable if the establishments control their processing operation and react to the ongoing data collected on the prechill FPS. The postchill FPS test is necessary for it is the only check for nonconformances on the carcasses caused by the chilling process and the last official check on the carcasses before the product leaves the establishment.

2. *Comment:* A time limit should be imposed for conducting a postchill FPS test to reduce variation in the application of the standard.

Response: FSIS agrees with this commenter and has distributed to all establishments performing FPS tests instructions establishing a time limit of 5 to 7 minutes for a postchill FPS test and 8 to 10 minutes for a prechill FPS test. Monitoring personnel operating outside these time limits are to be correlated to provide uniform administration of the FPS program. To further reduce the variation in the application of the standard, the Agency developed a procedure for observing the carcass while performing the FPS tests. These timeframes and procedures were published in FSIS Directive 6120.1 dated August 27, 1987.[2]

[2] Copies of this directive may be obtained free upon request from the Slaughter Inspection Standards and Procedures Division, Technical Services, Food Safety and Inspection Services, U.S.

Continued

3. *Comment:* Place a size limit on the extraneous material counted on the postchill FPS.

Response: Since all extraneous material added to the carcass are from the production process, counting all of the extraneous material is a direct indication of the degree of process control in the establishment. Production managers not allowing extraneous material on the product, through a process control program or by reacting to the extraneous material data obtained on the prechill FPS checks, should have little or no problem meeting the postchill FPS regardless of the size of the extraneous material. The Agency also realizes the differences that people have in seeing various sizes of particles. Therefore, it is difficult to set a size limitation when agreement cannot be reached on a size which is visible to all people.

4. *Comment:* The postchill FPS is not analogous to the AQL.

Response: The FPS program consists of two testing systems—prechill and postchill. The prechill FPS program was designed to be analogous to the AQL. FPS is applied at the prechill location so that any problems developing on the evisceration line can be detected early and corrected before product reaches the chiller. This makes the system more responsive than AQL. However, some defects can occur to product as it moves through the chiller, which makes the postchill FPS necessary. Establishments controlling their processing operation and reacting to the ongoing data collected on the prechill FPS should find the postchill FPS reasonable and achievable.

5. *Comment:* On MP–Form 231 (FSIS Form 6500–2), an establishment is penalized five points under category 7 for not removing airsacculitis exudate from a bird that is not marked. An establishment should not be penalized for a USDA inspection error.

Response: FSIS agrees. During the development of the NELS FPS program, with an on-line control program, FSIS thought that categories 7 and 8 on MP–Form 231 (FSIS Form 6500–2) would adequately control the removal of lesions/conditions. Upon developing the SIS FPS program, the control of removal of these lesions/conditions was designed identically to the NELS FPS. Since then, it has become evident that the lack of a QC program requires a permanent marking system for identifying lesions/conditions and is necessary to adequately control trimming. Therefore, the rule has been modified to reflect this change.

An establishment shall have a permanent marking system for birds identified by a USDA inspector as needing removal of airsacculitis exudate from the inside surfaces of the carcass. When removable lesions/conditions are identified inside the carcass by the USDA inspector, the helper will be directed by the inspector to apply the permanent mark to the carcass. Subsequent to that inspection, if establishment or inspection personnel find removable inside lesions/conditions in carcasses without the permanent mark, the establishment continues to be responsible for the removal of the lesion/conditions, but the inspection error is not recorded and charged against the establishment in the FPS test. The affected carcasses will be hungback for IIC disposition and inspection correlation.

B. USDA Employee Association

1. *Comment:* A poultry establishment cannot handle the responsibility for trimming designated defects on passed birds.

Response: This responsibility has already been accepted by establishments operating under the NELS inspection system, and studies conducted by FSIS comparing NELS and MTI and traditional inspection have proven that establishments are capable of handling this responsibility. Preliminary studies of the trim performed under SIS indicate that establishments are having no problems in meeting the trim FPS.

2. *Comment:* Not enough FPS tests are performed under the SIS to detect unacceptable product.

Response: FPS tests are performed under the SIS as often as AQL tests were performed under MTI. The FPS tests conducted by FSIS personnel are the minimum number of tests required, and that number may be increased at the discretion of the inspector-in-charge.

3. *Comment:* The postchill FPS is effective in the protection of the public's health. The postchill FPS should not be relaxed. Poultry processors that maintain programs of adequate feed withdrawal, properly maintain and operate automatic equipment, wash carcasses properly, and filter chill water can meet the present postchill FPS.

Response: FSIS agrees with this comment.

C. FSIS Poultry Inspectors

1. *Comment:* SIS places a greater burden on the FSIS inspector, leading to greater stress and fatigue.

Response: An easily and rapidly adjustable platform and improved lighting are required under SIS to aid the inspector. SIS has removed the burden of identifying and verifying outside trim. Presentation guidelines have also been issued to ensure uniformly good presentation so the inspector is not overly burdened. Industrial engineers have measured the ergonomics of the inspection tasks, and a maximum line speed has been established at which the inspector can perform effective inspection without greater stress and/or fatigue.

2. *Comment:* In § 381.76(b)(3)(i)(*d*), the definition of "start number" is unclear.

Response: The definition for "start number" has been changed to read, "A value halfway between zero and the action number. The start number is used to determine the starting CUSUM for the first subgroup of a shift and to reset the CUSUM value if the CUSUM is equal to or greater than the action number."

3. *Comment:* In § 381.76 (b)(3)(iv)(*d*)(*4*)(*i*)(*E*) there is no mention of the resumption of random time postchill FPS testing after it has been suspended due to retesting of carcasses that were produced by a process that was not in control as determined by processing a prechill FPS testing.

Response: The following sentence has been added to that provision: "Once all product identified as needing retesting has arrived at the postchill sampling location, random time postchill FPS testing resumes."

Miscellaneous Amendments

Paragraphs (b)(4) and (b)(5) of § 381.76 were inadvertently omitted from the Code of Federal Regulations in the publication of the January 29, 1986, interim rule (51 FR 3569). These provisions provide requirements applicable to the NTI and NELS inspection systems that were not affected by the interim rule. Therefore, this final rule corrects that error by reissuing those provisions.

In addition, FSIS overlooked two references to "Modified Traditional Inspection" (MTI) contained in § 381.76 (c)(3) and (c)(6). Since SIS replaced MTI, those references to MTI are deleted, and "SIS" is added instead in this final rule.

List of Subjects in 9 CFR Part 381

Poultry products inspection, Post-mortem.

Final Rule

The interim rule amending 9 CFR Part 381 was published at 51 FR 3569, on January 29, 1986, is adopted as a final rule with the following changes:

Department of Agriculture, Washington, DC 20250. A copy is also available for public inspection in the Office of the FSIS Hearing Clerk.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for Part 381 continues to read as follows:

Authority: 71 Stat. 441, 82 Stat. 791, as amended, 21 U.S.C. 451 *et seq.*; 76 Stat. 663 (7 U.S.C. 450 *et seq.*).

2. Section 381.76 is amended by revising paragraph (b)(3)(i)(*d*), by adding a new paragraph at the end of paragraph (b)(3)(iv)(*d*)(*4*)(*i*)(*E*) after the second undesignated paragraph, by revising Parts B7, 8, and 9 of Table 1, and by adding paragraphs (b)(4) and (b)(5) to read as follows:

§ 381.76 Post-mortem inspection, when required; extent; traditional, Streamlined Inspection System (SIS), New Line Speed (NELS) Inspection System and the New Turkey Inspection (NTI) System; rate of inspection.

* * * * *

(b) * * *

(3) * * *

(i) * * *

(*d*) "Start number". A value halfway between zero and the action number. The start number is used to determine the starting CUSUM for the first subgroup of a shift and to reset the CUSUM value if the CUSUM is equal to or greater than the action number. See Table 2.

* * * * *

(iv) * * *

(*d*) * * *

(*4*) * * *

(*i*) * * *

(*E*) * * *

Once all product identified as needing retesting has arrived at the postchill sampling location, random time postchill FPS testing resumes.

* * * * *

Table 1—Definitions of Nonconformances

* * * * *

B * * *

7. Trimmable lesions/Condition
—A trimmable tumor or identifiable portion of a tumor on any part of the carcass.
—Trimmable Synovitis/airsacculitis (saddle/frog) lesions that have not been removed.
—Lesion/condition subject to removal following an approved cleanout process. Examples: airsacculitis, salpingitis, nephritis, spleen, or liver conditions requiring removal of the kidneys.

Table 1—Definitions of Nonconformances—Continued

Note: All establishments shall develop and maintain a permanent marking system that identifies carcasses with removable lesions/conditions on the inside surfaces. When removable lesions/conditions are identified inside the carcass by the inspector, the helper will be notified to apply the permanent mark. When removable inside lesions/conditions are found on a subgroup sample without the permanent mark, the error is not recorded in line 7. The affected carcass(s) will be hungback for IIC disposition and corrective action.
—Factor is five.
—A maximum of one incident per carcass.

8. Failure to complete task as indicated by marking system. Example: Synovitis, airsacculitis, inflammatory process, contamination, etc.
—The helper, under the inspector's direction, will apply a mark to the carcass, indicating to the trimmer(s) that specific action must be taken on that carcass. When airsac and kidney cleanout, or synovitis part removal, or carcass removal from the line is not completed, or only partially completed, this occurrence is recorded as one defect.
—Factor is five. It will also be recorded as a line 7 defect for a total factor of 10.
—A maximum of one incident per carcass.

9. Compound fracture
—Any bone fracture (i.e., leg or wing) that has caused an opening through the skin. May be accompanied with a bruise, but not always. Do not count the bruise in line 3 or 4 if it is associated with the compound fracture.
—Factor is two.
—A maximum of three incidents per carcass.

* * * * *

(4) The following requirements are also applicable to NELS inspection:

(i) Inspection under NELS is conducted in two phases, as post-mortem inspection phase and a reinspection phase.

(*a*) Post-mortem inspection. The establishment shall provide three inspection stations on each eviscerating line in compliance with the facility requirements § 381.36(d)(1). The three inspectors shall inspect the inside, viscera, and outside of all birds presented. Each inspector shall be flanked by two establishment employees—the presenter and the helper. The presenter shall ensure that the bird is properly eviscerated and presented for inspection and the viscera uniformly trailing or leading. The inspector shall determine which birds shall be salvaged, reprocessed, condemned, retained for disposition by the veterinarian, or allowed to proceed down the line as a passed bird subject to reinspection. Poultry carcasses with certain defects not requiring condemnation of the entire carcass and specified in the partial quality control agreement as defects the establishment shall remove, shall be passed by the inspector, but shall be subject to reinspection to ensure the physical removal of the specified defects. The helper, under the supervision of the inspector, shall mark such carcasses for trim when the defects are not readily observable. Trimming of birds passed subject to reinspection shall be performed by:

(*1*) The helper, time permitting, and

(*2*) One or more plant trimmers positioned after giblet harvest and prior to reinspection.

(*b*) A reinspection station shall be located at the end of each line. This station shall comply with the facility requirements in § 381.36(d)(2). The inspector shall ensure that the establishment has performed the indicated trimming of carcasses passed subject to reinspection by visually monitoring, checking data, and/or gather samples at the station and at other critical points on the line. Specific reinspection activities shall be based on the establishment's partial quality control system and its performance under that system as determined by the inspector.

(ii) The approved quality control program for the establishment shall include critical control points on the line, which shall be monitored by the inspector. Establishment quality control employees shall operate the poultry carcass on-line quality control program and shall make immediately available to inspection personnel any and all data collected and maintained under the approved partial quality control program.

(iii) An inspector shall monitor the establishment's application of the poultry carcass on-line quality control program and shall take corrective action when he/she determines that the

establishment has failed to maintain or correct its process as described in the approved quality control program.

(iv) The maximum inspection rate for NELS shall be 91 birds per minute per eviscerating line.

(5) The following requirements are also applicable to the NTI System:

(i) Inspection under the NTI System is conducted in two phases, a post-mortem inspection phase and a reinspection phase. The NTI–1 Inspection System requires that the establishment provide one inspection station for each line and adequate reinspection facilitiates so carcasses can be removed from each line for evaluation. The NTI–2 Inspection System requires that the establishment provide two inspection stations for each line and adequate reinspection facilities so carcasses can be removed from each line for evaluation.

(*a*) *Post-mortem inspection.* Each inspection station must comply with the facility requirements in § 381.36(e)(1). Each inspector shall be flanked by an establishment employee assigned to be the inspector's helper. The one inspector on an NTI–1 Inspection System shall be presented every bird. Each inspector on an NTI–2 Inspection System line shall be presented every other bird on the line. An establishment employee shall present each bird to the inspector properly eviscerated with the back side toward the inspector and the viscera uniformly trailing or leading. Each inspector shall inspect the inside, viscera, and outside of all birds presented. The inspector shall determine which bird shall be salvaged, reprocessed, condemned, retained for disposition by a veterinarian, or allowed to proceed down the line as a passed bird subject to trim and reinspection. Turkey carcasses with certain defects not requiring condemnation of the entire carcass and specified in the partial quality control program described in paragraph (d) of this section as defects the establishment shall remove, shall be passed by the inspector, but shall be subject to reinspection to ensure the physical removal of the specified defects. The helper, under the supervision of the inspector, shall mark such carcasses for trim when the defects of birds passed subject to reinspection shall be performed by:

(*1*) The helper, time permitting, and

(*2*) One or more plant trimmers positioned after the giblet harvest and prior to reinspection.

(*b*) *Reinspection.* A reinspection station shall be located at the end of the lines. This station shall comply with the facility requirements in § 381.36(e)(2). The inspector shall ensure that establishments have performed the indicated trimming of each carcass passed subject to reinspection by visually monitoring, checking data, and/or sampling product at the reinspection station and, if necessary, at other points, critical to the wholesomeness of product, on the eviscerating line. Specific reinspection activities shall be based on the establishment's partial quality control program described in paragraph (d) of this section and its performance under that program as determined by the inspector.

(ii) The approved partial quality control program described in paragraph (c) of this section for the establishment shall include critical control points on the eviscerating line, which shall be monitored by the inspector. Establishment quality control employees shall operate the quality control program, and shall make immediately available to inspection personnel any and all data collected and maintained under the partial quality control program.

(iii) An inspector shall monitor the establishment's application of the quality control program described in paragraph (c) of this section and shall take corrective action when he/she determines that the establishment has failed to maintain or correct its process as described in the approved partial quality control program.

* * * * *

§ 381.76 [Amended]

3. Under § 381.76, paragraph (c) (3) and (6) are amended by substituting the words "Streamlined Inspection System" for "Modified Traditional Inspection".

Done at Washington, DC, on November 16, 1988.

Lester M. Crawford,

Administrator, Food Safety and Inspection Service.

[FR Doc. 88–26809 Filed 11–18–88; 8:45 am]

BILLING CODE 3410-DM-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88–NM–81–AD; Amdt. 39–6076]

Airworthiness Directives; De Havilland Model DHC–8–100 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revises, publishes in the **Federal Register**, and makes effective as to all persons an amendment adopting a new airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of de Havilland Model DHC–8–100 series airplanes by individual telegrams. This AD requires the addition of interim instructions to the Emergency Procedures Section of the Airplane Flight Manual (AFM). This action is prompted by incidents of inadvertent unfeathering of a propeller after the autofeather system had activated. This condition, if not corrected, could result in inadvertent unfeathering and loss of altitude during critical flight regimes. This action revises the previously issued telegraphic AD to limit the number of airplanes affected, and to provide for the installation of a modification which will eliminate the need for the additional instructions in the AFM.

DATES: Effective December 12, 1988.

Portions of this AD were effective earlier to all recipients of telegraphic AD T88–12–51, dated June 10, 1988.

ADDRESSES: The applicable service information may be obtained from Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Mr. Murry Schoenberger, Aerospace Engineer, New York Aircraft Certification Office, ANE–174, FAA, New England Region, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581; telephone (516) 791–7421.

SUPPLEMENTARY INFORMATION: On June 10, 1988, the FAA issued telegraphic AD T88–12–51, applicable to de Havilland Model DHC–8–100 series airplanes, which requires the addition of certain instructions to the Emergency Procedures Section of the FAA-approved Airplane Flight Manual (AFM). That action was prompted by two incidents where, during flight, the propeller on Model DHC–8 series airplanes inadvertently unfeathered after autofeather had occurred. Subsequent investigation revealed that when an engine fails with the autofeather system selected "ON," under certain conditions, the propeller could unfeather if either power lever is retarded. This unfeathering is inhibited once the condition lever is moved to the "START/FEATHER" of "FUEL OFF" position; furthermore, this can only

occur if there is an abnormal delay between movement of the power lever and the condition lever. This condition, if nor corrected, could lead to inadvertent unfeathering and loss of altitude during critical flight regimes.

Subsequent to the issuance of that AD, the manufacturer developed a modification to the autofeathering latching logic wiring which, when installed, prevents the inadvertent unfeathering condition. Procedures for installation (retrofit) of this modification are described in de Havilland Service Bulletin 61–12–2, Revision A, dated October 28, 1988.

The FAA has determined that installation of this modification would eliminate the need for the (interim) AFM procedures required by the telegraphic AD. Therefore, the final rule has been revised to reflect that installation of the modification would constitute terminating action for the AFM addition. Although, with this action, the modification is provided as an *optional* terminating action, the FAA is considering further rulemaking to require the installation of the modification on all affected airplanes.

Additionally, de Havilland has advised FAA that this modification, defined as Mod 8/0909, was installed in production on airplanes, Serial Numbers 114 and subsequent. In light of this, the FAA has determined that those airplanes should not be subject to the requirements of this AD. Therefore, the applicability of the final rule has been revised to reflect that only airplanes, Serial Numbers 1 through 113, are affected.

The FAA has determined that these changes to the final rule, as described above, will not increase the economic burden on any operator, nor do they increase the scope of this AD.

Since a situation existed, and still exists, that requires immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

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

The Federal Aviation Administration has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required).

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

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

(Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By revising Telegraphic AD T88–12–51, issued June 10, 1988, by revising the applicability statement, adding a new paragraph B., and redesignating existing paragraph B. and C., as follows:

Boeing of Canada, Ltd, De Havilland Division: Applies to Model DHC–8–100 series airplanes, Serial Numbers 1 through 113, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent inadvertent unfeathering of the propeller, accomplish the following:

A. Within 24 hours after the effective date of this AD, insert the following note into the Emergency Operating Procedures Section of the Airplane Flight Manual (AFM) [PSM–1–81–1A(FAA)], and alert all flight crews. This may be accomplished by inserting a copy of this airworthiness directive into the front of the Emergency Operating Procedures Section (Section 4) of the AFM:

Note.—Should an engine failure on fire after V_1 occur: Ensure that the emergency procedures of paragraphs 4.1.2., 4.2.1., and 4.2.2. of PSM 1–81–1A(FAA) are followed. The ENGINE SHUTDOWN check, paragraph 4.2.1., is not to be commenced until entering the third segment of the takeoff path. On commencement of the ENGINE SHUTDOWN or ENGINE FIRE (IN FLIGHT) check, paragraph 4.2.1. or 4.2.2., respectively, the check shoud be completed sequentially and uninterrupted to its conclusion.

B. Installation of the modification to the propellers-autofeather latching logic wiring, in accordance with de Havilland Service Bulletin 8–61–12, Revision A, dated October 28, 1988, constitutes terminating action for the requirements of paragraph A., above, and the required "**Note**" may be removed from the AFM.

C. An alternate means of compliance which provides an acceptable level of safety may be used when approved by the Manager, New York Aircraft Certification Office, FAA, New England Region.

All persons affected by this directive who have not already received the appropriate service information from the manufacturer, may obtain copies upon request to Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at FAA, New England Region, New York Aircraft Certification Office, 181, South Franklin Avenue, Room 202, Valley Stream, New York.

This amendment revises Telegraphic AD T88–12–51, issued June 10, 1988.

This amendment becomes effective December 12, 1988.

Issued in Seattle, Washington, on November 10, 1988.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 88–26807 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 39

[Docket No. 88–NM–79–AD; Amdt. 39–6072]

Airworthiness Directives; Boeing Model 707–300, –300B, –300C, and –400 Series Airplanes.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to all Boeing Model 707–300 and –400 series airplanes, which currently requires modification of horizontal stabilizers that have accumulated 8,000 or more landings. This amendment requires rework of these stabilizers if necessary, to prevent stress corrosion in the horizontal stabilizer rear spar upper chord clevis. The condition, if not corrected, could lead to separation of the horizontal stabilizer.

EFFECTIVE DATE: December 30, 1988.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Scott F. Romer, Airframe Branch, ANM-120S; telephone (206) 431-1966. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations by superseding AD 79-01-06, Amendment 39-3388 (44 FR 2363; January 11, 1979), applicable to certain Boeing Model 707-300 and -400 series airplanes, to require modification of the horizontal stabilizer to prevent stress corrosion in the horizontal stabilizer rear spar upper chord clevis, was published in the Federal Register on July 21, 1988 (53 FR 27527).

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter, a foreign operator, requested that the proposed compliance time of 1 year be extended to 18 months, due to this operator's low airplane utilization rate. The FAA does not concur. Stress corrosion, which has resulted in the reported incidents of cracking, is basically time dependent, not flight cycle dependent. Therefore, the FAA has determined that the proposed compliance time is the maximum amount of time allowable for accomplishment of the modification without compromising safety.

Paragraphs A. and B. of the final rule have been revised to include Boeing Service Bulletin 3253, Revision 3, dated February 25, 1988, since Boeing Alert Service Bulletin A3313, Revision 9 (the service bulletin reflected in the proposal) references that service bulletin for certain associated modification procedures. The FAA has determined that this change to the final rule is for clarifying purposes only. It does not increase the economic burden on any operator, nor does it expand the scope of the AD.

Additionally, paragraph A. has been revised to reflect the latest revision of Boeing Service Bulletin 3331 as Revision 3, dated June 15, 1979.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the following rule.

There are approximately 414 Model 707 series airplanes in the worldwide fleet. It is estimated that 55 airplanes of U.S. registry will be affected by this AD, that it will take approximately 100 manhours per airplane to accomplish the required actions, and that the average labor cost will be $40 per manhour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $220,000.

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

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities, because few, if any, Model 707 airplanes are operated by small entities. A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By superseding AD 79-01-06, Amendment 39-3388 (44 FR 2363; January 11, 1979), with the following new airworthiness directive:

Boeing: Applies to all Model 707-300, -300B, -300C, and -400 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

Note: The inspections required by AD 85-12-01 are not changed by this action.

To prevent the separation of the horizontal stabilizer, accomplish the following:

A. For airplanes on which the modification required by AD 79-01-06 has not been accomplished: Prior to the accumulation of 8,000 total landings, install structural improvement kits on the horizontal stabilizer outer panels and center section in accordance with Boeing Alert Service Bulletin A3313, Revision 9, dated February 25, 1988, Boeing Service Bulletin 3253, Revision 3, dated February 25, 1988, and Boeing Service Bulletin 3331, Revision 3, dated June 15, 1979.

B. For airplanes which have been modified in accordance with Boeing Service Bulletin A3313, Revision 8, or earlier versions, or Boeing Service Bulletin 3253, Revision 2, or earlier revisions, in compliance with AD 79-01-06: Within one year after the effective date of this AD, rework the clevis fittings in accordance with Boeing Alert Service Bulletin A3313, Revision 9, dated February 25, 1988, and Boeing Service Bulletin 3253, Revision 3, dated February 25, 1988.

C. Accomplishment of the modification requirements of this AD, constitutes terminating action for this AD and AD's 77-16-11 and 78-01-04.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Seattle Aircraft Certification Office.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

This amendment supersedes AD 79-01-06, Amendment 39-3388.

This amendment becomes effective December 30, 1988.

Issued in Seattle, Washington, on November 4, 1988.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 88-26806 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 88-CE-34-AD; Amdt. 39-6061]

Airworthiness Directives; British Aerospace (BAe) PLC, Models HP 137 Jetstream Mk1, Jetstreams 200, and 3101 (Includes Model 3100) Airplanes (All Serial Numbers)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts, and revises, a new Airworthiness Directive (AD), AD 88-21-08R1, applicable to British Aerospace (BAe) PLC, Models HP 137 Jetstream Mk1, Jetstreams 200, and 3101 (includes Model 3100) airplanes (all serial numbers), and codifies the corresponding emergency AD letter dated October 14, 1988, as revised, into the **Federal Register**. This AD requires initial and recurring visual inspections of the securing rivet of the flap torque shaft universal joint and replacement of the universal joint assembly if the rivet has failed or has excessive end play. This condition, which was found during an air carrier inspection, could result in loss of control of the airplane due to asymmetric flap deployment. The actions of this AD will preclude asymmetric flap deployment due to failure of the universal joint rivet.

DATES: *Effective Date:* November 26, 1988, to all persons except those to whom it has already been made effective by priority letter from the FAA dated October 14, 1988, and is identified as AD 88-21-08.

Compliance: As prescribed in the body of the AD.

ADDRESSES: BAe Jetstream Alert Service Bulletin (ASB) 27-A-JA-881041, signed October 6, 1988, and amended by the Addendum ASB-A-JA-881041, dated October 8, 1988, applicable to this AD, may be obtained from British Aerospace PLC, Manager, Product Support, Civil Aircraft Division, Prestwick Airport, Ayrshire, KA9 2RW, Scotland; telephone (44-292) 79888; or British Aerospace, Inc., Librarian, Box 17414, Dulles International Airport, Washington, DC 20041; telephone (703) 435-9100. This information may also be examined at the Rules Docket, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Mr. Ted Ebina, Aircraft Certification Division, AEU-100, Europe, Africa, and Middle East Office, FAA, c/o American Embassy, B-1000 Brussels, Belgium; telephone (322) 513.38.30; or Mr. John P. Dow, Sr., FAA, ACE-109, 601 East 12th Street, Kansas City, Missouri 64106; telephone (816) 426-6932.

SUPPLEMENTARY INFORMATION: During an inspection of a BAe Jetstream wing flap actuation system, an air carrier discovered a failed securing rivet in the flap torque shaft universal joint. If this failed rivet was left uncorrected, asymmetric flap deployment could occur with resultant loss of control of the airplane. As a result, the manufacturer issued service information to detect and remedy this problem by describing procedures to inspect the securing rivet in the flap torque shaft universal joint, and replace the universal joint assembly if the securing rivet has failed. The Civil Aviation Authority (CAA) of the United Kingdom (UK) made compliance with this service information mandatory in the UK. The FAA reviewed the information and circumstances involving the failed rivet and determined that the CAA action should be made mandatory immediately for airplanes certificated for operation in the U.S. This is an interim action pending implementation of a permanent modification not requiring recurrent inspections.

The FAA determined that this is an unsafe condition that may exist in other airplanes of the same type design, thereby necessitating the priority letter AD. It was also determined that an emergency condition existed, that immediate corresponding action was required, and that notice and public procedure thereon was impracticable and contrary to the public interest. Accordingly, the FAA notified all known registered owners of the airplanes affected by this AD by priority mail letter dated October 14, 1988. The AD became effective immediately to these individuals upon receipt of the letter, and is identified as AD 88-21-08.

Since the unsafe condition described therein may still exist on other British Aerospace (BAe) PLC, Models HP 137 Jetstream Mk1, Jetstreams 200, and 3101 (includes Model 3100) airplanes (all serial numbers), the AD is being published in the **Federal Register** as an amendment to Part 39 of the Federal Aviation Regulations (14 CFR Part 39) to make it effective to all persons who did not receive the priority letter notification. Minor editorial changes, and a clarification of paragraph a(1) of the AD has been made by the addition of paragraph a(3) based upon comments received from the public. As a result, the AD is being revised and reissued as AD 88-21-08R1. Because a situation still exists that requires the immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable and contrary to the public interest, and good cause exists for making this amendment effective in less than 30 days.

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

The FAA determined that this regulation is an emergency regulation that is not major under section 8 of Executive Order 12291. It is impractical for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this document involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required). A copy of it, when filed, may be obtained by contacting the Rules Docket at the location under the caption **"ADDRESSES."**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By revising and reissuing priority letter AD 88-21-08 as follows:

British Aerospace (BAe) PLC: Applies to Models HP 137 Jetstream Mk1, Jetstreams 200, and 3101 (includes Model 3100) airplanes (all serial numbers) certificated in any category.

Compliance: Required as indicated, unless already accomplished.

To prevent loss of airplane control due to asymmetric flap deployment, accomplish the following:

(a) Upon the accumulation of 2,000 cycles (1 cycle equals 1 takeoff and 1 landing) or within the next 25 cycles, whichever occurs later, visually and tactilely inspect the securing rivet on the left hand and right hand universal joints of the flap torque shaft as specified in BAe Jetstream Alert Service Bulletin (ASB) 27-A-JA-881041, signed October 6, 1988, and amended by the addendum to ASB 27-A-JA-881041, dated October 8, 1988. For each such universal joint:

(1) If the rivet has failed, or the vertical displacement of the rivet exceeds 0.040 inches, prior to further flight replace the torque shaft universal joint assembly with a serviceable part.

(2) If the vertical displacement of the rivet is end float only and does not exceed 0.040 inches as described in the above ASB as amended, repeat the inspection specified in paragraph (a) above thereafter at intervals not to exceed 50 cycles.

(3) If the rivet has not failed, and has no end float, repeat the inspection specified in paragraph (a) above thereafter at intervals not to exceed 200 cycles.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An equivalent means of compliance with this AD may be used if approved by the Manager, Aircraft Certification Division, AEU-100, Europe, Africa, and Middle East Office, FAA, c/o American Embassy, B-1000 Brussels, Belgium.

All persons affected by this directive may obtain copies of the documents referred to herein upon request to British Aerospace PLC, Manager, Product Support, Civil Aircraft Division, Prestwick Airport, Ayrshire, KA9 2RW, Scotland; telephone (44-292) 79888; or British Aerospace, Inc. Librarian, Box 17414, Dulles International Airport, Washington, DC 20041; telephone (703) 435-9100. These documents may also be examined at the FAA, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on November 26, 1988, to all persons except those to whom it has already been made effective by priority letter from the FAA dated October 14, 1988, and is identified as AD 88-21-08. This amendment revises AD 88-21-08, and will be identified as AD 88-21-08R1.

Issued in Kansas City, Missouri, on October 28, 1988.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 88-26805 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 88-NM-35-AD; Amdt. 39-6019]

Airworthiness Directives; McDonnell Douglas Model DC-9-10, -20, -30, -40, -50, and C-9 (Military) Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment revises an existing airworthiness directive (AD), applicable to McDonnell Douglas Model DC-9-30 series airplanes, which currently requires structural inspections and repair or replacement, as necessary, to assure continued airworthiness. This AD would expand the applicability of that AD to include certain Model DC-9-10, -20, -30, -40, and -50 series airplanes. This action is prompted by a structural reevaluation which has identified certain principal structural elements likely to develop fatigue cracks, as these airplanes approach and exceed the manufacturer's original design life estimates. Fatigue cracks in these areas, if not detected and corrected, could compromise the structural integrity of these airplanes.

DATES: *Effective:* December 23, 1988. The incorporation by reference of certain publications listed in this regulation is approved by the Director of the Federal Register as of December 23, 1988.

ADDRESSES: The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1-L00 (54-60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. Michael N. Asahara, Aerospace Engineer, Airframe Branch, ANM-122L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (213) 988-5321.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to revise AD 87-14-07, Amendment 39-5630 (52 FR 25589; July 8, 1987), to require inspections, and repair or replacement, as necessary, of the Principal Structural Elements (PSE) listed in McDonnell Douglas report number L26-008, R1, DC-9 Supplemental Inspection Document (SID), was published in the **Federal Register** on April 28, 1988 (53 FR 16724). The comment period for the proposal closed July 1, 1988.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the two comments received.

The first commenter supported the proposal.

The second commenter stated that the SID program, as implemented, does not generate the required confidence by inspection of the defined sample in that the sample size is inspected at a much lower design life than that defined by the Supplemental Inspection Document (SID) criteria. The commenter suggested that a much larger sample size is required to provide the necessary confidence. The FAA does not concur. In reviewing the SID criteria, the FAA finds, at this time, no major discrepancies or omissions in the statistical-probability base which may discredit the results being sought. However, the FAA is acutely aware of additional work being developed in this area and will be kept apprised by the manufacturer of further iterations of the Supplemental Inspection Program. Should the existing Supplemental Inspection Program require revisions, the FAA may consider further rulemaking to revise this AD to incorporate that program.

The commenter further advised that when design life estimate is advanced, in using the sampling technique, there are possibilities for the existence of cracks outside the sample population. The FAA concludes that no one program can assure optimal safe guards for the likelihood of finding all cracks. The SID program is intended to supplement the operators' normal maintenance program by mandating a physical examination of those critical structural elements identified by a damage tolerance assessment of the airplane. The SID, integrated with operator vigilance and a well-developed and diligently practiced normal maintenance program, may prolong the service life of the airplane. The FAA has been apprised by the manufacturer that it is undertaking a review of the Supplemental Inspection Program. Should this program required revisions, the FAA may consider further

rulemaking to reivse this AD to incorporate those revisions.

The final rule has been revised to remove all references to the use of "later FAA-approved revisions of the applicable service bulletin," in order to be consistent with FAA policy in that regard. The FAA has determined that this change will not increase the economic burden on any operator, nor will it increase the scope of the AD, since later revisions of the service bulletin may be approved as an alternate means of compliance with this AD, as provided by paragraph D.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB control number 2120–0056.

It is estimated that 136 airplanes of U.S. registry and 14 U.S. operators will be affected by this AD, that it will take approximately 1,000 manhours to incorporate the Supplemental Inspection Program for a typical operator. The average labor charge is estimated to be $40 per manhour. Based on these figures, the total cost to U.S. operators to incorporate the SID program is estimated to be $560,000.

The recurring inspection impact on the affected operators is estimated to be 341 manhours per airplane per year, at an average labor cost of $40 per manhour. Based on these figures, the annual recurring cost of this AD is estimated to be $1,655,040.

Based on the above figures, the total cost impact of this AD is estimated to be $2,415,040 for the first year, and $1,655,040 for each year thereafter.

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

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities, because few, if any, Model DC–9 series airplanes are operated by small entities. A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft, Incorporation by reference.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By revising the applicability statement and paragraph A. of AD 87–14–07, Amendment 39–5630 (52 FR 25589; July 8, 1987), to read as follows:

McDonnell Douglas: Applies to McDonnell Douglas Model DC–9–10, –20, –30, –40, –50, and C–9 (Military) series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To ensure the continuing structural integrity of these airplanes, accomplish the following:

A. Within one year after the effective date of this AD, incorporate a revision into the FAA-approved maintenance inspection program which provides for inspection of the Principal Structural Elements (PSE) defined in section 2 of Volume I (All Series) of McDonnell Douglas Report No. L26–008, R1, DC–9 Supplemental Inspection Document (SID), dated November 1987, in accordance with Section 2 of Volume III of that document. The non-destructive inspection techniques set forth in Volume II of the SID provide acceptable methods for accomplishing the inspections required by this AD. All inspection results (negative or positive) must be reported to McDonnell Douglas, in accordance with the instructions of Section 2 of Volume III–87 of the SID.

B. Cracked structure detected during the inspections required by paragraph A., above, must be repaired or replaced before further flight, in accordance with an FAA-approved method.

C. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

D. An alternate means of compliance or an adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note.—The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office.

McDonnell Douglas Report No. L26–008, DC–9 Supplemental Inspection Document (SID), Volume I—All Series, Revision 1, Volume II–10/20, Volume II–20/30, Revision 1, Volume II–40, Volume II–50, and Volume III–87, all dated November, 1987, identified and described in this directive, are incorporated by reference and made a part hereof pursuant to 5 U.S.C. 552(a)(1).

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1–L65 (54–60). These documents may be examined at the FAA, Northwest Mountain Region, 1790 Pacific Highway South, Seattle, Washington or the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

This Amendment becomes effective on December 23, 1988.

Issued in Seattle, Washington, on September 6, 1988.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 88-26701 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 87-ANE-06; Amdt. 39-6074]

Airworthiness Directives; Teledyne Continental Motors GTSIO-520-N Series Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action publishes in the Federal Register and makes effective as to all persons an amendment adopting a new airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of certain Teledyne Continental Motors (TCM) GTSIO–520–N series engines by individual priority letters. The AD requires that the proper torque be assured on the regulator valve cover attaching screws for the rotary fuel pump. The AD is needed to prevent possible fuel pump leaks, fluctuating fuel flow, engine failure, and/or engine

compartment fire which could result in loss of engine power and possible loss of the aircraft.

DATES: Effective December 1, 1988, as to all persons except those persons to whom it was made immediately effective by priority letter AD, issued February 12, 1987, which contained this amendment.

Compliance required within the next ten fight hours, after the effective date of this AD, unless already accomplished.

FOR FURTHER INFORMATION CONTACT: Jerry Robinette, Aerospace Engineer, Propulsion Branch, ACE–140A, Atlanta Aircraft Certification Office, Federal Aviation Administration, 1669 Phoenix Parkway, Suite 210, Atlanta, Georgia 30349; telephone (404) 991–3810.

SUPPLEMENTARY INFORMATION: On February 12, 1987, a priority letter AD was issued and made effective immediately as to all known U.S. owners and operators of certain TCM GTSIO–520–N series engines. The AD requires that the proper torque be assured on the regulator valve cover attaching screws for the rotary fuel pump on the GTSIO–520–N series engines. It has been determined that fuel leaks can occur because the four attaching screws are not properly torqued. Four such cases were reported in the United Kingdom, and TCM returned their entire stock of this type fuel pump to Lear Siegler for correction. AD action was necessary to prevent possible fuel leaks, fluctuating fuel flow, engine failure, and/or engine compartment fire in TCM GTSIO–520–N series engines which could result in loss of engine power and possible loss of the aircraft.

Since it was found that immediate corrective action was required, notice and public procedure thereon were impracticable and contrary to public interest, and good cause existed to make the AD effective immediately by individual priority letter AD, issued February 12, 1987, as to all known U.S. owners and operators of TCM GTSIO–520–N series engine. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to § 39.13 of Part 39 of the Federal Aviation Regulations to make it effective as to all persons.

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

Conclusion: The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required). A copy of it, when filed, may be obtained by contacting the person identified under the caption **"FOR FURTHER INFORMATION CONTACT".**

List of Subjects in 14 CFR Part 39

Engines, Air transportation, Aircraft, Aviation safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration (FAA) amends Part 39 of the Federal Aviation Regulations (FAR) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding to § 39.13 the following new airworthiness directive (AD):

Teledyne Continental Motors: Applies to GTSIO–520–N Series Engines equipped with rotary fuel pump, P/N 643367 or 643367A2, manufactured by Lear Siegler Romec.

Compliance is required within the next 10 flight hours, after the effective date of this AD, unless already accomplished. To prevent possible fuel pump leaks, fluctuating fuel flow, engine failure, and/or engine compartment fire; notwithstanding prior accomplishment of the referenced service bulletins, accomplish the following:

For all GTSIO–520–N series engines:

(a) Visually inspect the attaching screws on the regulator valve cover of fuel pump, P/N 643367 or 643367A2, for blue or green paint markings on the head of at least one screw.

(b) If paint markings are present, proper torque has been assured by the manufacturer. Therefore, make appropriate Engine Logbook entry, no further action is required.

(c) If paint markings are not present; accomplish the following:

(1) Cut and remove the safety wire from the four attaching screws on the regulator valve cover of fuel pump, P/N 643367 or 643367A2.

(2) Loosen screws one full turn.

(3) Tighten the four screws to 24–27 inch pounds.

(4) Safety wire the four screws with MS20995C32 wire.

(5) Make appropriate Engine Logbook entry.

Note.—Lear Siegler, Inc., Service Bulletin No. 101SB015, dated December 17, 1986, and Teledyne Continental Motors Service Bulletin No. M87–6, dated February 6, 1987, address this subject.

(d) Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

(e) Upon request, an equivalent means of compliance with the requirements of this AD may be approved by the Manager, Atlanta Aircraft Certification Office, Federal Aviation Administration, 1669 Phoenix Parkway, Suite 210, Atlanta, Georgia 30349.

This amendment becomes effective December 1, 1988, as to all persons except those persons to whom it was made immediately effective by priority letter AD, issued February 12, 1987, which contained this amendment.

Issued in Burlington, Massachusetts, on November 9, 1988.

Arthur J. Pidgeon,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 88–26800 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 87–ASW–15]

Designation of Control Zone in Springdale, AR, and Amendment of Control Zone in Fayetteville, AR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment will designate a control zone at Springdale, AR, and will alter the control zone at Fayetteville, AR. The intended effect of this amendment is to provide adequate controlled airspace for aircraft executing standard instrument approach procedures (SIAP) to the Springdale Municipal Airport and to return to public use airspace no longer required for the protection of aircraft arriving/departing the Drake Field Airport, Fayetteville, AR. This action is necessary since a part-time nonfederal airport traffic control tower (ATCT) and scheduled air service are provide at the Springdale Municipal Airport. Designation of a control zone will allow the Springdale Municipal Airport to be used as an alternate airport under

instrument flight rules (IFR). The alteration of the Fayetteville, AR, Control Zone is necessary, since a review indicated that there is more controlled airspace than is required for the protection of aircraft arriving/departing the Drake Field Airport.

EFFECTIVE DATE: 0901 U.t.c., November 19, 1987.

FOR FURTHER INFORMATION CONTACT: Bruce C. Beard, Airspace and Procedures Branch (ASW-534), Air Traffic Division, Southwest Region, Federal Aviation Administration, 4400 Blue Mound Road, Fort Worth, TX. 76193-0530, telephone (817) 624-5561.

SUPPLEMENTARY INFORMATION:

History

On April 22, 1987, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to designate a control zone at Springdale, AR, and to amend the control zone at Fayetteville, AR, (52 FR 16853).

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is that proposed in the notice. Section 71.171 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6C dated January 2, 1987.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations designates a control zone at Springdale, AR, and amends the control zone at Fayetteville, AR. The Springdale Municipal Airport has a part-time nonfederal ATCT. Designating a control zone at Springdale, AR, will enhance airport usage and will allow the airport to be used as an alternate under IFR conditions. The intended effect of this action is to ensure segregation of aircraft using the Springdale Municipal Airport under IFR and other aircraft operating VFR. A review of the control zone at Fayetteville, AR, indicated that there was more controlled airspace than really necessary. The alteration of the Fayetteville Control Zone will return to public use airspace no longer required for the protection of aircraft arriving/departing the Drake Field Airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended as follows:

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.171 [Amended]

2. Section 71.171 is amended as follows:

Springdale, AR [New]

Within a 5-mile radius of the Springdale Municipal Airport (Latitude 36°10'35"N., Longitude 94°07'09"W.). This control zone is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

Fayetteville, AR [Amended]

Within a 5-mile radius of the Drake Field Airport (Latitude 36°00'18"N., Longitude 94°10'12"W.). This control zone is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

Issued in Fort Worth, TX, on August 21, 1987.

Larry L. Craig,

Manager, Air Traffic Division, Southwest Region.

Editorial Note: This document was received by the Office of the Federal Register November 16, 1988.

[FR Doc. 88-26802 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 156

[Docket 25723; Adoption of Part 156]

State Block Grant Pilot Program; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments; correction.

SUMMARY: FAA is correcting errors in Amendment Number 156-1, "State Block Grant Pilot Program." In FR Doc. 88-24242, published Thursday, October 20, 1988, on page 41302, please remove "Amdt. No. 156-1" from the heading and replace with the words "Adoption of Part 156".

FOR FURTHER INFORMATION CONTACT: Mr. Mark Beisse, Office of Airport Planning and Programming, (APP-510), Federal Aviation Administration, telephone (202) 267-8724.

Michael D. Triplett,

Docket Section, Program Management Staff, ACC-10.

[FR Doc. 88-26700 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting and Supervising Federal Prisoners

AGENCY: United States Parole Commission.

ACTION: Final Rule.

SUMMARY: The U.S. Parole Commission is adopting an interpretative regulation that clarifies the parole eligibility status of Firearms Act violators under 26 U.S.C. 5871, who committed their crimes on or after October 12, 1984, the effective date of the Sentencing Reform Act of 1984. That law deleted the early parole eligibility provision of section 5871, effective October 12, 1984. This rule makes clear the Commission's interpretation that 18 U.S.C. 4205(a) makes these offenders eligible for parole after service of one-third of their sentences, but only if the crime was committed prior to November 1, 1987, when eligibility for parole was abolished for all federal offenders.

EFFECTIVE DATE: December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Janice G. McLeod, Attorney, U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, Maryland, Telephone (301) 492-5959.

SUPPLEMENTARY INFORMATION: In 1984, Congress amended 26 U.S.C. 5871 to delete the language in that statute that made violators thereof eligible for parole as the Commission "shall determine." See section 227 of the Sentencing Reform Act of 1984, Pub. L. 98–473. This deletion raised the question of whether such persons are eligible for parole at all.

The Commission has decided that, for violators of section 5871 who committed their offenses between October 12, 1984 and November 1, 1987, 18 U.S.C. 4205(a), the general parole eligibility statute, makes them eligible for parole after service of one-third of their term or terms, if over one year.

Effective November 1, 1987, 18 U.S.C. 4205(a) was abolished for all offenses committed from that date forward, and kept in place by a savings provision, section 235(b)(1) of the Sentencing Reform Act of 1984, only for offenses committed prior to that date. See Pub. L. 100–182, the Sentencing Act of 1987. Hence, section 5871 offenders who commit their crimes on or after November 1, 1987, are no longer eligible for parole at any time.

The Commission's current regulations continue to reflect only the law applicable to section 5871 offenses committed prior to October 12, 1984, the effective date of the Sentencing Reform Act of 1984. Therefore, the Commission has decided to amend this regulation to define the parole eligibility of section 5871 offenders who committed their crimes between October 12, 1984 and November 1, 1987.

This rule change will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Probation and Parole, Prisoners.

28 CFR Part 2 is amended as follows:

PART 2—[AMENDED]

1. The authority citation for 28 CFR Part 2 continues to read:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. 28 CFR 2.2(d) is revised to read as follows:

§ 2.2 [Amended]

* * * * *

(d) If the Court has imposed a maximum term or terms of more than one year pursuant to 18 U.S.C. 924(a) or 26 U.S.C. 5871 [violation of Federal gun control laws], a Federal prisoner serving such term or terms may be released in the discretion of the Commission as if sentenced pursuant to 18 U.S.C. 4205(b)(2). However, if the prisoner's offense was committed on or after October 12, 1984, and the Court imposes a term or terms under 26 U.S.C. 5871, the prisoner is eligible for parole only after service of one-third of such term or terms, pursuant to 18 U.S.C. 4205(a).

* * * * *

Issued at Chevy Chase, Maryland, November 1, 1988.

Benjamin F. Baer,

Chairman, U.S. Parole Commission.

[FR Doc. 88–26849 Filed 11–18–88; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD8–88–15]

Drawbridge Operation Regulations; Tchefuncta River, Louisiana

AGENCY: U.S. Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: At the request of the Louisiana Department of Transportation and Development and the town of Madisonville, the Coast Guard is changing the regulation governing the operation of the swing span bridge on State Route 22 across the Tchefuncta River, mile 2.5 at Madisonville, St. Tammany Parish, Louisiana, by permitting the draw to open only on the hour and half-hour between 5 a.m. and 8 p.m., and to open on signal at all other times. This change is being made to relieve vehicular traffic congestion. The opening of the draw on a regulated basis will allow motorists to plan crossings in conjunction with the regulated openings and will impose little inconvenience to vessel traffic.

EFFECTIVE DATE: This regulation becomes effective on December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. John Wachter, Bridge Administration Branch, Eighth Coast Guard District, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: On 9 September 1988, the Coast Guard published a proposed rule (53 FR 35094) concerning this amendment. The Commander, Eighth Coast Guard District, also published the proposal as a Public Notice dated 22 September 1988. In each notice interested parties were given until 24 October 1988 to submit comments.

Drafting Information

The drafters of this notice are Mr. John Wachter, project officer, and Commander J.A. Unzicker, project attorney.

Discussion of Comments

Five letters of comment were received in response to public notification of the proposed rule change. The National Marine Fisheries Service, the Federal Emergency Management Agency and the State of Louisiana offered no objection to the change. Two respondents objected to the proposed rule change, stating that accumulated vessels awaiting an opening of the bridge would create a hazard to vessels. The Coast Guard has carefully considered the comments and believes that the number of vessels accumulating at the bridge will be limited because mariners will plan their arrival to coincide with scheduled openings. Also, there are ample holding areas for vessels both upstream and downstream of the drawspan. While the objectors may be slightly inconvenienced by the regulated openings, they will still have the opportunity to pass through the bridge almost at will with knowledge of the schedule for openings and with minimal planning. Therefore, in the absence of significant objection to the proposal as published in (53 FR 35094) on 9 September 1988, the final rule is unchanged from the proposed rule.

Federalism Implications

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

Economic Assessment and Certification

This regulation is considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. The basis for this conclusion is that, with some planning by vessel operators that use the waterway, openings on a regulated basis will cause only minimal delay, or no delay, for boaters. Since the economic impact of this regulation is expected to be minimal, the Coast Guard certifies that it will not have a

significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulation

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations, is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46 and 33 CFR 1.05–1(g).

2. Section 117.500 is added to read as follows:

§ 117.500 Tchefuncta River.

The draw of the SR 22 bridge, mile 2.5 at Madisonville, shall open on signal; except that, from 5 a.m. to 8 p.m., the draw need open only on the hour and half-hour. The draw shall open on signal at any time for a vessel in distress or for an emergency aboard a vessel.

Dated: November 4, 1988.

W.F. Merlin,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 88–26892 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6688

[AK–932–09–4214–10; F–031073]

Revocation of Executive Order No. 1557 and Partial Revocation of Executive Order No. 7127, for Selection of Land by the State of Alaska; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes two Executive orders insofar as they affect 3.39 acres of public land withdrawn for the McCarty Military Reserve. The land is no longer needed for the purpose for which it was withdrawn. This action will also classify the land as suitable for selection by the State of Alaska, if such land is otherwise available. If not selected by the State, the land will be subject to the terms and conditions of Public Land Order (PLO) No. 5180, as amended, and will remain closed to location for metalliferous minerals until a further opening order is published.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Sandra C. Thomas, BLM Alaska State Office, 701 C Street, Box 13, Anchorage, Alaska 99513, 907–271–3342.

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, 90 Stat. 2751; 43 U.S.C. 1714, and by section 17(d)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 708 and 709; 43 U.S.C. 1616(d)(1), it is ordered as follows:

1. This order revokes Executive Order (EO) No. 1557, dated July 3, 1912, and partially revokes EO No. 7127, dated August 6, 1935, insofar as they affect the following described land:

McCarty Military Reserve

U.S. Survey No. 1483, situated in Sec. 8, T. 9 S., R. 10 E., Fairbanks Meridian.

The area described contains 3.39 acres.

2. Subject to valid existing rights, the land described above is hereby classified as suitable for and opened to selection by the State of Alaska under either the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, et seq.; 48 U.S.C. prec. 21, or section 906(b) of the Alaska National Interest Lands Conservation Act of December 2, 1980, 94 Stat. 2371, 2437–2438; 43 U.S.C. 1635.

3. As provided by section 6(g) of the Alaska Statehood Act, the State of Alaska is provided a preference right of selection for the land described above, for a period of ninety-one (91) days from the date of publication of this order, if the land is otherwise available. Any of the land described herein that is not selected by the State of Alaska will be subject to the terms and conditions of PLO No. 5180, as amended, and any other withdrawal of record and shall remain closed to location for metalliferous mining until a further opening order is published.

J. Steven Griles,

Assistant Secretary of the Interior

November 4, 1988.

[FR Doc. 88–26846 Filed 11–18–88; 8:45 am]

BILLING CODE 4310–JA–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Ch. I

[CGD 86–033]

Update of Cross References and Correction of U.S.C. Citations

AGENCY: Coast Guard, DOT.

ACTION: Final rule correction.

SUMMARY: The Coast Guard is correcting errors in the final rule which appeared in the **Federal Register** on September 16, 1988 (53 FR 36022). The subchapter was inadvertently not mentioned in document paragraph number 73. In various places in that document the Coast Guard removed footnotes 12 and 13 from tables which are identical or nearly identical in several subchapters. However, the Coast Guard failed to remove references to footnotes 12 and 13 in the text of the tables. Since the statutory references in the footnotes have been repealed, the references to them in the table have no legal effect and should also be removed.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce P. Novak, (202) 267–1477.

§ 2.01–7 [Corrected]

1. On page 36023, second column, line 56 is corrected to read:

d. Footnote 12 and all references to footnote 12 in the text of the table are removed.

§ 24.05–1 [Corrected]

2. On page 36023, third column, line 28 is corrected to read:

d. Footnote 13 and all references to footnote 13 in the text of the table are removed.

§ 30.01–5 [Corrected]

3. On page 36024, first column, line 12 is corrected to read:

iv. Footnote 12 and all references to footnote 12 in the text of the table are removed.

§ 70.05–1 [Corrected]

4. On page 36024, third column, line 33 is corrected to read:

c. Footnote 12 and all references to footnote 12 in the text of the table are removed.

§ 90.05–1 [Corrected]

5. On page 36025, second column, line 20 is corrected to read:

c. Footnote 12 and all references to footnote 12 in the text of the table are removed.

§ 175.05–1 [Corrected]

6. On page 36026, second column, line 22 is corrected to read:

c. Footnote 12 and all references to footnote 12 in the text of the table are removed.

§ 188.05–1 [Corrected]

7. On page 36026, second column, line 61 is corrected to read:

c. Footnote 12 and all references to footnote 12 in the text of the table are removed.

§ 194.05–9 [Corrected]

8. On page 36027, second column, line 7 is corrected to read: "49 CFR Parts 172, 173, and 176".

§ 194.05–17 [Corrected]

9. On page 36027, second column, lines 9, 10, and 11 are corrected to read:

73. Section 194.05–11(b) is amended by removing the words "Subpart 146.22 of Part 146 of Subchapter N of this chapter" and inserting the words "49 CFR Parts 172, 173, and 176" in their place.

Dated: November 10, 1988.

[FR Doc. 88–26893 Filed 11–18–88; 8:45 am]

BILLING CODE 491–014–M

VETERANS ADMINISTRATION

48 CFR Part 852

Acquisition Regulations Relating to Cost Comparisons

AGENCY: Veterans Administration.

ACTION: Final rule; correction.

SUMMARY: The Veterans Administration (VA) is correcting its final regulations implementing the Office of Management and Budget Circular A–76.

FOR FURTHER INFORMATION CONTACT: Chris A. Figg, Acquisition Policy Staff (93), Office of Acquisition and Materiel Management, Veterans Administration, 810 Vermont Avenue NW., Washington, DC, (202) 233–3054.

SUPPLEMENTARY INFORMATION: In the Federal Register of October 26, 1988 [53 FR 43209] the VA published its regulations relating to cost comparisons. Several dates and one line of text were inadvertently omitted from the final regulation. The VA hereby corrects the errors.

Dated: November 14, 1988.

C.G. Verenes,

Acting Chief, Directives Management Division.

48 CFR Chapter 8, is amended to read as follows:

1. The authority citation for Part 852 continues to read as follows:

Authority: 38 U.S.C. 210 and 40 U.S.C. 486(c).

2. On page 43211, in the middle column, the amendatory language in item 3 is corrected to read as follows:

3. In Subpart 852.2, sections 852.207–70, 852.207–71, and 852–72 are added to read as follows:

3. In 852.207–70, the heading to the clause is revised to read as follows:

852.207–70 Report of employment under commercial activities.

* * * * *

Report of Employment Under Commercial Activities (October 1988)

* * * * *

4. In 852.207–71, the heading to the provision in paragraph (a) is revised, and the heading and paragraph (b) of the provision in paragraph (b) is revised, to read as follows:

852.207–71 Notice of cost comparison.

* * * * *

(a) * * *

Notice of Cost Comparison (October 1988)

* * * * *

(b) * * *

Notice of Cost Comparison—Supplement (October 1988)

* * * * *

(b) Bidders (offerors) are placed on notice that this solicitation allows contractors to bid (offer) on the basis of Contractor-owned, Contractor-operated (COCO) and/or Government-owned, Government-operated (GOCO) basis. However, a COCO method of performance will only be considered if two or more responsive and responsible financially autonomous firms bid (offer) on a COCO basis, and a GOCO bid will only be considered if two or more responsive and responsible financially autonomous firms bid (offer) on a GOCO basis.

(End of Provision)

5. In 852.207–72, the heading to the provision is revised to read as follows:

852.207–72 Cost comparison criteria—VA medical facilities.

* * * * *

Cost Comparison Criteria—VA Medical Facilities (October 1988)

* * * * *

[FR Doc. 88–26695 Filed 11–18–88; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 380

[Docket No. 81012–8212]

Antarctic Marine Living Resources Convention Act of 1984

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of final rule.

SUMMARY: The Secretary of Commerce, on behalf of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), publishes notice of conservation and management measures promulgated by the Commission and accepted in whole by the United States Government to regulate catches in Convention for the Conservation of Antarctic Marine Living Resources (Convention) statistical reporting subarea 48.3, depicted at Figure 1, 50 CFR Part 380. These measures restrict overall catches of certain species of fish, prohibit the taking of other species, designate fishing seasons, and define reporting requirements.

EFFECTIVE DATE: November 21, 1988.

ADDRESS: A copy of the framework environmental assessment may be obtained from the Assistant Administrator for Fisheries, NOAA, National Marine Fisheries Service, Washington, DC 20235.

FOR FURTHER INFORMATION CONTACT: Robin Tuttle (NMFS International Science, Development and Polar Affairs Division), 202–673–5276.

SUPPLEMENTARY INFORMATION: At its annual meeting in Hobart, Tasmania, in 1986, CCAMLR, of which the United States is a member, adopted a conservation measure requiring the Commission at its 1987 meeting to adopt limitations on catch, or equivalent measures, binding for species upon which fisheries are permitted around Convention statistical reporting subarea 48.3 (South Georgia) for the 1987/88 season. For each fishing season after 1987/88, the Commission agreed to establish such limitations or other measures, as necessary, around South Georgia on a similar basis at the meeting of the Commission immediately preceding that season. Section 380.26 establishes the procedure through which this will be implemented each season.

The limitations on catch or equivalent measures will be consistent with the 1986 conservation measure (7/V), based upon the advice of the Scientific Committee, and take into account data resulting from recent fishery surveys around South Georgia. They will be announced in the Federal Register after the meeting at which they were adopted.

Vessels authorized to fish in subarea 48.3 must appoint a designated representative so that the National Marine Fisheries Service can gather and disseminate the required information in the timely manner necessary for it to implement its treaty obligations.

These regulations establish the reporting requirements for vessels fishing in subarea 48.3. Vessel operators are required to report in writing by cable, telex or rapifax personally or through a designated representative within 5 days of the end of the ten day

reporting periods catches of *Champsocephalus gunnari* taken in subarea 48.3 to the National Marine Fisheries Service.

If the seasonal catch limitation for *C. gunnari* set by the Commission is reached before the end of the season, the closure of the fishery will be announced in the **Federal Register**. NMFS will also notify the designated representative of the holder of a permit to fish in subarea 48.3 of the date of the closure of the fishery.

Classification

The Secretary of Commerce has determined that this rule is necessary to implement the Antarctic Marine Living Resources Convention Act of 1984 and to give effect to the conservation and management measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources and agreed to by the United States.

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator) prepared a framework environmental assessment (EA) for the implementation of the Antarctic Marine Living Resources Convention Act of 1984 in 1987. NMFS has reviewed this rule and determined that the actions it requires were generally summarized in the framework EA and are thus excluded from further National Environmental Policy Act analysis.

This action is exempt from Executive Order 12291 and section 553 of the Administrative Procedure Act because it involves a foreign affairs function of the United States. Because notice and comment rulemaking is not required for this rule, the Regulatory Flexibility Act does not apply; therefore, a regulatory flexibility analysis has not been prepared. At present there are no U.S. vessels or vessels subject to the jurisdiction of the United States harvesting Antarctic marine living resources within the area to which these regulations apply, except for research purposes. Presently, the only Antarctic resources affected are scientific specimens taken under National Science Foundation permits and by the U.S. Antarctic Marine Living Resources directed research program. Accordingly, these regulations should not have an incremental impact on U.S. vessels harvesting or performing associated activities in the Convention area.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act. The collection of information has been approved by the Office of Management and Budget under Control Number 0648–0194.

The annual reporting burden for this collection of information is estimated to average one-half hour per harvester, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Robin Tuttle, National Marine Fisheries Service, 1335 East-West Highway, Room 7240, Silver Spring, Maryland 20910 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

List of Subjects in 50 CFR Part 380

Antarctic, Fish and Wildlife, Reporting and recordkeeping requirements.

Dated: November 9, 1988.

James W. Brennan,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble of this rule, 50 CFR Part 380 is amended as follows:

PART 380—ANTARCTIC MARINE LIVING RESOURCES CONVENTION ACT OF 1984

1. The authority citation for Part 380 continues to read as follows:

Authority: 16 U.S.C. 2431 *et seq.*

2. Section 380.2 of Subpart A is amended by adding the following three terms in alphabetical order:

§ 380.2 Definitions.

* * * * *

Executive Secretary means the Executive Secretary of the Commission for the Conservation of Antarctic Marine Living Resources.

* * * * *

Fishery means.

(a) One or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(b) Any fishing for such stocks.

Fishing season means the period from July 1 to June 30.

* * * * *

§§ 380.20, 380.21 and 380.22 [Redesignated as §§ 380.21, 380.22, and 380.23] §§ 380.23 [Redesignated as § 380.20 and Revised]

3. Subpart B is amended by redesignating §§ 380.20, 380.21 and 380.22 as §§ 380.21, 380.22, and 380.23 respectively, and by redesignating existing § 380.23 and § 380.20, and revising it to read as follows:

§ 380.20 Scientific research.

The management measures in this subpart do not apply to scientific research, unless otherwise indicated.

4. New §§ 380.24, 380.25, and 380.26 are added to Subpart B to read as follows:

§ 380.24 Reporting requirements for Convention statistical reporting subarea 48.3.

(a) The calendar month is divided into three reporting periods; day 1 to day 10 is period A, day 11 to day 20 is period B, and day 21 to the last day of the month is period C.

(b) The operator of any vessel fishing in subarea 48.3 must, within 5 days of the end of a reporting period, report his catch of *Champsocephalus gunnari* to NMFS. The report must be made in writing by cable, telex, rapifax or other appropriate method to the number specified in the vessel's permit, and include the vessel name, permit number, month, reporting period, and its catch in metric tons (to the nearest tenth of a ton) of *C. gunnari* taken in subarea 48.3. An operator must also submit a negative report in writing if no *C. gunnari* is taken during the reporting period.

§ 380.25 Appointment of a designated representative.

(a) All holders of permits authorizing fishing in subarea 48.3 must appoint a designated representative in the United States.

(b) The designated representative will be notified of closures under § 380.26 and must transmit this information to the vessel on the grounds.

(c) The designated representative may receive catch reports from the vessel and transmit the reports to NMFS in writing.

§ 380.26 Seasonal restrictions in Convention statistical reporting subarea 48.3.

(a) Preseason actions.

(1) The Commission, at each annual meeting, will specify limitations on catch or equivalent measures for species on which fisheries are permitted around South Georgia (subarea 48.3) binding for that season.

(2) Such measures will be based upon the advice of the Scientific Committee, taking into account any data resulting from fishery surveys around South Georgia.

(3) Such measures will be announced after the meeting at which they were adopted through publication in the Federal Register.

(b) Inseason actions.

(1) When 90 percent of the seasonal catch limitation has been taken, the Executive Secretary will make a final estimate of the date upon which the seasonal catch limitation will be reached. The fishery involved will close at the end of the last day of the reporting period within which that date falls.

(2) The closure of the fishery will be announced in the Federal Register.

(3) NMFS will notify the designated representative of a holder of a permit that authorizes activities in the fishery involved of the date of the closure of the fishery.

[FR Doc. 88-26877 Filed 11-18-88; 8:45 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 53, No. 224
Monday, November 21, 1988

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1076

[DA-89-003]

Milk in the Southwestern Idaho-Eastern Oregon Marketing Area; Notice of Proposed Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed suspension of rule.

SUMMARY: This notice invites written comments on a proposal to suspend portions of the Southwestern Idaho-Eastern Oregon Federal milk order. The proposed relate to the limits on the amount of milk not needed for fluid (bottling) use that may be moved directly from farms to nonpool manufacturing plants and still be priced under the order. Suspension of the provisions was requested by a cooperative association representing a majority of the producers supplying the market to prevent uneconomic movements of milk. The proposed suspension would be for the months of December 1988 through May 1989.

DATE: Comments are due on or before November 28, 1988.

ADDRESSES: Comments (two copies) should be filed with the USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456.

FOR FURTHER INFORMATION CONTACT: Constance M. Brenner, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-7183.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under the criteria contained therein.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), the suspension of the following provisions of the order regulating the handling of milk in the Southwestern Idaho-Eastern Oregon marketing area is being considered for December 1988 through May 1989:

In § 1135.13, paragraphs (f)(3), (4), (5) and (6).

All persons who want to send written data, views, or arguments about the proposed suspension should send two copies of them to the USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20250-6456, by the 7th day after publication of this notice in the Federal Register. The period for filing comments is limited to 7 days to permit completion of the required procedures to make the action effective for the month of December.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27(b)).

Statement of Consideration

Dairymen's Creamery Association, Inc. (DCA), an association of producers that supplies much of the market's fluid milk needs and handles much of the market's reserve milk supplies, requested the suspension. The suspension would remove for December 1988 through May 1989 the limit on the amount of producer milk that a cooperative association or other handlers may divert from pool plants to nonpool plants.

The order now provides that a cooperative association may divert up to 80 percent of its total member milk received at all pool plants or diverted therefrom during any month. Similarly, the operator of a pool plant may divert up to 80 percent of its receipts of producer milk (for which the operator of such plant is the handler during the month) during any month.

DCA indicates that operation of the 80-percent diversion limit means that over 2,000,000 pounds of milk must be unloaded and re-loaded each month at the cooperative's Meridian, Idaho, pool supply plant to be transferred to nonpool manufacturing plants. Such unnecessary handling is, according to the cooperative, undertaken for the sole purpose of meeting the delivery requirements of the order. The cooperative states that such unnecessary unloading and re-loading takes employees' time and requires additional cleaning of lines and tanks.

DCA states that the requested suspension will allow the pooling of producers who stand ready to supply the fluid milk requirements of the marketing area to be handled without undue expense. The cooperative does not believe that the suspension would encourage association with the order of the milk of producers who are not bona fide suppliers of the bottling needs of the market. During the requested suspension, DCA expects to evaluate the advisability of proposing permanent amendments to the order to eliminate such unnecessary handling in the future.

List of Subjects in 7 CFR Part 1135

Milk marketing orders, Milk, Dairy products.

The authority citation for 7 CFR Part 1135 continues to read as follows:

Authority: Secs. 1-19, 48 stat. 31, as amended; 7 U.S.C. 601-674.

Signed at Washington, DC, on November 15, 1988.

J. Patrick Boyle,

Administrator.

[FR Doc. 88-26822 Filed 11-18-88; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 88-NM-121-AD]

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes a new airworthiness directive (AD), applicable to all McDonnell Douglas Model DC-9, DC-9-80, MD-88, and C-9 (military) series airplanes, which would require a revision to the FAA-approved Airplane Flight Manual (AFM) to add a preflight check of all fuel pumps. This proposal is prompted by reports of dual fuel pump failures. If a single pump failure were to go undetected, failure of the second pump could occur, at which time the remaining fuel, if in the center tank, would be trapped and could result in fuel starvation of one or both engines.

DATES: Comments must be received no late than January 9, 1989.

ADDRESS: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-121-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

FOR FURTHER INFORMATION CONTACT: Mr. James A. Richmond, Flight Test Pilot, Flight Test Branch, ANM-106L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (213) 988-5366.

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 should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. 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.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 88-NM-121-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion: An FAA review of the McDonnell Douglas Model DC-9/DC-9-80 series airplane fuel system, following two recent incidents of dual center fuel pump failures, identified the potential for insidious engine fuel starvation where adequate fuel is available but trapped in the aircraft. It was determined that, on the Model DC-9, DC-9-80, MD-88, and C-9 (military) series airplanes, the fuel system will operate satisfactorily following the failure of one pump in any tank, without direct indication of pump failure. The pump failure could go undetected until failure of the second pump occurs.

If this situation were to occur in either wing tank, that engine would revert to suction feed. If both center tank pumps become inoperative, center tank fuel would be trapped in the center tank and would be unuseable. This condition, if not corrected: could result in fuel starvation. This problem would be compounded on extended range flights.

The FAA has determined that, in most cases, this situation can be avoided by a preflight check of each fuel pump to verify its proper operation. Failures noted at that time can be corrected on the ground and will significantly decrease the potential for a dual failure being discovered during flight.

Since this condition exist on other airplanes of this same type design, an AD is proposed which would require a revision to the approved Airplane Flight Manual (AFM) to require a preflight check to ensure the proper operation of all fuel pumps in tanks containing useable fuel.

There are approximately 1,500 Model DC-9 series, Model DC-9-80 series, Model MD-88, and C-9 (military) series airplanes in the worldwide fleet. It is estimated that 824 airplanes of U.S. registry would be affected by this AD. The required action would not require the expenditure of any significant amount of funds to accomplish.

The regulation 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 sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 13034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because of the minimal cost of compliance per airplane. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend Section 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

McDonnell Douglas: Applies to all Model DC-9 series, Model DC-9-80 series, Model MD-88, and C-9, (military) series airplance, certificated in any category. Compliance required as indicated, unless previously accomplished.

To detect fuel pump failures, accomplish the following:

A. Within 10 calendar days after the effective date of this AD, revise the Limitations Section of the FAA-approved Airplane Flight Manual (AFM) to add the following, and provide to flight crews. This may be accomplished by inserting a copy of this Ad is the AFM:

Section 1—Limitations

Fuel Management

Add the following wording at the beginning of this section: "Prior to engine start, all tank-mounted fuel pumps in tanks containing useable fuel must be individually checked to verify pump operation by observing the respective inlet fuel pressure low lights extinguish when each individual pump is turned on. DC start pumps that are inoperative per the MEL, and center pumps on aircraft with a pump failure alerting system are not required to be checked."

B. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Prinicipal Operations Inspector (POI), who may add any comments and then send it to the Manager, Los Angeles Aircraft Certification Office.

All persons affected by this directive who have not already received the appropriate service information from the manufacurer may obtain copies upon request to the McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1–LOO (54–60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

Issued in Seattle Washington, on November 1, 1988.

Leroy A. Keith, Manager,

Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 88–26803 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 39

[Docket No. 88–NM–136–AD]

Airworthiness Directives; McDonnell Douglas Model DC–10 and KC–10A (Military) Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to revise an existing airworthiness directive (AD), applicable to DC–10 and KC–10A (Military) series airplanes, which currently requires inspection and repair, if necessary, of the horizontal stabilizer rear spar cap and/or upper rear skin panel for fatigue cracking. This action would add a requirement to repeat the inspections at intervals not to exceed 2,000 landings.

DATES: Comments must be received no later than January 10, 1989.

ADDRESS: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate (Attn: ANM–103), Attention: Airworthiness Rules Docket No. 88–NM–136–AD, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168. The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1–L00 (54–60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. Kyle L. Olsen, Aerospace Engineer, Airframe Branch, ANM–121L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (213) 988–5227.

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 should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received. 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.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM–103), Attention: Airworthiness Rules Docket No. 88–NM–136–AD, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

Discussion: On July 21, 1987, FAA issued AD 87–06–53–R1, Amendment 39–5694 (52 FR 28133; July 28, 1987), applicable to McDonnell Douglas DC–10 and KC–10A (Military) series airplanes, to require inspections and repair of the horizontal stabilizer upper outer section rear spar cap or rear skin panel.

That action was prompted by reports from two operators of cracks found in the outer section of the rear spar cap of the horizontal stabilizer on three airplanes. If not detected, a crack at this location on the spar cap or skin panel may progress until the spar cap or skin panel is severed, which could result in structural failure.

At the time AD 87–06–53–R1 was issued, the FAA was aware that repetitive inspections would be necessary in order to adequately detect fatigue cracking in the horizontal stabilizer. The requirements of the existing AD were considered by the FAA as interim action.

Subsequent to the issuance of AD 87–06–53–R1, McDonnell Douglas Corporation conducted flight tests (and has proposed to conduct ground fatigue tests) to verify the stress levels and determine an appropriate repetitive inspection. Currently, McDonnell Douglas recommends a repetitive inspection interval of 2,000 landings.

The FAA concurs with McDonnell Douglas' recommendation and has determined that the existing AD must be revised to include the repetitive inspections. McDonnell Douglas has advised the FAA that its ground fatigue testing program is continuing. If the results of these tests indicate that the repetitive inspection interval be modified, the FAA may consider further rulemaking to address this subject.

The FAA has reviewed and approved McDonnell Douglas Alert Service Bulletin A55–18, dated March 23, 1987, Revisions 1 dated May 21, 1988, and Revision 2, dated February 8, 1988, which describe inspection procedures to detect cracking in the horizontal stabilizer.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD amendment is proposed which would amend AD 87–06–53–R1 to require repetitive inspections of the horizontal stabilizer upper outer section rear spar cap and rear skin panel at intervals not to exceed 2,000 landings, in accordance with the service bulletin previously mentioned. Any necessary repair must continue to be accomplished in a manner approved by the FAA.

Additionally, this proposal would delete all references to the use of "later FAA-approved revisions" of the applicable service bulletin, in order to be consistnt with FAA policy in that

regard. The FAA has determined that this change would not increased the economic burden on any operator, nor would it expand the scope of the AD, since later revisions of the service bulletin may be approved as an alternate means of compliance with this AD, as provided by paragraph D.

There are 423 Model DC–10 series airplanes in the worldwide fleet. It is estimated that 153 airplanes of U.S. registry would be affected by this AD, that it would take approximately 1 manhour per airplane to accomplish the required inspections, and that the average labor cost would be $40 per manhour. Based on these figures, the total inspection cost impact of the AD on U.S. operators is estimated to be $6,120 per year.

The regulations proposed herein would not have sustantial 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. 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 these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not major under Executive Order 12291 and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities because few, if any, Model DC–10 series airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is containd in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federasl Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By amending Airworthiness Directive (AD) 87–06–53–R1, Amendment 39–5694 (52 FR 28133; July 28, 1987), as follows:

McDonnell Douglas: Applies to Model DC–10–10, –10F, –15, –30, –30F, –40 and KC–10A (Military) airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

To prevent failure of the horizontal stabilizer rear spar cap and/or upper rear skin panel due to fatigue cracking, accomplish the following:

A. Prior to the accumulation of 30,000 flight hours or 7,500 landings, whichever occurs earlier, or within 15 days after August 14, 1987 (the effective date of Amendment 39–5694), whichever occurs later, unless already accomplished within the last 120 days since August 14, 1987 (the effective date of Amendment 39–5694), conduct a dye penetrant or eddy current inspection of horizontal stabilizer upper outer section rear spar cap and a visual inspection of the horizontal stabilizer upper outer rear skin panel, in accordance with McDonnell Douglas Alert Service Bulletin A55–18, dated March 23, 1987, or Revision 1, dated May 21, 1987, or Revision 2, dated February 8, 1988.

B. Prior to the accumulation of 2,000 landings after the inspection required by paragraph A., above, or within 100 landings after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed 2,000 landings, repeat the inspection required by paragraph A., above.

C. If a crack is found as a result of the inspections required by paragraph A. or B., above, repair before further flight, in a manner approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who may add comments and then send it to the Manager, Los Angeles Aircraft Certification Office.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to the McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director of Publications, C1–L00 (54–60). These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 3229 East Spring Street, Long Beach, California.

Issued in Seattle, Washington, on November 2, 1988.

Leroy A. Keith,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 88–26804 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Part 774

[Docket No. 80996–8196]

Reexports into COCOM Participating Countries

AGENCY: Bureau of Export Administration Commerce.

ACTION: Proposed rule.

SUMMARY: The Omnibus Trade and Competitiveness Act (OTCA), signed by the President on August 23, 1988, amends section 5(a)(4) of the Export Administration Act of 1979 (EAA) to require the removal of controls on most reexports to COCOM and 54(k) countries.

This rule proposes implementing the OTCA by expanding the permissive reexport provisions of § 774.2 of the Export Administration Regulations to allow reexports of U.S. commodities to and among COCM countries, and countries qualifying for full benefits under section 5(k) of the EAA, without prior U.S. authorization. Certain limited exceptions are specified.

The Office of Export Licensing must be notified in writing when the U.S. commodities being reexported are above the PRC green zone level. The rule specifies what information would have to be included in the notice. While no specific form has been developed for this purpose at this time, BXA intends to do so in the future to facilitate OCR computerization of the information.

The permissive reexport provision would also allow shipments into Switzerland, with the additional requirement that a Swiss Blue Import Certificate be obtained by the reexporting party.

This procedure would not in any way alter the licensing requirements for such items to the Soviet Union and other COCOM-proscribed countries. Furthermore, this procedure would not authorize reexport to entities that the reexporter knows or has reason to know are controlled in fact by countries in Country Groups Q, W, Y, or Z. BXA is

seeking a means of assisting reexporters in identifying such entities. Among the options that will be considered is a full or partial list of entities known to BXA. Comments on this aspect of the proposal are encouraged.

Section 5(a)(6) of the EAA, as amended by the OTCA, requires issuance of a regulation to define "supercomputer" for purposes of implementing sections 5(a) (4) and (5) of the Act. This definition will be provided in a separate issuance.

DATE: Comments must be received by January 5, 1989.

ADDRESS: Written comments (six copies) should be sent to: Patricia Muldonian, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Patricia Muldonian, Regulations Branch, Office of Technology and Policy Analysis, Bureau of Export Administration, Telephone: (202) 377–2440.

Rulemaking Requirements

1. Because this rule concerns a foreign and military affairs function of the United States, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no preliminary or final Regulatory Impact Analysis has to be or will be prepared.

2. This rule, includes a collection of information requirement under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection, which would be included in § 774.2, is pending OMB approval. Public reporting burden for the reexport reporting requirement is estimated to average approximately 25 minutes per response. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Office of Administration, Bureau of Export Administration, Room 3889, Department of Commerce, Washington, DC 20230 and to the Office of Management and Budget, Washington, DC 20503.

3. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

4. Section 13(a) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule also is exempt from these APA requirements because it involves a foreign and military affairs function of the United States. Because this rule is being issued in proposed form, this rule complies with section 13(b) of the Export Administration Act. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, because of the importance of the issues raised by these regulations, this rule is issued in proposed form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close January 5, 1989. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4086, Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 377–2593.

5. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, the Export Administration Regulations (15 CFR Parts 768–799) are proposed to be amended as follows:

PART 774—[AMENDED]

1. The authority citation for Part 774 is revised to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981, by Pub. L. 99–64 of July 12, 1985, and Pub. L. 100–418 of August 23, 1988; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95–223 of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985), as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99–440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571 of October 27, 1986 (51 FR 39505, October 29, 1986).

2. Section 774.2 is amended by adding paragraph (k) to read as follows:

§ 774.2 Permissive reexports.

* * * * *

(k) *Reexports to and among COCOM participating countries and Switzerland.*—(1) *Except:*

(i) Supercomputers;

(ii) Electronic, mechanical or other devices, as described in § 776.13(a), primarily useful for surreptitious interception of wire or oral communications; and

(iii) Commodities intended for persons or entities that are controlled in fact (as defined in § 771.20(a) (1) and (2)) by the

governments of Country Groups Q, W, Y or Z. Parties to a reexport transaction who know or have reason to know that the shipment is intended for such an entity may not utilize this permissive reexport provision.

(2) *Provided that:*

(i) Eligible commodities are for use or consumption within a COCOM participating country or Switzerland, or reexport is in accordance with the other provisions of the Export Administration Regulations; and

(ii) For reexports into Switzerland, the reexporting party has obtained a Swiss Blue Import Certificate.

(3) *Reporting Requirement:*

Upon reexport under this § 774.2(k), a party that reexports commodities that are not identified in any of the Advisory Notes identified in Supplement No. 1 to Part 799 (the Commodity Control List) must submit a reexport notification in writing, signed by an authorized representative of the reexporter, to the Office of Export Licensing, P.O. Box 273, Department of Commerce, Washington, DC 20230, Attention: Reexport Notification. The notification shall be transmitted no later than the next business day following shipment, by a means intended to affect delivery within five business days of transmission. The reexport notification shall identify:

(i) The reexporter and the ultimate consignee;

(ii) The type (including the ECCN, if known), quantity and value of the commodity;

(iii) The date of the reexport; and

(iv) The original U.S. export license number under which the commodity was exported from the U.S. (if known) and the identity of the U.S. party from whom the reexporter received the goods.

Dated: November 16, 1988.

Michael E. Zacharia,

Assistant Secretary for Export Administration.

[FR Doc. 88-26864 Filed 11-18-88; 8:45 am]

BILLING CODE 3510-DT-M

DEPARTMENT OF STATE

Office of the Comptroller

22 CFR Part 34

[SD 220]

Collection of Debts by the Government Under the Debt Collection Acts

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State proposes to add Part 34 of 22 CFR establishing rules for the collection of debts owed to the State Department and the United States. These rules are published pursuant to 31 U.S.C. 3711(e)(1) and implement the collection procedures authorized by the Federal Claims Collection Act (31 U.S.C. 3701 through 3719) as amended by the Debt Collection Act of 1982 (Pub. L. 97-365 State. 1749). These laws have been implemented by the Federal Claims Collection Standards issued jointly by the General Accounting Office and the Department of Justice (4 CFR Parts 101 through 105), regulations issued by the Office of Personnel Management (5 CFR Part 550) and the procedures prescribed by the Office of Management and Budget in Circular A-129 of May 9, 1985.

DATES: Comments must be received by January 5, 1989.

ADDRESS: Comments should be sent to: U.S. Department of State, M/COMP/FM, P.O. Box 9487, Arlington, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Ramon A. Evon, United States Department of State, Room 4709, Annex 15, Washington, DC 20520, phone (703) 875-6880.

SUPPLEMENTARY INFORMATION: The Debt Collection Act of 1982 (the Act) authorizes procedures for the collection of debts owed to the United States, including (1) contracting for collection services to recover debts pursuant to to section 13 of the Debt Collection Act (codified at 31 U.S.C. 3718); (2) administrative offset pursuant section 10 of the Debt Collection Act (codified at 31 U.S.C. 3716); and (3) salary offset pursuant to section 5 of the Debt Collection Act (codified at 5 U.S.C. 5514). Although these are separate procedures, any procedure may be used by itself or in conjunction with other procedures.

Executive Order 12291

This proposed rule is not a "major rule" as defined under Executive Order 12291 because it will not result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographical regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Regulatory Flexibility Act

State finds that the proposed rule will have no significant economic impact upon a substantial number of small entities: Within the meaning of section 3(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 State. 1164 (5 U.S.C. 605(b)). This conclusion has been reached because the proposed rule does not in itself impose any additional requirements upon small entities. Accordingly, no regulatory flexibility analysis is required.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), any reporting recordkeeping provisions that are included in this rule will be submitted for approval to the Office of Management and Budget (OMB).

List of Subjects in 22 CFR Part 34

Administrative practices, Procedures, Debt, Claims.

Accordingly it is proposed to amend Title 22 CFR, Subchapter D, (by adding a new Part 34 to read as follows:

PART 34—COLLECTION OF DEBTS

Subpart A—General Provision

Sec.

Subpart B—Administrative Offset and Referral to Collection Agencies

Subpart C—Salary Offset

Authority: 31 U.S.C. 3701-3719; 5 U.S.C. 5514; 22 U.S.C. 2658; 22 U.S.C. 3926; 4 CFR 101 through 105; 5 CFR Part 550

Subpart A—General Provision

§ 34.1 Purpose.

These regulations prescribe the procedures to be used by the United States Department of State (*State*) in the collection of claims owed to *State* and to the United States.

§ 34.2 Scope.

(a) Applicability of Federal Claims Collection Standards (FCCS). Except as set forth in this part or otherwise provided by law, *State* will conduct administrative actions to collect claims (including offset, compromise, suspension, termination, disclosure and referral) in accordance with the FCCS of the General Accounting Office and Department of Justice, 4 CFR 101 through 105.

(b) This part is not applicable to:

(1) Claims against any foreign country or any political subdivision thereof, or any public international organization.

(2) Claims where the *State* Comptroller or his designee determines that the achievement of the purposes of any provision of law administered by *State* require a different course of action.

§ 34.3 Definitions.

(a) A "debt" or "claim" refers to an amount of money which has been determined to be owed to the United States from any person, organization or entity, except another Federal Agency. A debtor's liability arising from a particular contract or transaction shall be considered a single claim for purposes of the monetary ceilings of the FCCS.

(b) "Delinquent" means a debt that has not been paid by the date specified in *State's* written notification or applicable contractual agreement, unless other satisfactory arrangements have been made by that date, or at any time thereafter the debtor fails to satisfy obligations under a payment agreement with *State*.

(c) "Disposable pay" means the amount that remains from an employee's federal pay after required deductions from Federal, State and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for life and health insurance benefits and such other deductions that are required by law to be withheld.

§ 34.4 Interest, penalty, and administrative charges.

Except as otherwise provided by statute, contract or excluded in accordance with FCCS, *State* will assess:

(a) Interest on unpaid claims will follow existing Treasury rules and regulations.

(b) Penalty charges at 6 percent a year on any portion of a claim that is delinquent for more than 90 days.

(c) Administrative charges to cover the costs of processing and calculating delinquent claims.

(d) Late payment charges shall be computed from the date of mailing or hand delivery of the notice of the claim and interest requirements.

(e) When a debt is paid in partial or installment payments, amounts received shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and then to outstanding principal.

(f) *Waiver. State* shall consider waiver of interest, penalty charges and/or administrative charges in accordance with the FCCS, 4 CFR 102.13(g).

§ 34.5 Exceptions.

(a) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated, or settled in accordance with the regulations published under 31 U.S.C. 3726 (see 41 CFR Part 01–41).

(b) Claims arising out of acquisition contracts subject to the Federal Acquisitions Regulations (FAR) shall be determined, collected, compromised, terminated, or settled in accordance with those regulations (see 48 CFR Part 32).

(c) Claims based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an indication of fraud, presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice for compromise, suspension, or termination of collection action.

(d) Tax claims are excluded from the coverage of this regulation.

§ 34.6 Use of procedures.

Procedures authorized by this regulation (including but not limited to referral to a debt collection agency, administrative offset, or salary offset) may be used singly or in combination.

§ 34.7 Other procedures or actions.

(a) Nothing contained in this regulation is intended to require *State* to duplicate administrative proceedings required by contract or other laws or regulations.

(b) Nothing in this regulation is intended to preclude utilization of informal administrative actions or remedies which may be available.

(c) Nothing contained in this regulation is intended to deter *State* from demanding the return of specific property or from demanding the return of the property or the payment of its value.

(d) The failure of *State* to comply with any provision in this regulation shall not serve as defense of the debt.

Subpart B—Administrative Offset and Referral to Collection Agencies

§ 34.8 Demand for payment.

(a) A total of three progressively stronger written demands at approximately 30-day intervals will normally be made, unless a response or other information indicates that additional written demands would either be unnecessary or futile. When necessary to protect the Government's interest, written demand may be preceded by other appropriate actions under the FCCS, including immediate referral for litigation and/or offset.

(b) The initial written demand for payment shall inform the debtor of:

(1) The basis of the claim;

(2) The amount of the claim;

(3) The date when payment is due 30 days from the date of mailing or hand delivery of the initial demand for payment;

(4) The provision for late payment (interest), penalty and administrative charges, if payment is not received by the due date.

§ 34.9 Collection by administrative offset.

(a) Offset will be used whenever feasible and not otherwise prohibited. Offset is not required to be used in every instance and consideration should be given to the debtor's finanical condition and the impact of offset on *State* programs or projects.

(b) The procedures for offset in this section do not apply to the offset of Federal salaries under 5 U.S.C. 5514.

(c) Before offset is made, *State* will provide the debtor with written notice informing the debtor of:

(1) The nature and amount of the claim;

(2) The intent of *State* to collect by administrative offset, including asking the assistance of other Federal agencies to help in the offset whenever possible, if the debtor has not made payment by the payment due date or has not made an arrangement for payment by the payment due date;

(3) The right of the debtor to inspect and copy *State's.* records of the claim;

(4) The right of the debtor to a review of the claim within *State.* If the claim is disputed in full or part, the debtor shall

respond to the demand in writing by making a request by the payment due date state within the notice to the billing office for a review of the claim with *State*. The debtor's written response shall state the basis for the dispute. If only part of the claim is disputed, the undisputed portion must be paid by the date stated in the notice to avoid late payment, penalty and administrative charges. If *State* either sustains or amends its determination, it shall notify the debtor of its intent to collect the claim, with any adjustments based on the debtor's response by administrative offset unless payment is received within 30 days of the mailing of the notification of its decision following a review of the claim.

(5) The right of the debtor to offer to make a written agreement to repay the amount of the claim.

(6) The notice of offset need not include the requirements of paragraph (c) (3), (4), or (5) of this section if the debtor has been informed of the requirements at an earlier stage in the administrative proceedings, e.g., if they were included in a final contracting officer's decision.

(d) *State* will promptly make requests for offset to other agencies known to be holding funds payable to a debtor and, when appropriate, place the name of the debtor on the "List of Contractors Indebted to the United States". *State* will provide instructions for the transfer of funds.

(e) *State* will promptly process requests for offset from other agencies and transfer funds to the requesting agency upon receipt of the written certification that the person owes the debt and that the employee has been given the procedural rights required by 5 U.S.C. 5514 and 5 CFR Part 550, Subpart K.

§ 34.10 Administrative offset amounts payable from retirement and disability funds (Civil Service, Foreign Service, etc.).

(a) Unless otherwise prohibited by law, *State* may request that monies that are due and payable to a debtor from the Civil Service Retirement and Disability Fund, Federal Employee Retirement Fund, or the Foreign Service Retirement Fund be administratively offset in reasonable amounts in order to collect in one full payment or a minimal number of payments, debts owed the United States by the debtor. Such requests shall be made to the appropriate officials of the respective fund servicing agency in accordance with such regulations as may be prescribed by the Director of that agency.

(b) When making a request for administrative offset under paragraph (a) of this section, *State* shall include written statements that:

(1) The debtor owes the United States a debt, including the amount of the debt.

(2) *State* has complied with the applicable statutes, regulations, and procedures of the respective fund servicing agencies.

(3) *State* has complied with the requirements of § 34.9 of this part, including any required hearing or review.

(c) Once *State* decides to request offset under paragraph (a) of this section, it will make the request as soon as practical after completion of the applicable procedures in order that the fund servicing agency may identify the debtor's account in anticipation of the time when the debtor requests or becomes eligible to receive payments from the fund. This will satisfy any requirements that offset will be initiated prior to expiration of the applicable statute of limitations.

(d) If *State* collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, *State* shall act promptly to modify or terminate its request for offset under paragraph (a) of this section.

(e) This section does not require or authorize the fund servicing agency to review the merits of the *State* determination relative to the amount and validity of the debt, its determination on waiver under an applicable statute, or its determination whether to provide an oral hearing.

§ 34.11 Collection in installments.

Whenever feasible, and except as required otherwise by law, debts owed to the United States, together with interest, penalties, and administrative costs are required by this regulation, should be collected in one lump sum. This is true whether the debt is being collected under administrative offset or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installements. If *State* agrees to accept payment in installments, it will obtain a legally enforceable written agreement from the debtor that specifies all of the terms of the arrangement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of the payments should bear a reasonable relation to the size of the debt and ability to the debtor to pay. If possible the installment payments should be sufficient in size and frequency to liquidate the Government's claim within three years.

§ 34.12 Exploration of compromise.

State may attempt to effect compromise in accordance with the standards set forth in Part 103 of the FCCS (4 CFR Part 103).

§ 34.13 Suspending or terminating collection action.

The suspension or termination of collection action shall be made in accordance with the standards set forth in Part 104 of the FCCS (4 CFR Part 104).

§ 34.14 Referrals to the Department of Justice or the General Accounting Office.

Referrals to the Department of Justice or the General Accounting Office shall be made in accordance with the standards set forth in Part 105 of the FCCS (4 CFR Part 105).

§ 34.15 Collection services.

(a) *State* has authority to contract for collection services to recover delinquent debts in accordance with 31 U.S.C. 3718(c) and Part 102 of the FCCS (4 CFR Part 102).

(b) *State* may disclose delinquent debts, other than delinquent debts of current Federal employees, to consumer reporting agencies in accordance with 31 U.S.C. 3711(f) and the FCCS.

(c) *State* will not use a collection agency to collect a debt owed by a currently employed or retired Federal employee, if collection by salary or annuity offset is available.

Subpart C—Salary Offset

§ 34.16 Scope.

(a) This subpart sets forth *State's* procedures for the collection of a Federal employee's pay by salary offset to satisfy certain valid and past due debts owed the United States Government.

(b) This subpart applies to:

(1) Current employees of *State* and other agencies who owe debts to *State*.

(2) Current employees of *State* who owe debts to other agencies.

(c) This subpart does not apply to debts or claims arising under the Internal Revenue Code of 1954 (26 U.S.C. 1 *et seq.*); the Social Security Act (42 U.S.C. 310 *et seq.*); the tariff laws of the United States; or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g. travel advances in 5 U.S.C. 5705 and employee training expenses 5 U.S.C. 4108).

(d) This subpart does not apply to any adjustment to pay arising out of an employee's election of coverage or a

change in coverage under a Federal benefits program requiring periodic deductions from pay or ministerial adjustments in pay, if the amount to be recovered was accumulated over four pay periods or less.

(e) These regulations do not preclude an employee from:

(1) Requesting waiver of erroneous payment of salary, travel, transportation or relocation expense and allowances;

(2) Requesting waiver of any other type of debt, if waiver is available by statute; or

(3) Questioning the amount of validity of a debt by submitting a subsequent claim to the General Accounting Office.

(f) Nothing in these regulations precludes the compromise, suspension or termination of collection actions where appropriate under Subpart A or other regulations.

§ 34.17 Coordinating offset with another Federal agency.

(a) When *State* is owed a debt by an employee of another agency, the other agency shall not initiate the requested offset until *State* provides the agency with a written certification that the debtor owes *State* a debt (including the amount and basis of the debt and the due date of payment) and that *State* has complied with these regulations.

(b) When another agency is owed the debt, *State* may use salary offset against one of its employees who is indebted to another agency, if requested to do so by that agency. Such request must be accompanied by a certification that the person owes the debt (including the amount and basis of the debt and the due date of payment) and that the agency has complied with its regulations as required by 5 U.S.C. 5514 and 5 CFR Part 550, Subpart K.

§ 34.18 Notice requirements before offset.

Except as provided in § 34.16, salary offset deductions will not be made unless *State* first provides the employee with a written notice that he/she owes a debt to the Federal Government within a minimum of 30 calendar days before salary offset is initiated. When *State* is the creditor agency, this notice of intent to offset an employee's salary shall be hand-delivered or sent by certified mail to the most current address that is available to the Department and will state:

(a) That *State* has reviewed the records relating to the debt and has determined that the debt is owed, its origin and nature, and the amount due;

(b) The intention of *State* to collect the debt by means of deduction from the employee's current disposable pay until the debt and all accumulated interest are paid in full;

(c) The amount, frequency, approximate beginning date, and duration of the intended deductions;

(d) The requirement to assess and collect interest, penalties, and administrative costs in accordance with § 34.4, unless excused in accordance with § 34.4d;

(e) The employee's right to inspect and copy any *State* records relating to the debt, or, if the employee or their representative cannot personally inspect the records, to request and receive a copy of such records;

(f) The opportunity (under terms agreeable to *State*) to enter into a written agreement establishing a repayment schedule of the debt in lieu of offset;

(g) The right to a hearing conducted by an official (administrative law judge, or a hearing official not under the control of *State*) with respect to the existence of the debt, the amount of the debt, or the repayment schedule (i.e. the percentage of disposable pay to be deducted each pay period), so long as a request for a hearing is filed by the employee as prescribed in § 34.19;

(h) That the timely filing of a request for hearing within 30 calendar days after receipt of the notice of intent to offset will stay the commencement of collection proceedings;

(i) That the Department will initiate procedures to implement a salary offset, as appropriate, (which may not exceed 15 percent of the employee's disposable pay) not less than thirty (30) days from the date of receipt of the notice of debt, unless the employee files a timely petition for a hearing;

(j) That a final decision on the hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 calendar days after the filing of the request for a hearing unless the employee requests and the hearing official grants a delay in the proceedings;

(k) That any knowingly false or frivolous statements, representation, or evidence may subject the employee to disciplinary procedures (5 U.S.C. Chapter 75, 5 CFR Part 752 or other applicable statutes or regulations); penalties (31 U.S.C. 3729 through 3731 or other applicable statutes or regulations); or criminal penalties (18 U.S.C. 286, 287, 1001, and 1002 or other applicable statutes or regulations);

(l) Any other rights and remedies available to the employee under statues or regulations governing the program for which the collection is being made;

(m) That the amounts paid on or deducted from the debt which are later waived or found not owed to the United States will be promptly refunded to the employee, unless there are applicable contractual or statutory provisions to the contrary;

(n) The method and time period for requesting a hearing; and

(o) The name and address of the *State* official to whom communciations should be directed.

§ 34.19 Request for a hearing.

(a) Except as provided in paragraph c of this section, an employee must file a request for a hearing, that is received by *State* not later than 30 calendar days from the date of *State*'s notice described in § 34.18 if an employee wants a hearing concerning:

(1) The existence or amount of the debt; or

(2) *State*'s proposed offset schedule.

(b) The request must be signed by the employee and should identify and explain with reasonable specificity and brevity the facts, evidence and witnesses which the employee believes support his or her position. If the employee objects to the percentage of disposable pay to be deducted from each check, the request should state the objection and the reasons for it.

(c) The employee must also specify whether an oral or paper hearing is requested. If an oral hearing is desired, the request should explain why the matter cannot be resolved by review of the documentary evidence alone.

(d) If the employee files a request for hearing later than the required 30 calendar days as described in paragraph a of this section, the hearing officer may accept the request if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the filing deadline (unless the employee has actual notice of the filing deadline).

(e) An employee waives the right to a hearing and will have his or her disposable pay offset if the employee fails to file a petition for a hearing as prescribed in paragraph a of this section or fails to appear at the scheduled hearing.

§ 34.20 Hearings.

(a) If an employee timely files a request for a hearing under § 34.19 *State* shall select the time, date and location of the hearing.

(b) Hearings shall be conducted by a hearing official not under the control or authority of *State* and

(c) *Procedure.* (1) After the employee request a hearing, the hearing official or administrative law judge shall notify the employee of the form of the hearing to

be provided. If the hearing will be oral, notice shall set forth the date, time and location of the hearing. If the hearing will be paper, the employee shall be notified that he or she should submit arguments in writing to the hearing official or administrative law judge by a specified date after which the record shall be closed. This date shall give the employee reasonable time to submit documentation.

(2) *Oral hearing.* An employee who requests an oral hearing shall be provided an oral hearing if the hearing official or administrative law judge determines that the matter cannot be resolved by review of documentary evidence alone (e.g. when an issue of credibility or veracity is involved). The hearing is not an adversarial adjudication, and need not take the form of an evidentiary hearing. Oral hearings may take the form of, but not limited to:

(i) Informal conferences with the hearing official or administrative law judge, in which the employee and agency representative will be given full opportunity to present evidence, witnesses and argument;

(ii) Informal meetings with an interview of the employee; or

(iii) Formal written submissions, with an opportunity for oral presentation.

(3) *Paper hearing.* If the hearing official or administrative law judge determines that an oral hearing is not necessary, he or she will make the determination based upon a review of the available written record (5 U.S.C. 5514).

(4) *Record.* The hearing official must maintain a summary record of any hearing provided by this subpart. See 4 CFR 102.3. Witnesses who testify in oral hearings will do so under oath or affirmation.

(5) *Content of decision.* The written decision shall include:

(i) A statement of the facts presented to support the origin, nature, and amount of the debt;

(ii) The hearing official's findings, analysis and conclusions; and

(iii) The terms of any repayment schedules, if applicable.

(6) *Failure to appear.* If the absence of good cause shown (e.g. excused illness), an employee who fails to appear at a hearing shall be deemed, for the purpose of this subpart, to admit the existence and amount of the debt as described in the notice of intent. If the representative of the creditor agency fails to appear, the hearing official shall schedule a new hearing date upon the request of the agency representative. Both parties shall be given reasonable notice of the time and place of the new hearing.

§ 34.21 Review of State records related to the debt.

(a) *Notification by employee.* An employee who intends to insect or copy agency records related to the debt must send a letter to the official designated in § 34.18(o) stating his or her intention. The letter must be received by *State* within 30 calendar days after receipt of the notice of intent offset.

(b) *State's response.* In response to a timely notice submitted by the debtor as described in paragraph (a) of this section, *State* will notify the employee of the location and time when the employee may inspect and copy *State* records related to the debt.

§ 34.22 Written agreement to repay debt as alternative to salary offset.

(a) *Notification by employee.* The employee may propose, in response to the notice of intent to offset, a written agreement to repay the debt as an alternative to salary offset. The proposal shall admit the existence of the debt and set forth a proposed repayment schedule. Any employee who wishes to do this must submit a proposed written agreement to repay the debt which is received by *State* within 30 calendar days of the notice.

(b) *State's response. State* will notify the employee whether the proposed written agreement for repayment is acceptable. It is within *State's* discretion to accept a repayment agreement instead of proceeding by offset.

(c) *Procedures.* If the employee and *State* enter into a written agreement to repay instead of salary offset, the debt will be repaid in accordance with the agreement provisions and the procedures of § 34.23 will not apply.

§ 34.23 Procedures for salary offset.

Unless *State* agrees and regulations do not provide otherwise, the following procedures apply:

(a) *Method.* Salary offset will be made by deduction at one or more officially established pay intervals from the current pay account of the employee without his or her consent.

(b) *Source.* The source of salary offset is current disposable pay which is that part of current basic pay, special pay, retainer pay, or in the case of an employee not entitled to pay, other authorized pay remaining after the deduction of any amount required by law to be withheld.

(c) *Types of collection*—(1) *Lump sum payment.* Ordinarily debts will be collected by salary offset in one lump sum if possible. However, if the employee is financially unable to pay in one lump sum or the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval, the collection by salary offset must be made in installment deductions.

(2) *Installment deducations.* (i) The size of installment deductions must bear a reasonable relation to the size of the debt and the employee's ability to pay. If possible the size of the deduction will be that necessary to liquidate the debt in more than one year. However, the amount deducted for any period must not exceed 15 percent of the disposable pay from which the deduction is made, except as provided by other regulations or unless the employee has agree in writting to a greater amount.

(ii) Installment payments of less than $25 per pay period will be accepted only in the most unusal circumstances.

(iii) Installment deductions will be made over a period of not greater than the anticipated period of employment.

(d) *When deductions may begin.* (1) Salary offset will begin on the date stated in the notice as provided in § 34.18, unless a hearing is requested.

(2) If there has been a timely request for a hearing, salary offset will begin as of the date stated in the written decision.

(e) *Additional offset provisions*—(1) *Liquidation from final check.* If employment ends before salary offset is completed, the remaining debt will be liquidated by offset from payment of any nature due the employee from *State* (e.g. final salary payment, lump-sum leave, etc.).

(2) *Offset from other payments.* If the debt cannot be liquidated by offset from any final check, the remaining debt will be liquidated by offset from later payments of any kind due the former employee from the United States, inclusive of retirement or disability funds pursuant to § 34.10 of this regulation.

§ 34.24 Non-waiver of rights.

So long as there are statutory or contractual provision to the contrary, no employee payment (or all or a portion of a debt) collected under this subpart will be interpreted as a waiver of any rights that the employee may have under 5 U.S.C. 5514.

§ 34.25 Refunds.

(a) *State* will refund promptly to the appropriate individual amounts offset under this regulations when:

(1) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(2) *State* is directed by an administrative or judicial order to make a refund.

(b) Refunds do not bear interests unless required or permitted by law or contract.

Elizabeth A. Gibbons,

Associate Comptroller, Financial Management.

October 5, 1988.

[FR Doc. 88-26775 Filed 11-18-88; 8:45 am]

BILING CODE 4710-37-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD7-88-27]

Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Venice, FL

AGENCY: Coast Guard, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Florida Department of Transportation, Sarasota County, and the Venice Area Chamber of Commerce have requested the Coast Guard consider adding regulations governing the Hatchett Creek (SR 45/US-41), Venice Avenue, and South Venice (SR 45/US-41) drawbridges, mile 56.9, 56.6, and 54.9 respectively, at Venice, Florida by permitting the number of openings to be limited during certain periods. This proposal is being made because an increase in highway traffic has occurred on weekdays and bridge openings intensify traffic congestion. This action should accommodate the needs of vehicular traffic and still provide for the reasonable needs of navigation. This Supplemental Notice is being issued to clarify the Saturday, Sunday, and Federal Holiday regulations which were inadvertently omitted from the initial notice of proposed rulemaking.

DATE: Comments must be received on or before December 6, 1988.

ADDRESSES: Comments should be mailed to Commander (oan), Seventh Coast Guard District, 909 SE. 1st Avenue, Miami, Florida 33131-3050. The comments and other materials referenced in this notice will be available for inspection and copying on the 4th Floor, Brickell Plaza Federal Building, 909 SE. 1st Ave, Miami, Florida. Office hours are between 7:30 a.m. and 4 p.m., Monday through Friday, except holidays. Comments also may be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Gerald Fleming at (305) 536-4103.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, identify the bridge(s), and give reasons for concurrence with or any recommended change in the proposal. Persons desiring acknowledgement that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, Seventh Coast Guard District will evaluate all communications received and determine a course of final action on this proposal. The proposed regulations may be changed in light of comments received.

Drafting Information

The drafters of this notice are Lieutenant Commander Gerald Fleming, project officer, and Lieutenant Commander S.T. Fuger, Jr., project attorney.

Discussion of Proposed Regulations

On September 2, 1988, Commander, Seventh Coast Guard District published a notice of proposed rulemaking in the **Federal Register** soliciting comments on modifications to the Hatchett Creek (SR-45/US/41) and Venice Avenue drawbridge rgulations. No comments were received. It was subsequently noted that the notice of proposed rulemaking had inadvertently omitted the existing weekend regulations for the Hatchett Creek bridge. This Supplemental Notice is issued to correct this omission and offer interested parties an opportunity to submit any additional comments. Due to the administrative nature of the correction, and the urgent need for the City of Venice to implement this change, the comment period is being reduced to 15 days.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. We conclude this because the regulations exempt tugs with tows. Since the economic impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 117 of Title 33, Code of Federal Regulations, as follows:

PART 117—[AMENDED]

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05-1(g).

2. Section 117.287 (a-1) and (b) are revised to read as follows:

§ 117.287 Gulf Intracoastal Waterway, Caloosahatchee River to Perdido River.

* * * * *

(a-1) The draw of the Venice Avenue bridge, mile 56.6 at Venice, shall open on signal, except that from 7 a.m. to 4:35 p.m., Monday through Friday except Federal holidays, the draw need open only at 10 minutes after the hour, 30 minutes after the hour and 50 minutes after the hour and except between 4:35 p.m. and 5:35 p.m. when the draw need not open.

(b) The draw of the Hatchett Creek (US-41) bridge, mile 56.9 at Venice, shall open on signal, except that, from 7 a.m. to 4:25 p.m., Monday through Friday except Federal holidays, the draw need open only on the hour, 20 minutes after the hour, and 40 minutes after the hour and except between 4:25 p.m. and 5:25 p.m. when the draw need not open. On Saturdays, Sundays, and Federal holidays from 7:30 a.m. to 6 p.m. the draw need open only on the hour, quarter-hour, half-hour, and three quarter-hour.

* * * * *

Dated: November 7, 1988.

Martin H. Daniell

Rear Admiral, U.S. Coast Guard Commander, Seventh Coast Guard Distict.

[FR Doc. 88-26891 Filed 11-18-88; 8:45 am]

BILLING CODD 4910-14-M

33 CFR Part 117

[CGD8-88-19]

Drawbridge Operation Regulations; Carlin Bayou, LA

AGENCY: U.S. Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: At the request of the Louisiana Department of Transportation and Development (LDOTD), the Coast Guard is considering a change to the

regulation governing the operation of the vertical lift span bridge on State Route 14 across Carlin Bayou, mile 6.4 at Delcambre, Louisiana, by requiring that the draw open on signal from 5 a.m. to 9 p.m. and open on at least four hours advance notice from 9 p.m. to 5 a.m. Presently, the draw is required to open on signal at all times. This proposal is being made because of infrequent requests for opening the draw during the prescribed advance notice period. This action should releive the bridge owner of the burden of having a person constantly available at the bridge to open the draw between 9 p.m. and 5 a.m., while still providing for the reasonable needs of navigation.

DATE: Comments must be received on or before January 5, 1989.

ADDRESSES: Comments should be mailed to Commander (ob), Eighth Coast Guard District, 500 Camp Street, New Orleans, Louisiana 70130–3396. The comments and other materials referenced in this notice will be available for inspection and copying in Room 1115 at this address. Normal office hours are between 8:00 a.m. and 3:30 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: John Wachter, Bridge Administration Branch, at the address given above, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, comments, data or arguments. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for concurrence with or any recommended change in the proposal. Persons desiring acknowledgment that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, Eighth Coast Guard District, will evaluate all communications received and determine a course of final action on this proposal. This proposed regulation may be changed in the light of comments received.

Drafting Information

The drafters of this notice are John Wachter, project officer, and Commander J.A. Unzicker, project attorney.

Discussion of Proposed Regulation

The vertical clearance of the bridge in the closed position is 2 feet above mean high tide and 5 feet above mean low tide. Traffic through the bridge consists of commercial boats, shrimp/fishing boats and recreational craft. Data submitted by the LDOTD show that marine traffic through the bridge between the hours of 9 p.m. and 5 a.m. is less than one vessel passage every three days.

Considering the few openings involved during the 9 p.m. to 5 a.m. period, the Coast Guard feels that the current on-site attendance at the bridge between those hours can be discontinued and that the bridge can be placed on four hours advance notice for an opening during that time frame. This would allow relief to the bridge owner while still providing for the reasonable needs of navigation. The bridge would continue to open on signal between 5 a.m. and 9 p.m. as it does now.

The advance notice for opening of the draw would be given by placing a collect call at any time to the LDOTD in Lafayette, Louisiana, telephone (318) 233–7404. From afloat, this contact may be made by radiotelephone through a public coast station.

The LDOTD recognizes that there may be an unusual occasion to open the bridge on less than four hours notice for an emergency, or to operate the bridge on demand for an isolated but temporary surge in waterway traffic, and has committed to doing so if such an event should occur.

Federalism Implications

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 does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Economic Assessment and Certification

This proposed regulation is considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034: February 26, 1979).

The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. The basis for this conclusion is that very few vessels now pass the bridge during the proposed advance notice period of 9 p.m. to 5 a.m. For that period, the bridge averages opening less than one time every three days. The vessels involved can reasonably give four hours notice for a bridge opening by placing a collect call to the bridge owner at anytime. Mariners requiring the bridge opening are repeat users and scheduling their arrival at the bridge at the appointed time should involved little or no additional expense to them. Since the economic impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulation

In consideration of the foregoing, the Coast Guard proposes to amend Part 117 of Title 33, Code of Federal Regulations, as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; and 49 CFR 1.46; and 33 CFR 1.05–1(g).

2. Section 117.436 is added to read as follows:

§ 117.436 Carlin Bayou.

The draw of the S14 bridge, mile 6.4 at Delcambre, shall open on signal; except that, from 9 p.m. to 5 a.m. the draw shall open on signal if at least four hours notice is given. The draw shall open on less than four hours notice for an emergency and shall open on demand should a temporary surge in waterway traffic occur.

Dated: November 4, 1988.

W.F. Merlin,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 88–26890 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

45 CFR Part 3

Conduct of Persons and Traffic on the National Institutes of Health Federal Enclave

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Institutes of Health (NIH) in the United States Public Health Service, Department of Health and Human Services, proposes to revise the regulations in Title 45 Code of Federal Regulations, Part 3, governing the conduct of persons and traffic on the National Institutes of Health Federal

enclave in Bethesda, Maryland, to: (1) Describe explicitly the applicability and effect of the Assimilative Crimes Act (18 U.S.C. 13) and to identify certain Maryland criminal statutes that apply to NIH under that Act; (2) identify for the information of the public certain Federal criminal statutes, which apply without regard to the place of the offense and which are particularly relevant to activities on Federal enclaves; and (3) add a new section limiting solicitation.

DATES: Written comments must be received on or before January 23, 1989, in order to assure that NIH will be able to consider these comments in preparing the final regulations.

ADDRESS: Send written comments on the proposed regulations, preferably in duplicate, to Mr. Lowell D. Peart, Regulations Officer, National Institutes of Health, Building 31, Room 3B–11, Bethesda, Maryland 20892, (301) 496–4606.

FOR FURTHER INFORMATION CONTACT: William G. Ketterer, Senior Attorney, NIH, Office of the General Counsel, Building 31, Room 2B–50, Bethesda, Maryland 20892, (301) 496–6043.

SUPPLEMENTARY INFORMATION: Notice is hereby given that NIH proposes to revise 45 CFR Part 3 to make editorial and other changes, including (1) the addition of paragraphs (d) and (e) to § 3.2, "Applicability," concerning the application of Federal statutes and assimilated Maryland statutes to the enclave, and § 3.44 governing solicitation, to strengthen the authority of the Director to regulate this activity within the enclave, and (2) revision of § 3.22, relating to requests for identification, to conform the regulations with pertinent rulings of the United States Supreme Court. The explicit citation of the Assimilative Crimes Act and specific Federal statutes in Titles 18 and 21, United States Code, and certain Maryland Statutes of particular relevance to NIH, is to better inform the public as to the applicability of these statutes and their penalties. The following statements are provided for the information of the public:

1. These proposed regulations would revise existing regulations to improve readability, update certain provisions, explicitly identify certain Federal and State criminal laws which presently apply independently of Part 3, and add a provision governing solicitation. The existing penalties for violation of provisions of the regulations set forth in Subpart D are not affected, and any economic impact of the provision governing solicitation is expected to be insubstantial and will not affect a substantial number of small entities. For these reasons, the Director has determined that this rule is not a "major rule" under Executive Order 12291, and that a regulatory impact analysis is not required. Further, as noted, these regulations will not have a significant economic impact on a substantial number of small entities, and therefore do not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*).

2. Catalog of Federal Domestic Assistance: No assistance programs are affected.

3. This proposed rule does not contain information collection requirements subject to OMB approval under the Paperwork Reduction Act of 1980.

4. The Director, NIH, has considered the requirements of Executive Order 12606, in proposing these regulations and finds the proposals do not contain a significant potential negative impact on family well-being.

List of Subjects in 45 CFR Part 3

Conduct, Federal buildings and facilities, Government property, Traffic regulations.

It is therefore proposed to revise Part 3 of Title 45 Code of Federal Regulations to read as set forth below.

Dated: November 7, 1988.

James B. Wyngaarden,

Director, National Institutes of Health.

PART 3—CONDUCT OF PERSONS AND TRAFFIC ON THE NATIONAL INSTITUTES OF HEALTH FEDERAL ENCLAVE

Subpart A—General

Sec.

Subpart B—Traffic Regulations

Subpart C—Facilities and Grounds

Subpart D—Penalties

Authority: 40 U.S.C. 318–318d, 486; Delegation of Authority, 33 FR 604.

Subpart A—General

§ 3.1 Definitions.

"Director" means the Director or Acting Director of the National Institutes of Health (NIH), or other officer or employee of NIH to whom the authority involved has been delegated.

"Enclave" means, unless the context requires a different meaning, the area, containing about 318 acres, acquired by the United States in several parcels in the years 1935 through 1983, and any future acquisitions, comprising the National Institutes of Health located in Montgomery County, Maryland, over which the United States acquired exclusive jurisdiction under the Act of March 31, 1953, Chapter 158 (1953 Maryland Laws 311).

"Police officer" means a uniformed or nonuniformed police officer appointed under a delegation of authority to the Director under Title 40 United States Code sections 318 or 318d; any other Federal law enforcement officer; and any other person whose law enforcement services are secured by contract or upon request or deputation from a State or local law enforcement agency.

§ 3.2 Applicability.

(a) The regulations in this part apply to all areas in the enclave and to all persons on or within the enclave, except as otherwise provided.

(b) The regulations in this part do not apply to occupants, their visitors, and other authorized persons in areas used as living quarters:

(1) When specifically made inapplicable, and

(2) In the case of the following provisions: § 3.24 Parking permits; § 3.25 Servicing of vehicles; § 3.42(a) Hobbies and sports; and § 3.42(f) Smoking.

(c) All regulations in this part are in addition to the provisions in the United States Code, including Title 18 relating to crimes and criminal procedure, and Title 21 relating to food and drugs, which apply:

(1) Without regard to the place of the offense, or

(2) To areas (such as the enclave) subject to the "special maritime and territorial jurisdiction of the United States," as defined in Title 18 United States Code section 7.

(d) In accordance with the Assimilative Crimes Act (18 U.S.C. 13) (Act), whoever is found guilty of an offense which, although not made punishable by any act of Congress, nor any provision of these regulations, would be punishable if committed within the State of Maryland, shall be

guilty of a like offense and subject to a like punishment. In the event of an irreconcilable conflict between a provision of this part and a Maryland statute governing the identical subject matter, this part shall control.

(e) *Federal criminal statutes which apply.* The following Federal criminal statutes in the United States Code apply to Federal enclaves and elsewhere without regard to the place of the offense. This listing is provided solely for the information of the public and is not all-inclusive. The omission of other Federal statutes does not mean that such other statutes do not apply. In any given situation the cited statutory provisions and any amendments in effect when the alleged offense occurred shall determine the specifics of the offense, applicability, and penalty.

Subject	U.S. Code	Provides generally	Maximum penalty
1. By force or threat of force, willful injury, intimidation or interference with, or attempts to injure, intimidate or interfere with, a person from participating in or enjoying any benefit, service, privilege, program, facility, or activity, provided by or administered by the U.S., and engaging in certain other Federal protected activities.	18 U.S.C. 245.	Prohibits	Not involving death or bodily injury: Imprisonment one year and/or $1,000 fine.
2. Malicious destruction or damage, by an explosive, to a building or other property owned, possessed, used, or leased by the U.S., U.S. agency, or any organization receiving Federal financial assistance.	18 U.S.C. 844(f).	Prohibits	First offense not involving death or personal injury: Imprisonment 10 years and/or $10,000 fine and seizure and forfeiture of explosive materials.
3. Possession of explosive in buildings owned, possessed, used, or leased by U.S. or U.S. agency.	18 U.S.C. 844(g).	Prohibits, except with written consent of the agency.	Imprisonment one year and/or $1,000 fine and seizure and forfeiture of explosive materials.
4. Use of or carrying an explosive to commit, or during commission of, a felony prosecutable in a U.S. court.	18 U.S.C. 844(h).	Prohibits	First offense: Imprisonment 10 years and seizure and forfeiture of explosive materials.
5. Use of or carrying a firearm during and in relation to any crime of violence prosecutable in a U.S. court.	18 U.S.C. 924(c).	Prohibits	First offense: Imprisonment 5 years and $5,000 fine and seizure and forfeiture of firearm and ammunition.
6. Manufacture, distribution, dispensing, or possession with intent to do these acts, of narcotics and other controlled substances and counterfeit substances.	21 U.S.C. 841, 842, 843, 845.	Prohibits, except as authorized by the Controlled Substances Act (generally 21 U.S.C. 801–904).	First offense: Imprisonment 20 years and/or $250,000 fine depending on the amount and kind of substance (twice the above penalties for distribution by a person at least 18 years of age to one under age 21).
7. Simple possession of narcotics or other controlled substances.	21 U.S.C. 844.	Prohibits, unless substance obtained directly, or pursuant to prescription or order, from a practitioner, acting in the course of professional practice, or as otherwise authorized under the Controlled Substances Act.	First offense: Imprisonment 1 year and/or $5,000 fine.

(f) *Maryland criminal statutes which apply.* The matters described in this paragraph are governed, in whole or in part, by the current version of the cited Maryland criminal statutory provisions, which are made Federal criminal offenses under the Assimilative Crimes Act (18 U.S.C. 13). This listing sets forth areas of conduct particularly relevant to the enclave and is provided solely for the information of the public. The list is not all-inclusive and omission of other Maryland criminal statutes does not mean that such other statutes are not assimilated as Federal offenses under the Act. Generally, other Maryland criminal statutes will apply on the enclave, by force of the Act, unless superseded by Federal law or a provision of this part. In any given situation, the cited statutory provisions and any amendments in effect when the alleged offense occurred shall determine the specifics of the offense, applicability, and penalty.

Subject	Md. Code annotated	Provides generally	Maximum penalty
1. Pedestrian right-of-way	Transportation, Sec. 21–502.	Pedestrians have the right-of-way in crosswalks and certain other areas. Subject to certain limitations..	Imprisonment 2 months and/or $500 fine.
	Sec. 21–511	Blind, partially blind, or hearing impaired pedestrians have the right-of-way at any crossing or intersection. Subject to certain limitations..	$500 fine.
2. Drivers to exercise due care	Transportation, Sec. 21–504.	Drivers shall exercise due care to avoid colliding with pedestrians, children and incapacitated individuals.	$500 fine.
3. Driving while intoxicated, under the influence of alcohol and/or a drug or controlled dangerous substance.	Transportation, Sec. 21–902.	Prohibits	Sec. 21–902(a) (driving while intoxicated, first offense): Imprisonment 1 year and/or $1,000 fine. Sec. 21–902 (b), (c), (d) (driving under the influence): Imprisonment 2 months and/or $500 fine.
4. Unattended motor vehicles	Transportation, Sec. 21–1101.	Prohibits leaving motor vehicles unattended unless certain precautions are taken.	$500 fine.
5. Carrying or wearing certain concealed weapons (other than handguns) or openly with intent to injure.	Article 27, Sec. 36	Prohibits, except for law enforcement personnel or as a reasonable precaution against apprehended danger.	Imprisonment 3 years or $1,000 fine.

Subject	Md. Code annotated	Provides generally	Maximum penalty
6. Unlawful wearing, carrying, or transporting a handgun, whether concealed or openly.	Article 27, Sec. 36B.	Prohibits except by law enforcement personnel or with permit.	First offense and no prior related offense: Imprisonment 3 years and/or or $2,500 fine.
7. Use of handgun or concealable antique firearm in commission of felony or crime of violence.	Article 27, Sec. 36B.	Prohibits	Imprisonment 20 years.
8. Disturbance of the peace	Article 27, Sec. 122.	Prohibits acting in a disorderly manner in public places.	Imprisonment 30 days and/or $500 fine.
9. Gambling	Article 27, Secs. 240, 245.	Prohibits betting, wagering and gambling, and certain games of chance (does not apply to vending or purchasing lottery tickets authorized under State law in accordance with approved procedures).	Sec. 240: Imprisonment one year and/or $1,000 fine. Sec. 245: Imprisonment 2 years and/or $100 fine.

§ 3.3 Compliance.

A person must comply with the regulations in this part; with all official signs; and with the lawful directions or orders of a police officer or other authorized person including traffic and parking directions.

§ 3.4 False reports and reports of injury or damage.

A person may not knowingly give any false or fictitious report concerning an accident or violation of the regulations in this part or any applicable Federal or Maryland statute to any person properly investigating the accident or alleged violation. All incidents resulting in injury to persons or willful damage to property in excess of $100.00 in value must be reported by the persons involved to the Police Office as soon as possible. The Police Office's main location and telephone number is: Building 31, Room B3BN10; (301) 496–5685.

§ 3.5 Lost and found, and abandoned, property.

Lost articles which are found on the enclave, including money and other personal property, together with any identifying information, must be deposited at the Police Office or with an office (such as the place where found) which may likely have some knowledge of ownership. If the article is deposited with an office other than the Police Office and the owner does not claim it within 30 days, it shall be deposited at the Police Office for further disposition in accordance with General Services Administration regulations (41 CFR Part 101–48). Voluntarily abandoned, abandoned, or other unclaimed property and, in the absence of specific direction by a court, forfeited property, may be so identified by the Police Office and sold in accordance with 41 CFR 101–45.304–1 and 101–45.304–2.

§ 3.6 Nondiscrimination.

A person may not discriminate by segregation or otherwise against another person because of age, color, creed, handicap, national origin, race or sex, in furnishing or by refusing to furnish to that person the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided within the enclave. (Title 18 United States Code section 245 prohibits, by use of force or threat of force willful injury, intimidation, or interference with, a person from participating in or enjoying any benefit, service, privilege, program, facility, or activity provided by or administered by the United States, attempts to do these acts, and engaging in certain other activities.)

Subpart B—Traffic Regulations

§ 3.21 Emergency vehicles.

A person must yield the right of way to an emergency vehicle operating its siren or flashing lights.

§ 3.22 Request for identification.

Upon request by a police officer, a person involved in any of the following situations must provide identification, for example, by exhibiting satisfactory credentials (such as an employment identification card or driver's license):

(a) A traffic accident within the enclave;

(b) The police officer reasonably believes that the individual is engaged in or has engaged in criminal conduct or a violation of the regulations of this part, or

(c) The enclave or a portion of the enclave is not open to the public (see § 3.41).

A driver of a motor vehicle involved in an accident within the enclave shall also exhibit upon request of a police officer the owner's registration card or other satisfactory proof of ownership.

§ 3.23 Parking.

(a) A person may not stand (vehicle stopped with or without an occupant) or park a motor or other vehicle:

(1) In a lane, space, or area not designated by sign for parking, and/or standing;

(2) On a sidewalk;

(3) Within an intersection or crosswalk;

(4) Within 10 feet of a fire hydrant, 5 feet of a driveway or 20 feet of a stop sign, crosswalk, or traffic control signal;

(5) In a double-parked position;

(6) At a curb painted yellow;

(7) On the side of a street facing oncoming traffic;

(8) In a position that would obstruct traffic;

(9) For a period in excess of 24 hours, except at living quarters or with the approval of the Police Office.

(b) A person must park bicycles, motorbikes, and similar vehicles only in designated areas, and may not bring these vehicles inside buildings.

(c) A visitor must park in an area identified for that purpose by posted signs or similar instructions, such as "visitor parking" and "reserved for visitors."

(d) A person may not drive or park an unauthorized motor vehicle on a grassy or any nonpaved area without the approval of the Police Office.

§ 3.24 Parking permits.

Except for visitor parking, a person may not park a motor vehicle without displaying a parking permit, currently valid for that location. The Director may revoke or refuse to issue or renew any parking permit for violation of this section, or any provision of this part.

§ 3.25 Servicing of vehicles.

A person may not wash, polish, change oil, lubricate, or make nonemergency repairs on a privately owned vehicle.

§ 3.26 Speed limit.

The speed limit is 25 miles per hour, unless otherwise posted. A driver of a vehicle may not exceed the speed limit.

§ 3.27 Bicycles.

A person may not operate a bicycle, motorbike, or similar vehicle without a horn or other warning device, and, if the vehicle is operated between dusk and dawn, it must be equipped with an operating headlight, and taillight or reflector.

Subpart C—Facilities and Grounds

§ 3.41 Admission to facilities or grounds.

The enclave is officially open to the public during normal working and visiting hours and for approved public events. The enclave is closed to the public at all other times, and the Director may also officially close all or part of the enclave, or any building, in emergency situations and at other times the Director deems necessary to insure the orderly conduct of Government business. When all or part of the enclave is closed to the public, admission is restricted to employees and other authorized persons who may be required to display Government credentials or other identification when requested by a police officer and may be required to sign a register. The living quarters and adjacent areas are not open to the public but are open at all times to occupants and their visitors and business invitees, unless otherwise closed by the Director.

§ 3.42 Restricted activities.

(a) *Hobbies and sports.* A person may undertake hobbies and sports only in designated areas or as approved by the Director.

(b) *Pets and other animals.* A person may not bring on the enclave any cat, dog, or other animal except for authorized purposes. This prohibition does not apply to domestic pets at living quarters or to the exercise of these pets under leash or other appropriate restraints. The use of a dog by a handicapped person to assist that person is authorized.

(c) *Photography.* A person may take photographs, films or audiovisuals, for personal or news purposes on the grounds of the enclave or in entrances, lobbies, foyers, corridors, and auditoriums in use for public meetings, except when contrary to security regulations or Department of Health and Human Services policies, or where prohibited by appropriate signs. Photographs and similar activities for advertising or commercial purposes may be taken only with the advance written approval of the Director. A person may take photographs of a patient only with the informed consent of the patient (or the natural or legal guardian) and of the Director of the Warren Grant Magnuson Clinical Center or delegate.

(d) *Intoxicating beverages, narcotics, and other controlled substances.* A person may not possess, sell, consume, or use alcohol or other intoxicating beverages, except in connection with official duties, as part of authorized research, or as otherwise authorized by the Director; or, in the case of possession, consumption or use only, in living quarters. (The sale, consumption, use or possession of narcotics and other controlled substances is prohibited and shall be governed by the Controlled Substances Act (21 U.S.C. 841–845); driving under the influence of an alcoholic beverage, drug or controlled substance is prohibited and shall be governed by the Maryland *Transportation Code Annotated* section 21–902).

(e) *Nuisances and disturbances.* The following acts by a person are prohibited: Unwarranted loitering, disorderly conduct (acting in a disorderly manner to the disturbance of the public peace is prohibited and shall be governed by *Maryland Code Annotated,* Article 27, section 122); littering or disposal of rubbish in an unauthorized manner; the creation of any hazard to persons or property; the throwing of articles of any kind from or at a building; the climbing upon any part of a building for other than an authorized purpose; the loud playing of radios or other similar devices; and rollerskating, skateboarding, sledding or similar activities, except in officially designated areas.

(f) *Smoking.* Except as part of an approved medical research protocol, a person may not smoke in any building on the enclave.

§ 3.43 Removal of property.

A person may not remove Federal property from the enclave or any building on the enclave without a property pass, signed by an authorized property custodian, which specifically describes the items to be removed. In an emergency or when the property custodian is not available, a police officer may approve removal of Federal property if, after consulting with the administrative officer or other appropriate official, the police officer is authorized by that official to do so. Privately-owned property, other than that ordinarily carried on one's person, may be removed only under this property pass procedure, or upon properly establishing ownership of the property to a police officer. Packages, briefcases, or other containers brought within the enclave are subject to inspection while on, or being removed from, the enclave.

§ 3.44 Solicitation.

It shall be unlawful for a person (other than an employee using authorized bulletin boards), without prior written approval of the Director, to offer or display any article or service for sale within the enclave buildings or grounds; or to display any sign, placard, or other form of advertisement; or to collect private debts; or to solicit business, alms, subscriptions or contributions, except in connection with approved national or local campaigns for funds for welfare, health and other public interest purposes, or solicitation of labor organization membership or dues as authorized under the Civil Service Reform Act of 1978 (Pub. L. 95–454). This provision shall not apply to authorized lessees and their agents and employees with regard to space leased for commercial, cultural, educational, or recreational purposes, under the Public Buildings Cooperative Use Act of 1976 (40 U.S.C. 490(a)(16)).

Subpart D—Penalties

§ 3.61 Penalties.

(a) A person found guilty of violating any provision of the regulations in this part is subject to a fine of not more than $50 or imprisonment of not more than thirty days or both, for each violation (40 U.S.C. 318c).

(b) Penalties for violation of offenses proscribed by Federal statutes (generally codified in Title 18 of the United States Code) and Maryland criminal statutes which are made Federal offenses under the Assimilative Crimes Act are prescribed in the applicable provisions of those statutes.

[FR Doc. 88-26761 Filed 11-18-88; 8:45 am]
BILLING CODE 4140-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 663

[Docket No. 81130-8230]

Pacific Coast Groundfish Fishery; Foreign Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of preliminary groundfish fishery specifications and request for comments.

SUMMARY: NOAA announces and requests comments on the preliminary 1989 specifications for groundfish taken in the U.S. exclusive economic zone and State waters off the coasts of Washington, Oregon, and California. These preliminary specifications propose the level of the acceptable biological catch, the optimum yield, and the distribution of the optimum yield between domestic and foreign fishing operations for groundfish species and species groups as required by the regulations implementing the Pacific Coast Groundfish Fishery Management Plan. The intended effect of this action is to obtain public comments which will be considered before determining the final specifications for 1989.

DATE: Comments on the preliminary specifications for 1989 must be received by December 1, 1988.

ADDRESSES: Send comments to Rolland A. Schmitten, Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE, Bldg 1, Seattle WA 98115; or E. Charles Fullerton, Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island CA 90731.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at (206) 526–6140; or Rodney R. McInnis at (213) 514–6202.

SUPPLEMENTARY INFORMATION: Under the Pacific Coast Groundfish Fishery Management Plan (FMP) and its implementing regulations at 50 CFR Part 663.24, the management specifications for groundfish must be evaluated each calendar year, the preliminary specifications for the upcoming year must be published in the **Federal Register** inviting public comment, and the final specifications must be published in the **Federal Register** following public comment. The management specifications include the acceptable biological catch (ABC), the optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), joint venture processing (JVP), and the total allowable level of foreign fishing (TALFF).

The ABC is the annual catch, for the more than 80 groundfish species managed by the FMP, that can be taken without jeopardizing a resource's productivity. It may differ from the maximum sustainable yield (MSY) for biological reasons.

The MSY is the average, over a reasonable length of time, of the largest catch which can be taken continuously from a stock. The MSY is modified by relevant social, economic, and ecological factors to make the OY, which is the amount of fish that will provide the greatest overall benefit to the Nation. The FMP uses two types of OYs, numerical OYs which are quotas, and a nonnumerical OY which is all the fish which can be legally caught under the gear, area, and catch restrictions imposed by the FMP.

Each numerical OY is a quota, the maximum amount of fish (in round weight) that may be retained, or landed each year from the exclusive economic zone (EEZ) (3–200 nautical miles) and the state territorial waters (0–3 nautical miles) off the coasts off Washington, Oregon, and California. A numerical OY is specified only for each of six species: Pacific whiting, sablefish, Pacific ocean perch, shortbelly rockfish, widow rockfish, and, north of 39° N. latitude, jack mackerel. The OY for each of these six species includes determinations of the amounts available for domestic and foreign fishing. The DAH consists of estimates of DAP and JVP which are determined by surveys in September and June to assess the industry's planned utilizaton. The TALFF is the remainder, if any, of OY after domestic needs have been subtracted. Before TALFF is designated, a reserve of 20 percent of OY is established for each species in case the domestic industry needs more fish than was initially estimated.

The more than 70 remaining species managed under the FMP are included in the nonnumerical OY. For the most part, they cannot be harvested selectively and, unless biological stress is documented, have not been regulated by quotas. Full utilization by domestic processors of some species in this multispecies complex precludes joint venture or foreign targeting on underexploited species in this complex because large incidental catches of the fully utilized species are likely to result. Consequently, no numerical specifications for DAH, DAP, JVP, and TALFF are made because joint venture and foreign fishing are not available for any species in this multispecies complex. However, ABCs are specified for the major species or species groups.

The ABCs and OYs may be changed during the year, within limits, under the procedures outlined in the regulations at 50 CFR 663.22.

The preliminary 1989 management specifications for each species with an ABC different than in 1988, or with a numerical OY are discussed below, followed by Tables 1 and 2 which list the ABCs and OYs for all species or species groups. The aggregate data upon which these preliminary specifications are based are available for public inspection at the offices of the Regional Directors (see **ADDRESSES** above) during business hours until the end of the comment period.

Proposed Change to ABC for Nonnumerical OY Species

The ABCs for all species included in the nonnumerical OY are the same as in 1988, with the exception of yellowtail rockfish (Table 1). A new stock assessment, using cohort analysis and a dynamic pool model, suggests that the biomass of yellowtail rockfish has declined from the high levels in the late 1970's, and currently is close to levels that will sustain the maximum sustainable yield (MSY). The ABC was determined by averaging two estimates of biomass which were based on two slightly different models. One estimate uses a deterministic spawner-recruitment model (recruitment is dependent on stock size) and the other uses a constant recruitment model (recruitment is independent of stock size). The two estimates produced similar results. In the absence of data which would indicate that one was based on better scientific information than the other, the Groundfish Management Team (GMT) of the Pacific Fishery Management Council (Council) concluded that an average value was appropriate. This analysis included fish in the Canadian part of the Vancouver statistical area. The Council reconsidered how much of the biomass is available in the EEZ. In previous years, the Council estimated that 80 percent of the commercial catch of yellowtail rockfish occured in U.S. waters. The GMT believes this proportion is no longer appropriate, and although an accurate proportion is not yet known, that a 50 percent split is much more likely to represent the available biomass in U.S. waters. The GT expects better information in 1989 when preliminary results of a joint U.S.-Canada stock assessment become available.

Thus, although the estimate of biomass for yellowtail rockfish (including the Canadian portion of the Vancover statistical area) is higher than in 1988, this increase is partially offset by the reduced proportion estimated to be available off the U.S. coast. The result is no change to the 1,100 metric ton (mt) ABC in the U.S. Vancover area and a 300 mt increase, from 2,600 mt to 2,900, to the ABC in the Columbia area. Because there is no new stock assessment, the 300 mt ABC in the Eureka area is the same as in 1988. Accordingly, the total coastwide ABC for yellowtail rockfish is estimated at 4,300 mt, 300 mt above the 4,000 mt ABC in 1988.

For purposes of determining the harvest guideline for the *Sebastes* complex of rockfish (of which yellowtail rockfish is a dominant component), the ABC for yellowtail rockfish in the Columbia area is prorated to determine the portion of the 2,900 mt ABC that applies north of Coos Bay, Oregon. This amount is 2,800 mt. (See footnote 5 of Table 1.) Calculating the harvest guideline for the *Sebastes* complex in the same way in 1989 as in 1988 (equal to the sum of the ABCs of the species in the complex), the increase to the yellowtail rockfish ABC will raise the harvest guideline for the Sebastes complex north of Coos Bay, Oregon to 10,500 mt, 300 mt higher than in 1988.

Proposed Specifications for Numerical OY Species

Pacific whiting. The 1989 ABC for Pacific whiting (whiting) is preliminarily specified at 225,000 mt, slightly lower than the 1988 estimate of 232,000 mt. A new assessment of the Pacific whiting resource incorporates two age-structured analyses, recent fishery data, and revised growth estimates. This assessment documents a decrease in the estimated magnitude of the 1980 year class and a trend of declining mean length and weight at age over the 1976–1986 period. This results in a downward revision of short-term yield in comparison with the prior year's assessment.

Because whiting is a transboundary species, initial biomass estimates included stocks in the Canadian portion of the Vancouver area. The 1989 proposed ABC of 225,000 mt for UY.S. waters is only 75 percent of the estimated total avialable yield of 300,000 mt. This proportion was calculated from the percentage of each exploitable age group found in the EEZ in the most recent survey (1986). This estimate takes into account that older whiting migrate farther north and faster than younger fish.

In 1989 as in previous years, ABC and OY are proposed to be equal. The 1989 estimate of DAP is 18,000 mt, the same as in 1988. Because joint venture requests for 1989 currently exceed the amount preliminarily specified for OY, the estimate of JVP in 1989 in 207,000 mt, the difference between OY and DAP. Accordingly the preliminary determination of DAH in 1989 is equal to OY and there is no initial TALFF and no reserve. (The reserve, 20 percent of OY, is established in case the domestic industry needs more fish than originally projected, and thus is determined only when there is a TALFF.) These amounts may change, depending on the final specifications of ABC and OY, revised DAP requests, and applications for joint venture processing which are determined and published later in the year.

If a midseason survey of domestic processors indicates that the estimate of DAP is too high, JVO may be increased by the amount of DAP that the Secretary determines will not be needed by U.S. processors during the remainder of the fishing year. Similarly, TALFF may be increased by any part of the reserve and initial estimated DAH for the species under consideration that the Secretary determines will not be harvested by U.S. fishermen during the remainder of the calendar year.

Sablefish. The 1989 preliminary ABC for sablefish is 9,000 mt, 1,000 mt below the 1988 ABC of 10,000 mt. A new assessment was conducted based on a "stock synthesis" model, which uses landings and port sample data, tag returns, and information from trawl and pot surveys to estimate the current status of the stock. The GMT feels this assessment is a major improvement over previous analyses. The new analysis supported the trend of declining exploitable stock. The level of landings in recent years (averaging 13,600 mt between 1980 and 1986) is not sustainable. However, the analysis also indicated that the stock currently is above the 83,000 mt biomass level which will produce MSY at the estimated MSY exploitation rate. Once biomass is reduced to the level which will produce MSY, the expected average annual yield would be 8,200 mt.

The Council recommended that the preliminary OY be set at 10,400 mt, approximately the level of landings expected in 1988, and consistent with a fishing schedule designed to achieve MSY in about seven years. The Council examined the expected results of harvesting sablefish at higher and lower exploitation rates and decided on an OY of 10,400 mt as a step in a process of gradual reduction in harvest levels over a reasonable period of time. This process will help the industry adjust to the reduction of harvest to the MSY of 8,200 mt that must occur by the time the biomass level is reduced to 83,000 mt. Also, a gradual reduction in harvest rates would minimize risk due to uncertainty in the analysis. For the reasons stated above, and because the sablefish biomass is larger than that needed to produce MSY, it is not inconsistent to set OY higher than ABC. Because domestic processors intend to process all available sablefish, none is available for joint venture or foreign fishing in 1989 except for minimal allowances for unavoidable incidental catches.

Pacific ocean perch. Pacific ocean perch have been overfished in the past and now are managed under a rebuilding schedule specified in the FMP. No new stock assessment was conducted in 1988. The most recent available data indicated little or no rebuilding of the Pacific ocean perch stock since 1979, and currently there are no indications of strong recruitment to the population. Accordingly, the 1989 ABCs for both the Vancouver and Columbia areas are proposed to be set at zero, as in 1987 and 1988.

Also as in the past two years, the OY is proposed to be set at a level that will allow some if not all incidental catches to be landed, but will not encourage directed fishing; 500 mt in the Vancouver area and 800 mt in the Columbia area. Clearly, domestic processors will fully utilize OY so no Pacific ocean perch are available for joint venture or foreign fishing in 1989 except for minimal allowances for unavoidable incidental catches.

Widow rockfish. The 1989 preliminary specification of the coastwide ABC for widow rockfish is 9,500 mt, 21 percent lower than the final 1988 ABC of 12,100 mt. New analyses revealed a great deal of uncertainty in the estimates of stock abundance and its relationship to MSY. Given these uncertainties, the Council recommended setting ABC at MSY until more consistent stock assessments are available. The ABC was less than 9,500 mt in 1984–1986.

The preliminary OY of 9,500 mt equals ABC in 1989, and, like ABC, is 21 percent lower than in 1988. Although less than in 1986–1988, this preliminary OY is slightly higher than the 9,300 mt OY in 1984–1985. Because this species is fully utilized by domestic processors, no widow rockfish are available for JVP or TALFF in 1989 except for minimal allowances for unavoidable incidental catches.

Shortbelly rockfish. The preliminary 1989 ABC and OY specifications for shortbelly rockfish are both 10,000 mt, the same as during 1983–1988. As in 1986–1988, DAP is estimated at 1,000 mt and JVP is estimated at 5,000 mt, resulting in DAH of 6,000 mt. The reserve is set at 2,000 mt in case domestic needs become higher than initially estimated, and the remaining 2,000 mt is designated for TALFF. Most shortbelly rockfish are available south of 39 degrees N. latitude, an area closed to foreign trawiling, and no interest has been expressed in a directed foreign fishery for this species north of 39 degrees N. latitude in 1989.

Jack mackerel (north of 39° latitude). The preliminary 1989 ABC and OY specifications for jack mackerel are both 12,000 mt, the same as during 1985–1988. No new stock assessment has been conducted for this species. No domestic interest has been identifed for the stock north of 39 degrees N. latitude, the only component of this species managed by the FMP. Accordingly, a reserve of 2,400 mt is proposed in case domestic needs develop, and 9,600 mt is designated for foreign fishing in 1989.

Classification

These preliminary specifications are made under the authority of and in accordance with 50 CFR 663.24 (a) and (b). This action is in compliance with Executive Order 12291 and is covered by the Regulatory Flexibility Analysis prepared for the implementing regulations.

List of Subjects in 50 CFR Parts 663 and 611

Fisheries, Fishing, Foreign relations.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 15, 1988.

James W. Brennan,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

TABLE 1.—PRELIMINARY SPECIFICATIONS OF ABC FOR 1989 FOR THE WASHINGTON, OREGON, AND CALIFORNIA REGION BY INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION AREAS

[In thousands of metric tons]

Species	Area					
	Vancouver [1]	Columbia	Eureka	Monterey	Conception	Total
Roundfish:						
Lingcod	1.0	4.0	0.5	1.1	0.4	7.0
Pacific Cod	2.2	.9	([2])	([2])	([2])	3.1
Pacific Whiting						[3] 225.0
Sablefish						[3] 9.0
Rockfish:						
Pacific Ocean Perch	0	0	([2])	([2])	([2])	[3] 0
Shortbelly						[3] 10.0
Widow						[3] 9.5
Other Rockfish: [4]						
Bocaccio	([2])	([2])	([2])	4.1	2.0	6.1
Canary	.8	[5] 2.1	.6	([2])	([2])	3.5
Chilipepper						[3] 3.6
Yellowtail	1.1	[5] 2.9	.3	([2])	([2])	4.3
Remaining Rockfish	.6	[5] 3.7	1.9	4.3	3.3	14.0
Flatfish:						
Dover Sole	2.4	11.5	8.0	5.0	1.0	27.9
English Sole						[3] 1.9
Petrale Sole	.6	1.1	.5	.8	.2	3.2
Other Flatfish	.7	3.0	1.7	1.8	.5	7.7
Other Fish [6]						
Jack Mackerel [7]						12.0
Others	2.5	7.0	1.2	2.0	2.0	14.7

[1] U.S. portion.

[2] These species are not common or important in the areas footnoted. Accordingly, for convenience, Pacific cod is included in the "other fish" category for the areas footnoted and rockfish species are included in the "remaining rockfish" category for the areas footnoted only.

[3] Total all areas.

[4] "Other rockfish" means rockfish species at 50 CFR 663.2, as amended, which do not have a numerical OY.

[5] For management of the Sebastes complex of rockfish, the Columbia area is split into northern and southern parts at Coos Bay, Oregon 43°21'34" N. latitude), and ABCs for the Columbia area are prorated as follows: Canary (Species), 2.1 (Columbia area total), 1.7 (North of Coos Bay), 0.4 (South of Coos Bay); Yellowtail (Species), 2.9 (Columbia area total), 2.8 (North of Coos Bay), 0.1 (South of Coos Bay); Remaining rockfish (Species), 3.7 (Columbia area total), 3.3 (North of Coos Bay), 0.4 (South of Coos Bay).

[6] "Other fish" includes sharks, skates, ratfish, morids, grenadiers, jack mackerel, and, in the Eureka, Monterey, and Conception areas, Pacific cod. "Other fish" is part of the "other species" category listed at 50 CFR 663.2.

[7] North of 39° N. latitude.

TABLE 2.—PRELIMINARY SPECIFICATIONS OF OY AND ITS DISTRIBUTION FOR 1989

[In thousands of metric tons]

Species	Total OY	DAP	JVP [1]	DAH	Reserve	TALFF [1]
Pacific Whiting	225.0	18.0	207.0	225.0	0	0
Sablefish	10.4	10.4	0	10.4	0	0
Pacific Ocean Perch	[2] 1.3	[2] 1.3	0	[2] 1.3	0	0
Shortbelly Rockfish	10.0	1.0	5.0	6.0	2.0	2.0
Widow Rockfish	9.5	9.5	0	9.5	0	0
Jack Mackerel	12.0	0	0	0	2.4	9.6
Other Species	([3])					

[1] In the foreign trawl and joint venture fisheries for Pacific whiting, incidental catch allowance percentages (based on TALFF) and incidental retention allowance percentages (based on JVP) are: sablefish 0.173 percent; Pacific ocean perch 0.062 percent; rockfish excluding Pacific ocean perch 0.738 percent; flatfish 0.1 percent; jack mackerel 3.0 percent; and other species 0.5 percent. In foreign trawl and joint venture fisheries, "other species" means all species, including nongroundfish species, except Pacific whiting, sablefish, Pacific ocean perch, rockfish excluding Pacific ocean perch, flatfish, jack mackerel, and prohibited species. In a foreign trawl or joint venture fishery for species other than Pacific whiting, incidental allowance percentages will be stated in the conditions and restrictions to the foreign fishing permit. See 50 CFR 611.70(c)(2) for application of incidental retention allowance percentages to joint venture fisheries.

[2] Of this 1,300 metric tons, 500 metric tons is for the Vancouver area and 800 metric tons is for the Columbia area. Pacific ocean perch from other areas are included in the OY for "other species". See 50 CFR 663.21(a)(3).

[3] The total OY for "other species" is that amount of fish that may be lawfully harvested and/or processed under 50 CFR 611.70 and Part 663. See 50 CFR 663.2 for species listing.

[FR Doc. 88-26827 Filed 11-16-88; 1:12 pm]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 53, No. 224
Monday, November 21, 1988

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

Forest Service

Hiawatha National Forest, Pictured Rocks National Lakeshore

AGENCY: Forest Service, USDA.

ACTION: Notice; transfer of administrative jurisdiction.

SUMMARY: The Secretary of Agriculture has approved the transfer of 866.08 acres of the Hiawatha National Forest from the administrative jurisdiction of the Forest Service to the jurisdiction of the National Park Service, Department of the Interior, for addition to the Pictured Rocks National Lakeshore. A copy of the order as signed by the Secretary is set out at the end of this notice.

EFFECTIVE DATE: By order of the Secretary of Agriculture, the transfer was effective October 31, 1988.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Johnson, Lands Staff, USDA, Forest Service, P.O. Box 96090, Washington, DC 20090–6090, (703) 235–2406.

Dated: November 14, 1988.

Larry Henson,

Associate Deputy Chief.

In compliance with section 8 of the Act of October 15, 1966, Pub. L. 89–668, notice is hereby given that pursuant to the authority vested in the Secretary of Agriculture, the following lands are hereby transferred from the administrative jurisdiction of the Forest Service, Hiawatha National Forest, U.S. Department of Agriculture, to the administrative jurisdiction of the National Park Service, Pictured Rocks National Lakeshore, U.S. Department of the Interior.

Those certain lands now administered as a part of the Hiawatha National Forest, situated, lying, being in T. 47 N., R. 18 W., of the Michigan Meridian, Alger County, Michigan, and being more particularly described as follows:

T. 47 N., R. 18 W.,

Section 1, N½NW¼; SW¼SW¼

(State of Michigan reserves all mineral, coal, oil and gas, right of ingress and egress across any lands lying along any watercourse, and all aboriginal antiquities and right to explore and excavate for same.)

S½NW¼; NW¼SW¼

(Third party reserves all metals, oils, salt, gas, marl, ores, minerals, limestone, and all granite, stone or rock valuable for building purposes.)

Sec. 2, E½SE¼SW¼; E½NE¼; SW¼NE¼; SE¼

(Third party reserves all metals, oils, salt, gas, marl, ores, minerals, limestone, and all granite, stone or rock valuable for building purposes.)

Sec. 16, NE¼Sw¼; NW¼SE¼; NE¼SE¼

(State of Michigan reserves all mineral, coal, oil, and gas, right of ingress and egress across any lands lying along any watercourse, and all aboriginal antiquities and right to explore and excavate for same.)

Sec. 26. SW¼SE¼; S½NW¼SE¼
Sec. 29, NW¼SW¼
S½SW¼NW¼
NE¼SW¼NW¼
Sec. 35, W½NE¼

The area described aggregates 866.08 acres.

Effective date. This order is effective on the 31st of October, 1988.

Richard E. Lyng,

Secretary, Department of Agriculture.

[FR Doc. 88–26896 Filed 11–18–88; 8:45 am]

BILLING CODE 3410–11–M

ARMS CONTROL AND DISARMAMENT AGENCY

Hubert H. Humphrey Fellowship Competition

The U.S. Arms Control and Disarmament Agency will conduct a competition in 1989 for one-year Hubert H. Humphrey Fellowships in support of unclassified doctoral dissertation research in arms control and disarmament. Law candidates for the Juris Doctor or any higher degree are also eligible if they are writing a substantial paper in partial fulfillment of degree requirements. The fellowship stipends for Ph.D. candidates will be $5,000 plus applicable tuition and fees up to a maximum of $3,400. Stipends and tuition for law candidates will be prorated according to the credits given for the research paper. Fellows must be citizens or nationals of the United States and degree candidates at a U.S. University. The application deadline for the awards is March 15, 1989. Awards will be for a 12-month period beginning either September 1989 or January 1990. For information and application materials please write: Hubert H. Humphrey Fellowship Program, Office of Public Affairs, U.S. Arms Control and Disarmament Agency, Washington, DC 20451.

Date: November 4, 1988.

Sigmund Cohen, Jr.,

Director of Public Affairs.

[FR Doc. 88–26777 Filed 11–18–88; 8:45 am]

BILLING CODE 6820–32–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Transportation and Related Equipment Technical Advisory Committee; Partially Closed Meeting

A meeting of the Transportation and Related Equipment Technical Advisory Committee will be held December 8, 1988, 9:30 a.m., Room 1617–F, U.S. Department of Commerce, 14th & Constitution Avenue, NW. Washington, DC. The Committee advises the Office of Technology & Policy Analysis with respect to technical questions which affect the level of export controls applicable to transportation and related equipment or technology.

General Session

1. Opening Remarks by the Chairman.
2. Introduction of Members and Visitors.
3. Presentation of Papers or Comments by the Public.
4. Discussion of TAC Chairmen's Meeting.
5. Discussion of Annual Report & 1989 Plan.
6. Discussion of Rechartering.
7. Election of Chairman.
8. Discussion of other Export Issues.

Executive Session

9. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control program and strategic criteria related thereto.

The general session of the meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on December 17, 1986, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended that the series of meetings or portions of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C. 552b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public. A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, U.S. Department of Commerce, Washington, DC. For further information or copies of the minutes call Ruth D. Fitts, 202–377–4959.

Date: November 15, 1988.

Betty Anne Ferrell,

Director, Technical Support Unit, Office of Technology and Policy Analysis.

[FR Doc. 88–26865 Filed 11–18–88; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

[A–588–019]

Cyanuric Acid and Its Chlorinated Derivatives From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Tentative Determination To Revoke in Part

AGENCY: International Trade Administration/Import Administration Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative reviews and tentative determination to revoke in part.

SUMMARY: In response to requests by the petitioner and four respondents, the Department of Commerce has conducted administrative reviews of the antidumping duty orders on cyanuric acid and its chlorinated derivatives from Japan. The reviews cover two manufacturers/exporters of this merchandise to the U.S., Nissan Chemical Industries, Ltd., Shikoku Chemicals Corporation, two trading companies, Mitsubishi Corporation and Toyo Menka Kaisha, Ltd., and two consecutive periods from April 1, 1985 through March 31, 1986 and April 1, 1986 through March 31, 1987. The reviews indicate the existence of dumping margins for Shikoku Chemicals Corporation for cyanuric acid for both periods. The margins for Shikoku Chemicals Corporation for dichloro isocyanurates and trichloro isocyanuric acid for both periods were less than 0.5 percent and, therefore, *de minimis*. There were no margins for Nissan Chemical Industries, Ltd. for either dichloro isocyanurates or trichloro isocyanuric acid for both periods. The order on cyanuric acid excludes sales produced by Nissan.

As a result of the reviews, we preliminarily determine to assess dumping duties on cyanuric acid equal to the calculated differences between United States price and foreign market value.

We also tentatively determine to revoke the antidumping duty orders on dichloro isocyanurates and trichloro cyanuric acid.

Interested parties are invited to comment on these preliminary results and tentative determination to revoke in part.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Susan Silver or Robert Marenick, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–3601/5255.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 1987, the Department published in the **Federal Register** (52 FR 15970) the final results of its last administrative reviews of the antidumping duty orders on cyanuric acid and its chlorinated derivatives from Japan (49 FR 18148, April 27, 1984). The petitioner and respondents requested in accordance with § 353.53a of the Commerce Regulations that we conduct administrative reviews. We published notices of initiation on May 20, 1986 (51 FR 18475) and May 20, 1987 (52 FR 18937). The Department has now conducted the administrative reviews in accordance with section 751 of the Tariff Act of 1930, as amended ("the Tariff Act").

Scope of the Reviews

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to this Harmonized Tariff System ("HTS"). Until that time, the Department will be providing both the appropriate Tariff Schedules of the United States Annotated ("TSUSA") item numbers and the appropriate HTS item numbers with our product descriptions on a test basis. As with the TSUSA, the HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

We are requesting petitioners to include the appropriate HTS item numbers as well as the TSUSA item numbers in all new petitions filed with the Department. A reference copy of the proposed Harmonized System schedule is available for consultation in the Central Records Unit, Room B–099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Additionally, all Customs offices have reference copies, and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

Imports covered by the reviews are shipments of cyanuric acid (also known as isocyanuric acid) and its chlorinated derivatives (dichloro isocyanurates, and trichloro isocyanuric acid) used in the swimming pool trade.

We have categorized the merchandise as cyanuric acid, dichloro trichloro isocyanurates and trichloro isocyanuric acid, which we consider to be separate classes or kinds of merchandise. These products are sold in three basic consistencies: powder, granular and tablet. Such merchandise is currently classifiable under item number 425.1050 of the TSUSA and item number 2933.69.50.50 of the HTS. The review covers Shikoku Chemicals Corporation ("Shikoku"), Nissan Chemical Industries ("Nissan"), Mitsubishi Corporation and Toyo Menka Kaisha, Ltd., and two consecutive periods from April 1, 1985 through March 31, 1986 and April 1, 1986 through March 31, 1987.

Petitioner alleged that Nissan esablished a fictitious market for home market sales of trichloro isocyanuric acid by lowering the prices of the granular form of this product while increasing prices of the tablet and powder forms in order to avoid the imposition of dumping duties. Nissan only exports the granular form of this product to the United States. Petitioner states that, pursuant to section 1319 of the Omibus Trade and Competitiveness Act of 1988, section 773(a)(5) of the Traffic Act, we are required to examine

all forms of the product to establish foreign market value. During verification, we examined the volume and prices of sales for all forms of the products under review in the home market and found that while prices for tablet and powder were higher than the granular form, the predominant shares of home market sales was in the granular form. In addition, we noted a downward movement of prices for granular, tablet and powder forms between the third and fourth review periods. We found that tablet and powder forms of the product were not sold in sufficient quantities to offset the lower-priced sales of granular in the home market. Even if we were to weight-average home market sales of tablet, powder and granular to establish foreign market value, the weighted-average foreign market value would still be far below the lowest U.S. price of the granular form. Therefore, we do not consider such a predominant share of home market sales of the granular form of the products under review at lower prices and a downward movement of prices for all forms of the product to indicate a fictitious market of the granular form within the meaning of section 773(a)(5) of the Tariff Act. Accordingly, we preliminarily determine that Nissan has not established a fictitious market of the granular form in order to avoid the imposition of dumping duties, and we consider only the sales of the granular form of these products to establish foreign market value.

The petitioner also alleged that Nissan's sales for dichloro isocyanurates and trichloro isocyanuric acid were below cost of production for both periods. Petitioner submitted the cost of production data for both products for both periods. We initiated a cost of production investigation for both periods for trichloro isocyanuric acid sales and for dichloro isocyanurates for the April 1, 1986 through March 31, 1987 period. We verified actual cost data and preliminarily determine that Nissan made no sales below its cost of production for trichloro isocyarnurc acid sales for both periods and for dichloro isocyanurates for the period April 1, 1986 through March 31, 1987.

Regarding the below cost allegation for dichloro isocyanurates for the April 1, 1985 through March 31, 1986 review period, we applied the cost of production data that petitioner had submitted for dichloro isocyanurates to all home market sales of dichloro isocyanurates submitted by respondents for the same period. We assumed that using cost data from the petitioner was equivalent to performing a cost test based upon the best information available because the results obtained from using petitioner's cost data would be more adverse to the respondent than would be the results from using the respondent's actual cost data. Further, we applied this best information cost data for the product to all sales of that product. We found that a small percentage of all sales of dichloro isocyanurates was below the best information cost of production for the review period. We therefore concluded that the results from using actual cost data would also show a similarly small percentage of sales below cost. Accordingly, we preliminarily determine that there was an insufficient basis to initiate a cost of production investigation for dichloro isocyanurates for the April 1, 1985 through March 31, 1986 period.

In addition, petitioner submitted cost data in support of its allegation of sales below cost for Shikoku for both products for the April 1, 1986 through March 31, 1987 review period. We initiated a cost of production investigation for both products for that period. We verified actual data and preliminarily determine that Shikoku made no sales below its cost of production for either product for both periods.

Petitioner also alleged that Shikoku's trading company, Mitsubishi Corporation, was engaging in middleman dumping, *i.e.*, that Mitsubishi was selling to U.S. purchasers below its acquisition or purchase cost from Shikoku. At verification, we examined the sales made by Mitsubishi Corporation which formed the basis of petitioner's middlemen dumping allegation. By using verified acquisition prices, we found no evidence that Mitsubishi Corporation was selling below its acquisition cost from Shikoku. Therefore, we preliminarily determine that petitioner's allegation with respect to Mitsubishi Corporation provided an insufficient basis to pursue further the issue of middleman dumping.

United States Price

In caluclating United States price, the Department used purchase price as defined in seciton 772 of the Tariff Act. Purchasse price was based on the packed f.o.b. price from the manufacturers to the unrelated Japanese trading firms in Japan because the manufacturers knew that the merchandise was destined for the United States at the time of sale. We made adjustments, where applicable, for foreign inland freight, brokerage and handling and insurance. No other adjustments were claimed or allowed.

Foreign Market Value

In calculating foreign market value, the Department used home market price as defined in section 773 of the Tariff Act, since there were sufficient sales of such or similar merchandise in the home market.

Home market price was based on the packed, delivered price to unrelated purchasers in the home market. We made adjustments, where applicable, for inland freight, insurance, competitive discounts, rebates, advertsing and promotion, and difference in credit and packing expenses. No other adjustments were claimed or allowed.

Preliminary Results of the Reviews

As a result of our reviews, we preliminarily determine that the following margins exist:

Manufacturer/exporter	Product	Time period	Margin (percent)
Nissan Chemical Industries, Ltd.[1]	Dichloro Isocyanurates	April 19, 1985 to March 19, 1987	0
	Trichloro Isocyanuric acid	....do	0
Shikoku Chemicals Corp	Cyanuric acid	April 19, 1985 to March 19, 1986	2.58
		April 19, 1986 to March 19, 1987	11.77
	Dichloro Isocyanurates	April 19, 1985 to March 19, 1986	0.01
		April 19, 1986 to March 19, 1987	0.01
	Trichloro Isocyanuric acid	April 19, 1985 to March 19, 1986	0.09
		April 19, 1986 to March 19, 1987	0.08

[1] The order on cyanuric acid excludes sales produced by Nissan.

Interested parties may request disclosure and/or an administrative protective order within 5 days of the date of publication of this notice and may request a hearing within 8 days of publication. Any hearing, if requested, will be held 35 days after the date of publication, or the first workday thereafter. Pre-hearing, briefs and/or written comments from interested parties may be submitted not later than 25 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed no later than 32 days after the date of publication.

The Department shall determine, and the Customs Service shall assess antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Nissan and Shikoku requested revocation of the orders with respect to the merchandise they exported. Since neither of these companies has had sales at less than fair market value for three years for dichloro isocyanurates and trichloro isocyanuric acid, and, as provided for in section § 353.54(e) of the Commerce Regulations, Nissan and Shikoku have agreed in writing to immediate suspension of liquidation and reinstatement of the order under circumstances specified in the written agreement, we tentatively determine to revoke the antidumping duty orders on dichloro isocyanurates and trichloro isocyanuric acid. If this revocation is made final, it will apply to all unliquidated entries of dichloro isocyanurates and trichloro isocyanuric acid from Japan, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. Further, as provided for by § 353.48(b) of the Commerce Regulations, for shipments of cyanuric acid from Shikoku, the Department shall require a cash deposit of 11.77 percent of estimated dumping duties based on the more recent of the above margins. For shipments of cyanuric acid from Nissan, the Department will not require a cash deposit of estimated dumping duties, since the order on cyanuric acid excludes sales produced from Nissan. For any future entries of cyanuric acid from a new exporter, not covered in this or any prior administrative reviews, whose first shipment occurred after March 31, 1987 and who is unrelated to the reviewed firms, a cash deposit of 11.77 percent of estimated dumping duties will be required. For any future shipments of dichloro isocyanurates and trichloro isocyanuric acid, no cash deposit will be required.

These administrative reviews, tentative determination to revoke in part, and notice are in accordance with section 751(a)(1) and (c) of the Tariff Act (19 U.S.C. 1675(a)(1), (c)) and 19 CFR 353.53a and 353.54.

Jan W. Mares,

Assistant Secretary for Import Administration.

Dated: November 14, 1988.

[FR Doc. 88-26867 Filed 11-18-88; 8:45 am]

BILLING CODE 3510-DS-M

[A-357-802]

Preliminary Determination of Sales at Less Than Fair Value; Light-Walled Welded Rectangular Carbon Steel Tubing From Argentina

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that light-walled welded rectangular carbon steel tubing from Argentina is being, or is likely to be, sold in the United States at less than fair value. We also preliminarily determine that critical circumstances exist with respect to imports of the subject merchandise from Argentina. We have notified the International Trade Commission of our determination and have directed the Customs Service to suspend liquidation of all entries of the subject merchandise from Argentina as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final detemination by January 30, 1989.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Contact Alain Letort or Richard Capwell, Office of Agreements Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: 202/377-3818 (Letort) or 202/377-8668 (Capwell).

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that light-walled welded rectangular carbon steel tubing ("LWRT") from Argentina is being, or is likely to be, sold in the United States at less than fair value within the meaning of section 733 of the Tariff Act of 1930, as amended ("the Act"). The estimated margin of sales at less than fair value is 92.30 percent *ad valorem*, as shown in the "Suspension of Liquidation" section of this notice. We also preliminarily determine that critical circumstances exist with respect to imports of the merchandise from Argentina, as outlined in the "Critical Circumstances" section of this notice.

Case History

Since our Notice of Initiation (53 FR 24988—July 1, 1988), the following events have occurred. On July 21, 1988, the International Trade Commission ("ITC") preliminarily determined there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of LWRT (USITC Publication 2098—July 1988).

On August 3, 1988, we presented a questionnaire to Laminfer S.A. ("Laminfer"), which accounted for virtually all the exports to the United States from Argentina during the period of investigation. We requested the Laminfer answer section A by August 24, 1988 and sections B and C by September 4, 1988. On August 18, 1988, at respondent's request, we extended the deadline for response to section A of the questionnaire until August 31, 1988, and to sections B and C until September 16, 1988. On August 31, 1988, we received Laminfer's response to section A of the questionnaire. On September 15, 1988, again at respondent's request, we extended the deadline for response to sections B and C until September 26, 1988. On September 26, 1988, we received Laminfer's response to sections B and C of the questionnaire. As a result of our analysis of Laminfer's responses, we issued a deficiency letter on September 30, 1988, and requested a response by October 11, 1988. On October 11, 1988, we received Laminfer's response to our deficiency letter, to which we requested that Laminfer reply by Novermber 18, 1988.

Scope of Investigation

The product covered by this investigation is light-walled welded carbon steel pipes and tubes of rectangular (including square) cross-section, having a wall thickness of less than 0.156 inch, currently provided for under item numbers 610.4928 of the *Tariff Schedules of the United States, Annotated* and classifiable under item number 7306.60.5000 of the *Harmonized Tariff Schedule.*

Period of Investigation

The period of investigation for LWRT from Argentina extends from January 1, 1988 through June 30, 1988.

Fair Value Comparisons

To determine whether sales in the United States of LWRT from Argentina were made at less than fair value, we compared the United States price with the foreign market value for Laminfer, using the data provided in the responses.

United States Price

We based United States price on purchase price, in accordance with section 772(b) of the Act, because the merchandise was sold to unrelated purchasers in the United States prior to its importation. We calculated purchase price based on the c. & f. or f.o.b. packed prices to U.S. customers. We made deductions from purchase price, where appropriate, for foreign inland freight, foreign inland insurance, ocean freight, and stevedorage charges. We made an addition to purchase price for indirect taxes which were later rebated by reason of the exportation of the subject merchandise to the United States, in accordance with section 772(d)(1)(C) of the Act. Consistent with our practice in past investigations [see, *e.g., Barbed Wire and Barbless Fencing Wire from Argentina; Final Determination of Sales at Less Than Fair Value* (50 FR 38563—September 23, 1985)], we limited the addition to purchase price to 6.34 percent of the value of the exported product, which is the amount of allowable indirect taxes found to have been paid by Laminfer in the concurrent countervailing duty investigation of the subject merchandise [see *Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders; Certain Welded Carbon Steel Pipe and Tube Products from Argentina* (53 FR 37619—September 27, 1988)].

Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we calculated foreign market value based on delivered or f.o.b. packed prices to unrelated purchasers in Argentina. Since Argentine home-market prices were constantly adjusted upward to reflect the high rate of inflation in Argentina during the period of investigation, we calculated foreign market values for each month during the period of investigation rather than calculating a weighted-average foreign market value for the entire six-month period. We made deductions to foreign market value, as appropriate, for inland freight, inland insurance, cash discounts, and quantity discounts. In accordance with § 353.15 of our regulations, we made an adjustment to foreign market value for differences in circumstances of sale for credit expenses. In order to adjust for differences in packing between the two markets, we deducted Argentine packing costs from foreign market value and added U.S. packing costs. We also made an adjustment for the differences between sales commissions in the U.S. and home markets. In accordance with § 353.16 of our regulations, we made an adjustment to foreign market value to account for differences in the physical characteristics of the merchandise where there was no identical product in the home market with which to compare a product in the United States.

We disallowed the following adjustments claimed by Laminfer. We disallowed Laminfer's claimed adjustment for advertising expenses in the home market because, although Laminfer stated in its response that it used booklets and brochures as advertising media, the company did not provide samples of these as requested in our questionnaire. Laminfer also claimed adjustments to foreign market value for bad debt expenses, inventory carrying costs, administrative expenses, and selling expenses, all of which we disallowed because none of these expenses bear a direct relationship to the sales under investigation, as required by § 353.15 of our regulations.

Laminfer also claimed a deduction from foreign market value in certain sales where the merchandise was returned. Consistent with past practice in antidumping duty investigations, we disregarded sales involving returned merchandise in making our fair value comparisons.

Currency Conversions

Because Laminfer reported all U.S. sales data in Argentine australs, we made no currency conversions in our fair-value comparisons for purposes of this preliminary determination. We have requested that Laminfer provide us with a revised U.S. sales response listing all prices and expenses in the currency in which they actually were quoted or incurred. We will verify this information and use it in making our final determination in this case.

Verification

As provided in section 776(b) of the Act, we will verify all information used in reaching the final determination in this investigation.

Critical Circumstances

The petitioners allege that "critical circumstances" exist with respect to imports of LWRT from Argentina. Under section 733(e)(1) of the Act, critical circumstances exist if we determine that there is a reasonable basis to believe or suspect that:

(A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation; or

(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value; and

(B) there have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

Pursuant to section 733(e)(1)(B), we generally consider the following factors in determining whether imports have been massive over a relatively short period of time: (1) The volume and value of imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by imports.

Based on our analysis of Bureau of the Census import data, we find that there is a reasonable basis to believe or suspect that imports of LWRT from Argentina have been massive over a relatively short period of time. Therefore, we preliminarily determine that the requirements of section 733(e)(1)(B) are met.

We also reviewed recent antidumping duty cases, as well as antidumping actions of other countries made available to us through the Antidumping Code Committee of the General Agreements on Tariffs and Trade, and found no evidence of dumping of LWRT by Argentine manufacturers, producers, or exporters in the United States or other countries. Therefore, we preliminarily determine that the requirements of section 733(e)(1)(A)(i) are not met.

We then considered whether the person by whom, or for whose account, the subject merchandise was imported knew or should have known that the exporter was selling the merchandise at less than its fair value. It has been our standard practice to impute knowledge of dumping when the estimated dumping margins in our determinations are of such magnitude that the importer knew, or should have known, that the subject merchandise was being sold at less than its fair value. Normally, we consider estimated margins of 25 percent or greater to be sufficient to impute

knowledge of dumping [*see, e.g., Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Italy* (52 FR 24198—June 29, 1987)]. In this case, the estimated dumping margin calculated on the basis of the responses to our questionnaire is sufficiently large, even though there is no corporate relationship between the exporter and the importers, that the importers knew or should have known that the subject merchandise was being sold in the United States at less than its fair value. Accordingly, we find that the requirements of section 733(e)(1)(A)(ii) are met.

Therefore, we preliminarily determine that critical circumstances, within the meaning of section 733(e)(1) of the Act, exist with respect to imports of LWRT from Argentine.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of LWRT from Argentina, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption, on or after the date which is 90 days prior to the date of publication of this notice in the **Federal Register**, in accordance with section 733(e)(2) of the Act. The U.S. Customs Service shall require a cash deposit or posting of a bond equal to the estimated amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price, which is 92.30 percent *ad valorem*. This suspension of liquidation will remain in effect until further notice.

Article VI:5 of the General Agreement on Tariffs and Trade provides that "[n]o product * * * shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." This provision is implemented by section 772(d)(1)(D) of the Act. Since dumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there is no reason to require a cash deposit or bond for that amount. Accordingly, the level of export subsidies as determined in *Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders; Certain Welded Carbon Steel Pipe and Tube Products from Argentina* (53 FR 37619—September 27, 1988), which is 9.25 percent *ad valorem*, will be substracted from the dumping margin for deposit or bonding purposes.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If our final determination is affirmative, then the ITC will determine no later than 120 days after the date of this preliminary determination or 45 days after the final determination, whichever is later, whether these imports are materially injuring, or threaten material injury to, an industry in the United States.

Public Comment

In accordance with 19 CFR 353.47, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 10:00 a.m. on January 4, 1989, at the United States Department of Commerce, Room 3708, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Individuals who wish to participate in the hearing must submit a request to the Assistant Secretary for Import Administration, Room B–099, at the above address within ten days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reasons for attending; and (4) a list of the issues to be discussed.

In addition, pre-hearing briefs in at least ten copies, both public and non-public versions, must be submitted to the Assistant Secretary by December 28, 1988. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, at the above address, in at least ten copies, not less than 30 days before the date of the final determination, or, if a hearing is held, within seven days after the hearing transcript is available.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

November 14, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88–26870 Filed 11–18–88; 8:45 am]

BILLING CODE 3510–05–M

[A–583–803]

Preliminary Determination of Sales at Less Than Fair Value; Light-Walled Welded Rectangular Carbon Steel Tubing From Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that light-walled welded rectangular carbon steel tubing (LWRT) from Taiwan is being, or is likely to be, sold in the United States at less than fair value. We also preliminarily determine that critical circumstances exist with respect to imports of the subject merchandise from Taiwan. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to suspend liquidation of all entries of the subject merchandise from Taiwan as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by January 30, 1989.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION: Contact Barbara Williams, Kathy McNamara, or Richard Weible, Office of Agreements Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: 202/377–0405 (Williams), 202/377–2312 (McNamara), or 202/377–0519 (Weible).

SUPPLEMENTARY INFORMATION:

Preliminary Determination

We preliminarily determine that light-walled welded rectangular carbon steel tubing (LWRT) from Taiwan is being, or is likely to be, sold in the United States at less than fair value within the meaning of section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). The estimated weighted-average margins are shown in the "Suspension of Liquidation" section of

this notice. We also preliminarily determine that critical circumstances exist with respect to imports of the subject merchandise from Taiwan, as outlined in the "Critical Circumstances" section of this notice.

Case History

Since our Notice of Initiation (53 FR 24988—July 1, 1988) the following events have occurred. On July 21, 1988, the ITC preliminarily determined there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of LWRT (USITC Publication 2098—July 1988).

On August 17, 1988, we presented questionnaires to Ornatube Enterprise Co., Ltd. (Ornatube), Yieh Hsing Industries, Ltd. (Yieh Hsing), and Vulcan Industrial Corp. (Vulcan), which accounted for substantially all of the exports to the United States from Taiwan. We requested that Ornatube, Yieh Hsing, and Vulcan respond to section A by August 31, 1988 and sections B and C by September 16, 1988.

On September 1, 1988, we received Ornatube's response to section A of the questionnaire. On September 6, 8, and 15, 1988, we received additional information from Ornatube in response to section A. On September 9, 1988, we issued a deficiency letter regarding Ornatube's section A response, and requested a response by September 16, 1988. On September 12, 1988, at respondent's request, we extended the deadline for response to sections B and C until September 23, 1988. On September 16, again at respondent's request, we extended the due date for the response to the deficiency letter to September 19, 1988. On October 3 and 11, 1988, we received Ornatube's responses to sections B and C of the questionnaire. As a result of our analysis of Ornatube's response, we issued a deficiency letter on October 14, 1988, and met with counsel for Ornatube on October 17, 1988. We requested a response to the deficiency letter by October 24, 1988. On October 24, 1988, we received Ornatube's response to our deficiency letter. Ornatube provided additional information on November 8 and 10, 1988.

On September 1, and 6, we contacted counsel for respondents Yieh Hsing and Vulcan regarding their response to our questionnaire. We have received no response from Yieh Hsing or Vulcan.

Scope of Investigation

The United States developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the *Harmonized Tariff Schedule* (HTS) and all merchandise entered or withdrawn from warehouse for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate *Tariff Schedules of the United States Annotated* (TSUSA) item number(s) and the appropriate HTS item numbers with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all petitions filed with the Department through the end of this year. A reference copy of the HTS is available for consultation in the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Additionally, all U.S. Customs offices have reference copies, and petitioners may contact the import specialist at their local customs office to consult the schedule.

The product covered by this investigation is light-walled welded carbon steel pipes and tubes of rectangular (including square) cross-section, having a wall thickness of less than 0.156 inch, currently provided for under item number 610.4928 of the TSUSA and classifiable under item number 7306.60.5000 of the HTS.

Period of Investigation

The period of investigation for LWRT from Taiwan extends from January 1, 1988 to June 30, 1988.

Fair Value Comparisons

To determine whether Ornatube's sales in the United States of LWRT from Taiwan were made at less than fair value, we compared United States price with foreign market value, using the data provided in Ornatube's responses.

To determine whether Yieh Hsing's or Vulcan's sales in the United States of LWRT from Taiwan were made at less than fair value, we compared United States price, based on the best information available, with foreign market value, also based on the best information available. We used the best information available for Yieh Hsing and Vulcan, as required by section 776(c) of the Act, because appropriate responses were not submitted.

United States Price

For Ornatube, we based United States price on purchase price (PP), in accordance with section 772(b) of the Act, because the merchandise was sold to unrelated purchasers in the United States prior to its importation. We calculated Ornatube's purchase price based on the C&F, C&F&C, CIF, CIFC packed prices to U.S. customers. We adjusted for value-added taxes incurred on merchandise sold in the home market which have been related, or which have not been collected, by reason of the exportation of the merchandise to the United States. We made deductions from the tax-inclusive price, where appropriate, for inland freight, marine insurance, ocean freight, brokerage charges, and port charges.

Since neither Ysieh Hsing nor Vulcan responsed to our questionnaire, we did not have specific data as to the quantities and prices of the subject merchandise sold in the United States by the two companies. Therefore, we used the price information provided in the petition as the best information available, pursuant to section 776(c) of the Act. We used the packed United States price estimated by petitioner, minus deductions for freight, insurance, handling charges, and U.S. customs duty.

Foreign Market Value

In accordance with section 773(a)(1)(A) of the Act, we calculated Ornatube's foreign market value based on delivered C&F packed prices to unrelated purchasers in Taiwan. We made deductions to Ornatube's foreign market value, as appropriate, for inland freight and discounts. In accordance with § 353.15 of our regulations, we made a circumstance of sale adjustment to foreign market value for differences in credit expenses.

In this preliminary determination, we have allowed a circumstance of sale adjustment for export rebates resulting from China Steel's two-tier pricing system [*see, e.g., Certain Welded Carbon Steel Standard Pipe and Tube from India; Final Determination of Sales at Less than Fair Value*, 51 Fed. Reg. 9089 (March 17, 1987)]. The courts have sustained the authority of the Department to make adjustments for rebates such as the rebates granted by China Steel. *Sawhill Tubular Div., Cyclops Corp. v. United States*, 666 F. Supp. 1550 (Ct. Int'l Trade 1987); *cf. United States v. European Trading Co.*, 27 C.C.P.A. 289 (1940). Nevertheless, as we have encountered more and more two-tiered pricing schemes, we have

become concerned over the wisdom of exercising our discretionary authority to make circumstance of sale adjustments in a manner which indirectly may facilitate the maintenance of barriers to trade that give rise to such two-tiered pricing schemes. Therefore, prior to our final determination in this proceeding, we intend to reexamine our policy with respect to these types of adjustments. In this regard, we welcome comments from interested members of the public, as well as the parties to this proceeding.

In order to adjust for any differences in packing between the two markets, we deducted Taiwanese packing costs from foreign market value and added U.S. packing costs. We also made an adjustment for the differences between sales commissions in the U.S. and the indirect selling expenses in the home market.

We disallowed the following adjustments claimed by Ornatube. Due to insufficient information provided by responsdent, we disallowed Ornatube's claimed adjustment for differences in the physical characteristics of the merchandise with which there was no identical product in the home market with which to compare a product in the United States. We disallowed the portion of indirect selling expenses attributable to sales management salaries, since management costs are considered part of general and administrative expenses.

We received an inadequate explanation of the calculation methodology in Ornatube's response for packing costs and credit expenses in both the U.S. and Taiwanese markets. Therefore, we recalculated packing costs and credit expenses attributable to sales in both markets using information provided by respondent.

Since we did not have specific data with respect to the quantities and prices of the subject merchandise from Yieh Hsing and Vulcan, we used the constructed value of the subject merchandise provided in the petition as the best information available, pursuant to section 776(c) of the Act. The constructed value calculated in the petition was based on domestic producer's costs adjusted for differences in Taiwan manufacturing costs, with the statutorily mandated addition of 10 percent of the cost of manufacture for general expenses and 8 percent of the cost of manufacture and genereal expenses for profit.

Currency Conversions

In our calculations for Ornatube, we used the conversion rate in effect on the date of sale to convert New Taiwan dollars to United States dollars.

Verification

As provided in section 776(b) of the Act, we will verify all information used in reaching the final determination in this investigation.

Critical Circumstances

Petitioners allege that "critical circumstances" exist with respect to imports of LWRT from Taiwan. Under section 733(e)(1) of the Act, the Department must determine if there is a reasonable basis to believe or suspect that:

(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation; or

(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value; and

(B) there have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

Pursuant to section 733(e)(1)(B), we generally consider the following factors in determining whether imports have been massive over a relatively short period of time: (1) the volume and value of imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by imports.

Based on our analysis of the Department's import data, we find that there is a reasonable basis to believe or suspect that imports of LWRT from Taiwan have been massive over a relatively short period of time. Therefore, we determine that the requirements of section 733(e)(1)(B) are met.

We also reviewed recent antidumping duty cases, as well as antidumpting actions of other countries made available to us through the Antidumping Code Committee of the General Agreements on Tariffs and Trade, and found no evidence of dumping of LWRT by Taiwanese manufacturers, producers, or exporters in the United States or other countries. Therefore, we preliminarily determine that the requirements of section 733(e)(1)(A)(i) are not met.

We then considered whether the person by whom, or for whose account, the subject merchandise was imported knew or should have known that the exporter was selling the merchandise at less than its fair value. It has been our standard practice to impute knowledge of dumping when the estimated dumping margins in our determinations are of such magnitude that the importer knew, or should have known, that the subject merchandise was being sold at less than its fair value. Normally, we consider estimated margins of 25 percent or greater to be sufficient to impute knowledge of dumping [*see, e.g., Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Italy* (52 FR 24198—June 29, 1987)]. In this case, the estimated dumping margin calculated on the basis of the responses to our questionnaire is sufficiently large, even though there is no corporate relationship between the exporter and the importers, that the importers knew or should have known that the subject merchandise was being sold in the United States at less than its fair value. Accordingly, we find that the requirements of section 733(e)(1)(A)(ii) are met.

Therefore, we preliminarily determine that critical circumstances, within the meaning of section 733(e)(1) of the Act, exist with respect to imports of LWRT from Taiwan.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of LWRT from Taiwan, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption, on or after the date which is 90 days prior to the date of publication of this notice in the **Federal Register**, in accordance with section 733(e)(2) of the Act. The U.S. Customs Service shall require a cash deposit or posting of a bond equal to the estimated amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price, as shown below:

Manufacturere/Producer/Exporter	Weighted-average margin (percent)
Ornatube Enterprise Co., Ltd	25.86
Vulcan Industrial Corp	40.97
Yieh Hsing Industries, Ltd	40.97
All other manufacturers/producers/exporters	25.86

This suspension of liquidation will remain in effect until further notice.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this

investigation. We will allow the ITC access to all privileged and proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If our final determination is affirmative, then the ITC will determine no later than 120 days after the date of this preliminary determination or 45 days after the final determination, whichever is later, whether these imports are materially injuring, or threaten material injury to, an industry in the United States.

Public Comment

In accordance with 19 CFR 353.47, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on this preliminary determination at 2:00 p.m. on January 4, 1989, at the United States Department of Commerce, Room 3708, 14th Street and Constitution Avenue, NW., Washington DC 20230.

Individuals who wish to participate in the hearing must submit a request to the Assistant Secretary for Import Administration, Room B-099, at the above address within ten days of the publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; (3) the reasons for attending; and (4) a list of the issues to be discussed.

In addition, pre-hearing briefs in at least ten copies, both public and non-public versions, must be submitted to the Assistant Secretary by December 28, 1988. Oral presentations will be limited to issues raised in the briefs. All written views should be filed in accordance with 19 CFR 353.46, at the above address, in at least ten copies, not less than 30 days before the date of the final determination, or, if a hearing is held, within seven days after the hearing transcript is available.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f))

November 14, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-26871 Filed 11-18-88; 8:45 am]

BILLING CODE 3510-DS-M

[A-583-501]

Reinstitution of Antidumping Duty Investigation; 12-Volt Motorcycle Batteries From Taiwan

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: Based on a determination of the United States International Trade Commission (ITC), we are reinstituting our investigation on 12-volt motorcycle batteries from Taiwan. This investigation was terminated on the basis of a negative preliminary determination by the ITC on February 20, 1985. If this investigation proceeds normally, we will make our preliminary determination by February 16, 1989.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Mary S. Clapp, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377-3965.

SUPPLEMENTARY INFORMATION:

On February 7, 1985, we published a notice of Initiation of Antidumping Duty Investigation on 12-Volt Motorcycle Batteries from Taiwan (50 FR 5286). We initiated the investigation on the basis of a petition filed in proper form on January 11, 1985, by the General Battery Corporation, on behalf of the U.S. industry producing 12-volt motorcycle batteries. On January 15, 1985, the petition was amended to include Yuasa-General Battery Corporation as a co-petitioner. The petitioner is now Yuasa-Exide Battery Corporation, a successor entity to the original petitioners. In compliance with the filing requirements of section 353.36 of the Commerce Regulations (19 CFR 353.36), the petition alleged that imports of the subject merchandise from Taiwan are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Tariff Act of 1930, as amended (the Act), and that these imports are causing material injury, or threaten material injury, to a U.S. industry.

The petitioner based the United States price on 1984 list prices for sales from Taiwan to the United States. Where appropriate, f.o.b. prices were adjusted to ex-factory prices by deducting estimated transportation charges.

The petitioner based foreign market value on 1980 list prices updated according to official Taiwan commodity price and labor wage indices and quoting adjustments based on experience from the 1981 investigation on motorcycle batteries.

Based on the comparison of prices calculated using the foregoing sources and methodology, the petitioner alleged an average dumping margin of 12 percent for 12-volt motorcycle batteries.

On March 6, 1985, the ITC published a Negative Determination of Reasonable Indication of Injury on this product (50 FR 9141). At that time, the ITC determined, pursuant to section 733(a) of the Act, that there was no reasonable indication that an industry in the United States was materially injured or threatened with material injury, nor that the establishment of an industry in the United States was materially retarded, by reason of imports from Taiwan of 12-volt motorcycle batteries, provided for in item 683.05 of the *Tariff Schedules of the United States*, which were alleged to be sold in the United States at less than fair value.

On September 29, 1988, the ITC informed the Department that it had now found a reasonable indication of threat of material injury to the United States industry producing 12-volt motorcycle batteries. This determination was made pursuant to the decision and order of the Court of International Trade in *Yuasa-General Battery Corp. v. United States* (Slip Op. 88-89, July 12, 1988). This decision is final and is not being appealed.

Based on the foregoing, we are reinstituting our antidumping duty investigation on 12-volt motorcycle batteries from Taiwan.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the *Harmonized Tariff Schedule* (HTS) and all merchandise entered or withdrawn from warehouse for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate *Tariff Schedules of the United States Annotated* (TSUSA) item number(s) and the appropriae HTS item number(s) with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and customs purposes. The written description remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all petitions filed with the Department through the end of this year. A reference copy of the HTS is available for consultation in the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Additionally, all U.S. Customs officers have reference copies, and petitioners may contact the Import Specialist at their local customs office to consult the schedule.

The products covered by this investigation are 12-volt motorcycle batteries. Motorcycle batteries are lead-acid storage batteries which are rated from 2 to 32 ampere hours (10 hour rate) with voltage levels of either 6 or 12 volts. This investigation is limited to 12-volt motorcycle batteries. The batteries are mainly used as replacement batteries for motorcycles, but may, to a very limited extent, be used in snowmobiles, lawnmowers, and other such equipment. They are currently provided for under TSUSA item numbers 683.0110 and 683.0120 and currently classifiable under HTS item number 8507.10.00. These products were formerly provided for under TSUS item numbers 683.01 and 683.05.

Other Information

If this investigation proceeds normally, we will make our preliminary determination by February 16, 1989.

This notice is published pursuant to section 732(c)(2) of the Act.

November 14, 1988.

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-26866 Filed 11-18-88; 8:45 am]

BILLING CODE 3510-DS-M

[C-557-803]

Final Negative Countervailing Duty Determinations; Standard Pipe, Line Pipe, Light-walled Rectangular Tubing and Heavy-walled Rectangular Tubing From Malaysia

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that *de minimis* countervailable benefits are being provided to manufacturers, producers, or exporters in Malaysia of standard pipe and light-walled rectangular tubing (LWRT), and that no benefits which constitute bounties or grants within the meaning of the countervailing duty law are being provided to manufacturers, producers, or exporters of heavy-walled rectangular tubing (HWRT). We also determine that no benefits within the meaning of the countervailing duty law are applicable to line pipe because we found no evidence to indicate that there are any producers or exporters in Malaysia which export line pipe to the United States. These products, which constitute four separate "classes or kinds" of merchandise, are fully described in the "Scope of Investigations" section of this notice.

Since the estimated net bounties or grants on standard pipe, line pipe, LWRT and HWRT are either *de minimis* or zero, our determinations are negative. Since our preliminary determination with respect to standard pipe was affirmative, we will direct the U.S. Customs Service to discontinue suspension of liquidation of all entries of standard pipe from Malaysia that were entered, or withdrawn from warehouse, for consumption on or after September 8, 1988, and to refund all estimated countervailing duties deposited on these entries.

EFFECTIVE DATE: November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Kay Halpern or Barbara Tillman, Office of Countervailing Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-0192 or 377-2438.

SUPPLEMENTARY INFORMATION:

Final Determinations

Based on our investigations, we determine that *de minimis* countervailable benefits are being provided to manufacturers, producers, or exporters in Malaysia of standard pipe and LWRT, and that no benefits which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (the Act), are being provided to manufacturers, producers, or exporters in Malaysia of HWRT. We also determine that no countervailable benefits are applicable to line pipe because we found no evidence to indicate that there are any producers or exporters in Malaysia which export line pipe to the United States.

For purposes of the investigation of standard pipe, the following program is found to be countervailable:

- Allowance of a Percentage of Net Taxable Income Based on the F.O.B. Value of Export Sales

For purposes of the investigation of LWRT, the following program is found to be countervailable:

- Export Credit Refinancing

We determine the estimated net bounty or grant for standard pipe to be *de minimis* (0.30 percent *ad valorem*) for all manufacturers, producers and exporters in Malaysia. We determine the estimated net bounty or grant for LWRT for all manufacturers, producers and exporters in Malaysia to be *de minimis* (0.002 percent *ad valorem*). We determine the estimated net bounty or grant for line pipe and HWRT for all manufacturers, producers and exporters in Malaysia to be zero.

Case History

Since the last **Federal Register** publication pertaining to these investigations [the Notice of Preliminary Determinations (53 FR 34801, September 8, 1988)], we conducted verification at the government and company offices in Malaysia from September 12 through 23, 1988. Case briefs and rebuttal briefs were received on October 25, 1988 and October 27, 1988, respectively.

Scope of Investigations

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the *Harmonized Tariff Schedule* (HTS) and all the merchandise entered or withdrawn from warehouse for consumption on or after that date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate *Tariff Schedules of the United States Annotated* (TSUSA) item number(s) and the appropriate HTS item number(s) with its product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and Customs purposes. The Department's written description of the products under investigation remains dispositive as to the scope of the product coverage.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all petitions filed with the Department through the end of this year. A reference copy of the HTS is available for consultation in the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Additionally, all U.S. Customs offices have reference copies, and petitioners may contact the import specialist at their local Customs office to consult the schedule.

The products covered by these investigations constitute four separate "classes or kinds" of merchandise. The four separate "classes or kinds" are as follows:

(1) Certain circular welded carbon steel pipes and tubes, 0.375 inch or more but not over 16 inches in outside diameter, generally known in the industry as standard pipe. This is a general-purpose commodity used in such applications as plumbing pipe, sprinkler systems, and fence posts. Standard pipe may be supplied with an oil coating (black pipe) or may be galvanized, and is sold in plain, threaded, threaded and coupled, or beveled ends. These products are generally produced to American Society of Testing Materials (ASTM) specifications A–53, A–120, or A–135. Imports of these products are classified under TSUSA categories 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925, and are classified under HTS categories 7306.30.1000, 7306.30.5025, 7306.30.5030, 7306.30.5040, 7306.30.5045, 7306.30.5050, 7306.30.5060, 7306.30.5065, 7306.30.5070, and 7306.30.5075.

(2) Certain welded carbon steel American Petroleum Institute (API) line pipe, 0.375 inch or more but not over 16 inches in outside diameter known in the industry as line pipe. Line pipe generally is produced to API specification 5L. Line pipe is used for the transportation of gas, oil, or water, generally in pipeline or utility distribution systems. API line pipe not over 16 inches in outside diameter is classified under TSUSA categories 610.3208 and 610.3209, and is classified under HTS categories 7306.10.1010 and 7306.10.1050.

(3) Certain heavy-walled carbon steel rectangular tubing having a wall thickness of 0.156 inch or greater, which is generally used for support members for construction or load-bearing purposes in construction, transportation, farm, and meterial-handling equipment. The product is generally produced to ASTM specification A–500, Grade B. Imports of heavy-walled rectangular tubing are classified under TSUSA category 610.3955, and are classified under HTS category 7306.60.1000.

(4) Certain light-walled carbon steel rectangular tubing having a wall thickness of less than 0.156 inch, which is generally employed in a variety of end uses other than the conveyance of liquid or gas, such as agricultural equipment frames and parts, and furniture parts. The product is generally produced to ASTM specification A–513 or A–500, Grade A. Imports of light-walled rectangular tubing are classified under TSUSA category 610.4928, and are classified under HTS category 7306.60.5000.

Analysis of Programs

We verified that all three respondent companies, Maruichi Malaysia Steel Tube Bhd. (Maruichi), Amalgamated Industrial Steel Bhd. (AIS) and Steel Pipe Industry of Malaysia (SPIM), produce and export standard pipe to the United States. We also verified that only AIS produces and exports LWRT and HWRT to the United States. Finally, we found no evidence at verification to indicate that there are any producers or exporters in Malaysia which exported line pipe to the United States during or after the review period.

For purposes of these determinations, the period for which we are measuring bounties or grants ("the review period") is calendar year 1987, which corresponds to the most recently completed fiscal year of one of the respondent companies. The other two respondent companies each have different fiscal years which overlap this period. In accordance with our practice in such situations, we have chosen the most recently completed calendar year as our review period.

Based upon our analysis of the petition, the responses to our questionnaries, verification, and written comments from petitioners and respondents, we determine the following:

I. Programs Determined To Confer Bounties or Grants

A. We determine that bounties or grants are being provided to manufacturers, producers or exporters in Malaysia of standard pipe under the following program:

Allowance of a Percentage of Net Taxable Income Based on the F.O.B. Value of Export Sales

Effective in 1984, section 29 of the Investment Incentives Act of 1968 was amended to allow for a flat deduction or allowance of five percent of export revenues (based on F.O.B. value) from taxable income. Due to the enactment of the Promotion of Investments Act of 1986, this program, provided for under section 39 of the 1986 Act, currently applies only to trading companies and agricultural companies.

However, Maruichi was able to claim the section 29 allowance on its tax return filed during the review period. This return was based on Maruichi's fiscal year completed in 1986 (February 1, 1985—January 31, 1986). The Malaysian tax authorities allowed only those exports shipped through December 31, 1985, to be used for the allowance claim. Because only exporters are eligible for the program, we determine that it is countervailable.

To calculate the benefit from this program, we divered Maruichi's tax savings from the program by the respondent companies' total exports during the review period in accordance with section 706(a)(2) of the Act, which requires us to calculate a country-wide rate for purposes of determining whether an investigation results in an affirmative or a negative determination. The country-wide rate includes all respondent companies because we verified that each company exports standard pipe to the United States. We divided the tax savings by the respondents' total exports because the program is not segregable by product or market. The resulting estimated net bounty or grant rate is 0.30 percent *ad valorem.*

In the preliminary determination on standard pipe we had calculated a bounty or grant rate for the review period of 1.17 percent *ad valorem.* We obtaining this rate by dividing Maruichi's section 29 allowance tax savings by its total exports during the review period. We excluded from this calculation all respondent companies with *de minimis* rates. We now have determined that the more appropriate way of calculating the bounty or grant rate is to include companies with *de minimis* rates in our determination of the country-wide rate (see *DOC Position* on *Comment 2*).

This rate is only applicable to standard pipe because Maruichi exported only standard pipe to the United States during the review period. The rate for this program appolicable to LWRT and HWRT is zero because AIS, the only respondent which exported these products to the United States during the review period, did not claim benefits under this program on its tax return filed during the review period.

On January 1, 1986, the Government of Malaysia terminated the Allowance of a Percentage of Net Taxable Income Based on the F.O.B. Value of Export Sales, except with regard to trading and agricultural companies. This termination was implemented through the passage of the Promotion of Investments Act of 1986. The Government replaced the Allowance with a new program applicable to exports made on or after January 1, 1986. The new program, provided for under Section 36 of the 1986

Act, is the "Abatement of Taxable Income Based on the Ratio of Export Sales to Total Sales and Abatement of Five Percent of the Value of Indigenous Materials Used in Exports." It provides for an abatement of adjusted income for exports. The amount of adjusted income to be abated is: (1) A rate equivalent to 50 percent of the ratio of export sales to total sales; and (2) five percent of the value of indigenous Malaysian materials incorporated in the manufacture of exported products. This program is only applicable if there is adjusted income and cannot be carried forward if there is an adjusted loss. It is not available to companies still participating in programs under the repealed Investment Incentives Act of 1968, including pioneer status, or to companies granted pioneer status or an investment tax allowance under the Promotion of Investments Act of 1986.

We verified that Maruichi and AIS claimed the first section of the Abatement on their tax returns filed in 1988. However, since these benefits were not claimed until after the review period, they do not affect our net bounty or grant determination. We must look at a finite period of time in making our determination as to whether countervailable benefits are above a *de minimis* rate. During the review period the countervailable tax benefits realized by the respondent companies were *de minimis*. Since the export tax allowance program was the only countervailable program used during the review period, we have no basis to issue an affirmative determination on standard pipe. Furthermore, we note that we can not at this time determine whether the benefits from the Abatement program would be above *de minimis* after the review period.

In our preliminary determination on standard pipe we estimated a duty deposit rate for Maruichi for the Abatement program by dividing its 1988 tax savings by its 1987 sales. We used the 1987 sales as a surrogate for 1988 sales in order to estimate the eventual duty liability. However, as described above, for purposes of our final determination on standard pipe we have now determined that the countervailable benefits during the review period are *de minimis*, and that there is, therefore, no basis to issue a countervailing duty order on standard pipe. Accordingly, the issue as to the appropriate duty deposit rate is moot.

B. We determine that bounties or grants are being provided to manufacturers, producers or exporters in Malaysia of LWRT under the following program:

Export Credit Refinancing

The Bank Negara Malaysia, the central bank of Malaysia, provides short-term export credit refinancing through commercial banks. The Export Credit Refinancing (ECR) programs, as revised in January 1986, provide pre- and post-shipment financing of exports for periods of up to 90 days. In December 1987, the maximum periods for financing under these programs were extended to 120 and 180 days, respectively. Currently, ECR offers order-based pre- and post-shipment financing and "certificate of performance" (CP) based pre-shipment financing. Order-based financing is provided on specific sales to specific markets. CP-based financing, which is a line of credit based on the previous 12 months' export performance, cannot be tied to specific sales in specific markets.

We verified that AIS is the only respondent company which paid interest on an Export Credit Refinancing loan for exports to the United States during the review period. The company received an order-based ECR loan on one shipment of LWRT to the United States. Because only exporters are eligible for ECR loans, we determine that they are countervailable to the extent that they are provided at preferential rates.

In order to determine whether the loan received by AIS was provided at a preferential rate, we compared the interest rate charged to our short-term loan benchmark interest rate. As a benchmark for short-term loans, it is our practice to use the most comparable, predominant commercial rate for short-term financing. For purposes of these determinations, we are using the 90-day Bankers' Acceptance (BA) rate as the most comparable and commonly used alternative source of short-term financing. This is the benchmark that we applied in *Final Affirmative Countervailing Duty Determination: Carbon Steel Wire Rod from Malaysia* (53 FR 13303, April 22, 1988) (*Wire Rod*), the last investigation in which this program was used. Based on this comparison, we find that the ECR loan was provided at a preferential rate and, therefore, is countervailable.

To calculate the benefit from the ECR loan on which AIS paid interest in 1987, we followed the short-term methodology which has been applied consistently in our past determinations and is described in more detail in the *Subsidies Appendix* attached to the notice of *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order* (49 FR 18006, April 26, 1984).

We compared the amount of interest actually paid during the review period to the amount that would have been paid at the benchmark rate. Because order-based ECR loans are shipment-specific, we included only that loan which financed exports of the products under investigation to the United States (in this case, LWRT). For this loan, we calculated the amount of interest that would have been paid using the BA benchmark and subtracted the amount of interest that was actually paid. We divided the result by AID's exports of LWRT to the United States during the review period. The result was a rate of 0.002 percent *Ad valorem*. This rate is only applicable to LWRT because the loan received by AIS was for a shipment of this product.

II. Program Determined Not To Confer a Bounty or Grant

We determine that bounties or grants are not being provided to manufacturers, producers or exporters in Malaysia of standard pipe, line pipe, LWRT or HWRT under the following program:

Accelerated Depreciation Allowance

The Accelerated Depreciation Allowance (ADA) was introduced in the mid-1970s. Since then, it has gone through several revisions, the most recent being a change from allowing an 80 percent annual depreciation on approved assets (thus providing a 100 percent tax write-off for these assets in the first year, since the initial allowance is 20 percent), to reducing the annual allowance to 40 percent (thereby spreading the tax write-off over two years). This revision was implemented with respect to assets purchased after January 1, 1986, according to Rules 1986 of the Income Tax Act of 1967. The allowance applies to plant and machinery.

We verified that there are no restrictions as to which companies can claim the ADA. In addition, we found that there are no qualifying or application procedures associated with the claim and that the Government has no discretion to vary the level of the allowance (40 percent for all companies). Moreover, we found no distinctions within the manufacturing sector as to which companies have claimed the ADA. We thus determine that this program is not limited to a specific enterprise or industry or group of enterprises or industries and, therefore, is not counteravailable.

III. Programs Determined Not To Be Used

Based on verified information, we determine that manufacturers, producers, or exporters in Malaysia of the pipe and tube products under investigation did not apply for, claim or receive benefits during the review period for exports of these products to the United States under the programs listed below. The program descriptions given below are based on verified information. Programs not described below are fully described in the notice of preliminary determinations in these investigations (53 FR 34801, September 8, 1988).

A. Export Tax Incentives

1. *Abatement of Five Percent of the Value of Indigenous Materials Used in Exports.* Section 36 of the Promotion of Investments Act of 1986 provides for an abatement of adjusted income for exports. The amount of adjusted income to be abated is: (1) A rate equivalent to 50 percent of the ratio of export sales to total sales; and (2) five percent of the value of indigenous Malaysian materials incorporated in the manufacture of exported products. Maruichi made a claim under the first section of this program on its tax return filed in 1988 (see section I. of the notice), but did not make a claim under the second. This program is not available to companies still participating in programs under the repeal Investment Incentives Act of 1968, including pioneer status, or to companies granted pioneer status of an investment tax allowance under the Promotion of Investments Act of 1986.

2. *Allowance of Taxable Income of Five Percent for Trading Companies Exporting Malaysian-made Products.* Under section 39 of the Promotion of Investments Act of 1986, an allowance of five percent of the F.O.B. value of export revenues is available to trading companies and agricultural companies exporting Malaysian-made products. This program, like the abatement based on indigenous materials used in exports, is not available to companies still participating in programs under the repealed Investment Incentives Act of 1968, including pioneer status, or to companies granted pioneer status or an investment tax allowance under the Promotion of Investments Act of 1986.

3. *Double Deduction for Export Credit Insurance Payments.*

4. *Double Deduction for Export Promotion Expenses.*

5. *Industrial Building Allowance.*

B. Other Export Incentive

Export Insurance Program.

C. Other Tax Incentives

1. *Pioneer Status Under the Investment Incentives Act of 1968.* Pioneer status under this Act, as amended, is available to companies producing a product (1) with favorable prospects for further development, including development for export, or (2) currently being produced in insufficient quantities to meet the development needs of Malaysia, including export. Benefits granted under pioneer status include exemptions on the portion of income derived from sales of the pioneer product from the following: (1) The 40 percent corporate income tax; (2) the five percent development tax; and (3) the three percent excess profits tax. Pioneer status benefits are available for a period of up to five years and may be extended for up to an additional three years. This program is not available to companies granted pioneer status for the same product under the Promotion of Investments Act of 1986. It is also not available to companies which received an investment tax credit under the Investment Incentives Act of 1968 or which received an investment tax allowance under the 1986 Act.

We verified that all three respondent companies received pioneer status in the 1970s and that they completely utilized any residual benefits remaining from this program before the review period.

2. *Pioneer Status Under the Promotion of Investments Act of 1986.* As stated above, the Promotion of Investments Act of 1986 replaced the Investment Incentives Act of 1968. Companies which received pioneer status under the 1968 Act may not receive it again under the 1986 Act for the same product. They may, however, receive it again under the 1986 Act for a different product. In addition, pioneer status under the 1986 Act is not available to companies which received an investment tax credit under the 1968 Act or which received an investment tax allowance under the 1986 Act.

The primary changes in the pioneer status program under the new law are as follows: (1) The initial grant of pioneer status is five years for all companies, regardless of their level of investment; (2) the product must be on the "promoted product" or "promoted activities" list; (3) specific one-year extensions for location, priority products, and Malaysian content have been eliminated; (4) extensions are now granted for five years if the product is on the "promoted product" list for extensions and the company meets certain investment, employment, or development criteria; and (5) pioneer status may also be provided to non-corporate entities such as cooperative societies, associations, etc. We verified that none of the respondent companies have been approved for pioneer status under the 1986 Act.

3. *Investment Tax Allowance.*

4. *Reinvestment Allowance.*

D. Medium- and Long-term Government Financing

E. Reduction in the Cost of State Land for New Industry

F. Preferential Financing for Bumiputeras

Interested Party Comments

Comment 1

Petitioners argue that we should use a weighted-average rate for overdrafts and Bankers Acceptances (BAs) combined as the benchmark for calculating benefits from ECR financing. They allow that BA financing is "comparable" to ECR financing but contend that the BA rate alone should not be used because BAs are not the "predominant" form of short-term financing in Malaysia. In support of their contention, they cite *Final Affiramtive Countervailing Duty Determination: Carbon Steel Wire Rod From Malaysia* (53 FR 13303, April 18, 1988) (*Wire Rod*), where the Department used "the most comparable, predominant commercial rate for short-term financing" as the benchmark for the ECR loan program.

Respondents claim that BA financing is the commercial equivalent of ECR financing and, therefore, the BA rate is the most appropriate benchmark for calculating benefits from ECR financing.

DOC Position

In calculating benefits from short-term loans, the Department uses the most appropriate national average commercial method of short-term financing (see, for example, the *Subsidies Appendix*). In *Wire Rod*, the BA rate was used as the benchmark for calculating benefits from ECR loans because BA financing was found to be the predominant alternative to ECR financing. In the current investigation we verified at the Bank Negara, Malaysia's central bank, and at a commercial bank that BA financing is the predominant alternative to ECR financing. Therefore, we consider the BA rate the most appropriate rate to use as our benchmark.

Comment 2

Petitioners argue that the Department should obtain a final bounty or grant rate for standard pipe by calculating an individual rate for Maruichi, as it did in

the preliminary determination. They cite section 607 of the Act (19 U.S.C. 1671e(a)(2)), which allows the Department to calculate separate rates for different companies if there is a "significant differential between companies receiving subsidy benefits." They further contend that it has been the Department's practice to find a significant differential between companies when one received *de minimis* benefits and another received benefits that are above *de minimis*. In support of their argument, they cite *Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Hollow Products from Sweden* (52 Fr 5794, February 1987), among other cases, in which significant differentials were found and only the sales of non-*de minimis* companies were used in calculating the subsidy rate.

Respondents claim that the Department should calculate a final rate for standard pipe by allocating Maruichi's tax benefits received during the review period over all respondent companies' sales. They cite *Ceramica Regiomontana, S.A. v. United States* (7 ITRD 2512, CIT 1986), in which the Court of International Trade ruled that "Congress has endorsed a legislative presumption in favor of a country-wide rate." They also refer to the Department's proposed regulations, which interpret the term "significant differential" to allow for company-specific rates only if there is "a difference of the greater of at least 10 percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis."

DOC Position

Section 706(a)(2) of the Act creates a presumption in favor of country-wide rates. This presumption is overcome if the Department determines there is a significant differential between companies receiving subsidy benefits. In this regard, Congress directed the Department to develop a "reasonable" standard for determining what is a significant differential. *See* H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 180 (1984).

Section 355.20(d)(3) of our proposed countervailing duty regulations (50 FR 24217, 24225 (1985)) defines a significant differential as "a difference of the greater of at least 10 percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis." It is also our practice, as the cases cited by petitioners suggest, to define a significant differential as the difference between a net subsidy of zero (or *de minimis*) and any rate greater than *de minimis*. However, before we will consider the question of a significant differential, we must first test the presumption in favor of country-wide rates. Thus, the initial step in the Department's calculation of the net subsidy is to determine the country-wide average rate. In the past, we have excluded companies with *de minimis* rates in determining the country-wide rate. We now determine that the more appropriate basis to calculate the country-wide rate is to include all companies regardless of the level of benefits for each company.

If the country-wide average is *de minimis*, our determination in an investigation will be negative. If the country-wide average is above *de minimis*, we then compare individual company rates with the country-wide average rate to determine whether significant differentials exist. Because we also consider individual rates of zero and *de minimis* to constitute a "significant differential," we remove all zero and *de minimis* companies (as well as other companies with significantly different rates) from the calculation of the country-wide average rate. As soon as at least one company is removed from the country-wide rate average, we no longer use the country-wide rate for duty deposit purposes. Rather, we assign individual company-specific rates to those companies that are "significantly different" (including zero rate and *de minimis* companies); the remaining companies form the basis of the "all other" rate. An "all other" rate is different from a country-wide rate because an "all other" rate is not based on all companies. There are three exceptions to this general practice: (1) An investigation does not cover virtually all exports of the merchandise to the United States; (2) we have no company-specific export data, only aggregate export data from a government; and (3) we use generally recognized sampling techniques.

Since none of these three exceptions apply to these investigations and since the country-wide rates for our investigations of standard pipe and LWRT are *de minimis*, we did not reach the question of whether there is a significant differential between the companies receiving countervailable benefits. Therefore, our determinations in these investigations are negative.

Comment 3

Respondents argue that the tax benefits received by Maruichi and AIS on their returns filed in 1988 should not be considered in making our final determination for standard pipe because these returns were filed after the review period. They contend that the Department's policy has been to treat benefits from income tax programs as accruing in the year in which the tax return claiming the benefits is filed.

DOC Position

The Department's practice for tax programs is to calculate benefits based on when the respondent companies realize or know the extent of their tax savings. Generally, as here, the amount of tax savings is not known until the tax return is filed. As noted in section I.A. of the notice, the countervailable tax benefits realized by the respondent companies during the review period were *de minimis*. Since the export tax allowance program was the only countervailable program used during the review period, we have no basis to issue an affirmative determination on standard pipe. While post-review period information can be used to determine whether there has been a program-wide change for purposes of calculating a duty deposit rate in an affirmative determination, such information cannot be used as the basis for obtaining an affirmative determination. Therefore, since the estimated net bounty or grant rate for the review period is negative for standard pipe, there is no reason to calculate a separate duty deposit rate based on post-review period information.

Comment 4

Respondents claim that the tax allowance benefit received by Maruichi was not generated by U.S. sales since the fiscal year covered by Maruichi's 1987 return was February 1, 1985—January 31, 1986, and Maruichi began exporting to the United States in the last quarter of 1987.

DOC Position

Since our determination for standard pipe is negative, the issue is moot. In calculating the benefit bestowed by a tax program, it is our practice to apply the tax savings from the return filed during the review period to review period sales, regardless of the fiscal year covered by the tax return.

Verification

We verified the information used in making our final determinations in accordance with section 776(b) of the Act. We used standard verification

procedures including meetings with government and company officials and examination of relevant accounting records and original source documents of the respondents. Our verification results are outlined in the public versions of the verification reports which are on file in the Central Records Unit (Room B-099) of the Main Commerce Building.

Suspension of Liquidation Discontinued

The estimated net bounty or grant rate for standard pipe is 0.30 percent *ad valorem*. The estimated net bounty or grant rate for LWRT is 0.002 percent *ad valorem*. Under section 355.8 of our regulations, an aggregate net subsidy of less than 0.5 percent *ad valorem* is considered *de minimis*.

The estimated net bounty or grant rate for HWRT is zero because no bounties or grants were conferred on the export of this product to the United States during the review period. The estimated net bounty or grant rate for line pipe is zero because we verified that there were no exports of this product from Malaysia to the United States during the review period.

For the above reasons, we are directing the U.S. Customs Service to discontinue suspension of liquidation of all entries of standard pipe from Malaysia that we entered, or withdrawn from warehouse, for consumption on or after September 8, 1988, and to refund all estimated countervailing duties deposited on these entries. Since the determinations on line pipe, HWRT and LWRT are also negative, no suspension of liquidation will be required for these products.

These determinations are published pursuant to section 705(d) of the Act (19 U.S.C. 1671d(d)).

Jan W. Mares,

Assistant Secretary for Import Administration.

[FR Doc. 88-26869 Filed 11-18-88; 8:45 am]

BILLING CODE 3510-DS-M

Articles of Quota Cheese; Changes in and Additions to Listing of Foreign Government Subsidies

AGENCY: International Trade Administration/Import Administration Commerce.

ACTION: Publication of changes in and additions to list of certain foreign government subsidies on articles of quota cheese.

SUMMARY: The Department of Commerce, in consultation with the Secretary of Agriculture, has determined that there have been changes in cerain foreign government subsidies on articles of quota cheese. We are publishing a listing of those changes.

EFFECTIVE DATE: October 14, 1988.

FOR FURTHER INFORMATION CONTACT: Patricia W. Stroup or Paul J. McGarr, Office of Countrvailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION: Section 702(a)(3) of the Trade Agreements Act of 1979 ("the TAA") requires the Department of Commerce ("the Department") to determine, after receipt of information or advice from any person, including the Secretary of Agriculture, whether any foreign government is providing a subsidy with respect to any article of quota cheese (as defined in section 701(c)(1) of the TAA), or whether there have been changes in subsidies previously included in the Department's annual listing or quarterly update to that annual listing, and to publish notification of any such additions or modifications.

On October 13, 1988, the Department of Agriculture notified the Department of changes in the amounts of subsidies (as defined in section 702(h)(2) of the TAA) being provided by the European Community ("E.C.") on articles of quota cheese.

The Department has now determined, in consultation with the Secretary of Agriculture, that the subsidy amounts have increased for E.C. member countries since our October 1, 1988 quarterly update to our annual subsidy list. The appendix to this notice lists the countries, the subsidy program, and the current gross and net amount of the subsidies.

The Department will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy program listed, as the information is developed.

The Department encourages any person having information on foreign government subsidy programs which benefit articles of quota cheese to submit such information in writing to the Assistant Secretary for Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

This determination and notice are in accordance with section 702(a) of the TAA (19 U.S.C. 1202 *note*).

Date: November 9, 1988.

Timothy N. Bergan,

Acting Assistant Secretary Import Administration.

Appendix—Quota Cheese Subsidy Programs

Country	Programs(s)	Gross [1] subsidy	Net [2] subsidy
Belgium	European Community (EC) Restitution Payments	22.5¢/lb.	22.5¢/lb.
Denmark	EC Restitution Payments	28.4¢/lb.	28.4¢/lb.
France	EC Restitution Payments	23.1¢/lb.	23.1¢/lb.
Greece	EC Restitution Payments	0.0¢/lb.	0.0¢/lb.
Ireland	EC Restitution Payments	65.8¢/lb.	65.8¢/lb.
Italy	EC Restitution Payments	59.4¢/lb.	59.4¢/lb.
Luxembourg	EC Restitution Payments	22.5¢/lb.	22.5¢/lb.
Netherlands	EC Restitution Payments	28.9¢/lb.	28.9¢/lb.
Portugal	EC Restitution Payments	24.0¢/lb.	24.0¢/lb.
Spain	EC Restitution Payments	26.1¢/lb.	26.1¢/lb.
U.K.	EC Restitution Payments	24.8¢/lb.	24.8¢/lb.
W. Germany	EC Restitution Payments	35.3¢/lb.	35.3

[1] Defined in 19 U.S.C. 1677(5).
[2] Defined in 19 U.S.C. 1677(6).

[FR Doc. 88-26868 Filed 11-18-88; 8:45am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Deep Seabed Mining; Environmental Reference Area; Ocean Mining Associates

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Designation of expanded deep seabed mining environmental reference area.

SUMMARY: On March 3, 1988, at 53 FR 6858, the National Oceanic and Atmospheric Administration (NOAA) announced Ocean Mining Associates' (OMA) proposal of an interim preservational reference area within OMA's Deep Seabed Hard Mineral Resources Exploration License USA–3. Concern that mining in adjacent areas could affect the reference area led to a NOAA designation of this area as an environmental reference area on May 16, 1988, at 53 FR 17237. At that time NOAA noted its intention to use the area for study, while further proceeding to evaluate its potential as a provisional interim preservational reference area (PIPRA). (Subsequent to this announcement, NOAA noticed OMA's proposal of a provisional impact reference area on September 7, 1988, at 53 FR 34572. This latter area is separate from the subject of this notice.)

OMA originally identified 6,520 km² within its license site as an area to be set aside as a "preserve" for environmental monitoring. Because of the concern noted above, OMA and two neighboring NOAA licensees have now added enough additional area to more than double the size of the original environmental reference area. OMA's supplemental area is 2,063 km² in size; that of the Kennecott Consortium, 2,998 km², and Ocean Minerals Company, 3,576 km². NOAA believes it is likely that this expanded environmental reference area of 15,157 km² could become a valuable preservational area for environmental studies of deep-sea biota; one that could serve as an excellent control area against which the extent of commercial mining's impact on deepsea marine life can be compared. The next step will be inspection of data to validate this belief.

All three consortia have agreed to release all resource and environmental data associated with their contributed areas for NOAA's evaluation and for public examination. NOAA is currently acquiring these data and will analyze them in the coming months for suitability toward final designation of the expanded environmental reference area as a PIPRA, and possibly a joint PIPRA applicable to all three license sites.

Coordinates for each consortium's contribution to this expanded environmental reference area are as follows:

OCEAN MINING ASSOCIATES.—ENVIRONMENTAL REFERENCE AREA WITHIN USA–3

Turning points	Latitude (North)	Longitude (West)
1	14°10′	128°5′
2	14°10′	128°0′
3	12°32.5′	128°0′
4	12°32.5′	128°35′
5	13°34.56′	128°35′
6	13°34.56′	128°15′
7	13°55′	128°15′
8	13°55′	128°10′
9	14°0′	128°10′
10	14°0′	128°5′
1	14°10′	128°5′

KENNECOTT CONSORTIUM.—ENVIRONMENTAL REFERENCE AREA WITHIN USA–4

Turning points	Latitude (North)	Longitude (West)
1	13°30′	128°00′
2	13°30′	127°45′
3	12°30′	127°45′
4	12°30′	128°00′
1	13°30′	128°00′

OCEAN MINERALS COMPANY.—ENVIRONMENTAL REFERENCE AREA WITHIN USA–1

Turning points	Latitude (North)	Longitude (West)
1	13°20.2′	128°57.5′
2	13°20.2′	128°35′
3	12°32.5′	128.35′
4	12°32.5′	128°57.5′
1	13°20.2′	128°57.5′

NOAA invites public inquiry and participation in this effort. The data should be on hand in early 1989 for inspection in the office noted below. Alternatively, summaries of the environmental data and other information should be available by mid-year and may be obtained from the following persons.

FOR FURTHER INFORMATION CONTACT: James P. Lawless or John W. Padan, Ocean Minerals and Energy Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Suite 710, Washington, DC 20235, (202) 673–5117.

John J. Carey,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 88–26771 Filed 11–18–88; 8:45 am]

BILLING CODE 3510–12–M

COMMISSION OF FINE ARTS

Cancellation of Meeting

The Commission of Fine Arts' meeting scheduled for November 17, 1988, is cancelled. Our next scheduled meeting is Thursday, December 15, 1988, at 10:00 a.m. in the Commission's offices at 708 Jackson Place, NW., Washington, DC 20006 to discuss various projects affecting the appearance of Washington, DC, including buildings, memorials, parks, etc.; also matters of design referred by other agencies of the government. Handicapped persons should call the Commission offices (566–1066) for details concerning access to meetings.

Inquires regarding the agenda and requests to submit written or oral statements should be addressed to Charles H. Atherton, Secretary, Commission of Fine Arts, at the above address or call the above number.

Dated in Washington, DC, November 8, 1988.

Charles H. Atherton,

Secretary.

[FR Doc. 88–26845 Filed 11–18–88; 8:45 am]

BILLING CODE 6330–01–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcing 1989 Agreement Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Hong Kong

November 16, 1988.

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

ACTION: Notice.

AUTHORITY: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854)

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and

Apparel, U.S. Department of Commerce, (202) 377–4212.

SUPPLEMENTARY INFORMATION: The Bilateral Textile Agreement of August 4, 1986, as amended, between the Governments of the United States and Hong Kong establishes limits for the agreement year which begins on January 1, 1989 and extends through December 31, 1989. These limits are listed below.

A copy of the current bilateral agreement is available from the Textiles Division, Economic Bureau, U.S. Department of State, (202) 647–1998.

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 Annotated (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 52 FR 23491, published on June 22, 1987.

Category	Twelve-month limit
Group I:	
200–229, 300–326, 360–369, 400–414, 464–469, 600–629 and 665–670, as a group.	196,754,909 square meters equivalent.
Sublevels in group I:	
200	261,571 kilograms.
219	30,338,882 square meters.
225/317/326	50,410,954 square meters.
226/313	54,421,439 square meters.
314	14,676,809 square meters.
315	7,256,264 square meters.
369(1)[1] (shoptowels)	596,317 kilograms.
604	179,550 kilograms.
611	4,783,334 square meters.
Group II:	
237,239, 330–359, 431–459, 630–659 and 843/844(1), as a group.	723,483,464 square meters equivalent.
Sublevels in Group II:	
237	877,318.
239	3,008,347 kilograms.
331	3,619,229 dozen pairs.
333/334	241,836 dozen.
335	303,633 dozen.
336	167,807 dozen.
338/339[2] (shirts and blouses other then tank, knit).	2,606,468 dozen.
338/339(1)[3] (tank tops).	1,933,253 dozen.
340	2,495,969 dozen.
341	2,533,942 dozen.
342	431,688 dozen.
345	367,871 dozen.
347/348	5,966,097 dozen of which not more than 2,936,286 dozen shall be in Category 347 and not more than 4,521,335 dozen shall be in Category 348.
350	112,182 dozen.
351	1,067,078 dozen.
352	5,110,411 dozen.
359(1)[4] (coveralls, overalls and jumpsuits).	475,763 kilograms.
359(2)[5] (outer vests)	991,590 kilograms.
434	9,376 dozen.
435	68,617 dozen.
436	89,369 dozen.
438	777,093 dozen.
442	76,723 dozen.
443	56,388 numbers.
443/444/643/644/843/844(1), (made-to-measure suits).	49,452 numbers.
444	34,740 numbers.
445/446	1,213,175 dozen.
447/448	61,010 dozen.
631	486,925 dozen pairs.
633/634/635	1,105,096 dozen of which not more than 412,101 dozen shall be in Categories 633/634 and not more than 849,120 dozen shall be in Category 635.
636	229,681 dozen.
638/639	4,332,611 dozen.
640	740,903 dozen.
641	748,658 dozen.
642	181,938 dozen.
644	33,360 numbers.
645/646	1,256,751 dozen.
647	405,056 dozen.
648	938,258 dozen.
649	623,624 dozen.
650	128,963 dozen.
651	246,966 dozen.
652	3,878,750 dozen.
659(1)[6] (coveralls, overalls and jumpsuits).	525,843 kilograms.
659(2)[7] (swimsuits)	205,938 kilograms.
Groups III:	
831–844 and 847–859, as a group.	40,429,044 square meters equivalent.
Sublevels in Group III:	
835	97,183 dozen.
836	127,807 dozen.
840	577,274 dozen.
842	211,445 dozen.
847	310,017 dozen.
Limits not in a group:	
845(1)[8] (sweaters made in Hong Kong).	1,096,385 dozen.
845(2)[9] assembled in Hong Kong from knit-to-shape component parts knitted elsewhere).	2,624,329 dozen.
846(1)[10] (sweaters made in Hong Kong).	177,296 dozen.
846(2)[11] (sweaters assembled in Hong Kong from knit-to-shape component parts knitted elsewhere).	427,216 dozen.

[1] In Category 369(1), only tariff number 6307.10.20.10.

[2] In Categories 338/339, all tariff numbers except 6109.10.00.25, 6109.10.00.30, 6109.10.00.60 and 6109.10.00.65.

[3] In Categories 338/339(1), only tariff numbers 6109.10.00.25, 6109.10.00.30, 6109.10.00.60 and 6109.10.00.65.

[4] In Category 359(1), only tariff numbers 6103.42.20.20, 6103.49 30.34, 6104.62.10.20, 6104.69.30.10, 6114.20.00.48, 6114.20.00.52, 6203.42.20.10, 6204.62.20.10, 6211.32.00.10 and 6211.42.00.10.

[5] In Category 359(2), only tariff numbers 6103.19.20.30, 6103.19.40.30, 6104.12.00.40, 6104.19.20.40, 6110.20.10.22, 6110.20.10.24, 6110.20.20.30, 6110.20.20.35, 6110.90.00.44, 6110.90.00.46, 6201.92.20.10, 6202.92.20.20, 6203.19.10.30, 6203.19.40.30, 6204.12.00.40, 6204.19.30.40, 6211.32.00.70 and 6211.42.00.70.

[6] In Category 659(1), only tariff numbers 6103.23.00.55, 6103.43.20.20, 6103.49.20.00, 6103.49.30.38, 6104.63.10.20, 6104.69.10.00, 6104.69.30.14, 6114.30.30.40, 6114.30.30.50, 6203.43.20.10, 6203.49.10.10, 6204.63.15.10, 6204.69.10.10, 6211.33.00.10 and 6211.43.00.10.

[7] In Category 659(2), only tariff numbers 6112.31.00.10, 6112.31.00.20, 6112.41.00.10, 6112.41.00.20, 6112.41.00.30, 6112.41.00.40, 6211.11.10.10, 6211.11.10.20, 6211.12.10.10 and 6211.12.10.10.

[8] In Category 845(1), only tariff numbers 6103.29.20.74, 6104.29.20.72, 6110.90.00.24, 6110.90.00.42 and 6117.90.00.20.

[9] In Category 845(2), only tariff numbers 6103.29.20.70, 6104.29.20.70, 6110.90.00.22 and 6110.90.00.40.

[10] In Category 846(1), only tariff numbers 6103.29.20.68, 6104.29.20.68, 6110.90.00.20, 6110.90.00.38 and 6117.90.00.18.

[11] In Category 846(2), only tariff numbers 6103.29.20.66, 6104.29.20.64, 6110.90.00.18 and 6110.90.00.36.

Ronald I. Levin,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88–26872 Filed 11–18–88; 8:45 am]

BILLING CODE 3510-DR-M

COMMODITY FUTURES TRADING COMMISSION

Deposit of Customer Funds in Foreign Depositories

AGENCY: Commodity Futures Trading Commission.

ACTION: Statement of Agency Interpretation.

SUMMARY: The Commodity Exchange Act ("Act") requires that all money, securities and property received by futures commission merchants ("FCMs") to margin, guarantee, or secure trades or contracts of any customer on domestic designated contract markets or accruing to such customer as the result of such trades or contracts be segregated pursuant to section 4d(2) of the Act, 7 U.S.C. 6d(2), and the regulations promulgated thereunder. The Commodity Futures Trading Commission ("Commission") is providing further guidance with respect to where customer funds relating to contracts traded on domestic exchanges may be deposited consistent with section 4d(2). The Commission generally has required that such funds be held in the United States with the exception of certain funds held on behalf of foreign-domiciled customers. In view of the interest in pricing and settling certain domestic futures and option contracts in foreign currencies, the Commission has determined that it is appropriate to permit funds of customers domiciled in the United States to be deposited in foreign depositories under certain

conditions designed to insure consistency with the segregation requirements of the Act. The Commission also finds that the special provisions of the Bankruptcy Code applicable to the bankruptcy of commodity brokers generally require that in the event of the bankruptcy or insolvency of an FCM all segregated funds be distributed on a pro-rata basis to customers of the same class.

Accordingly, in order to assure the consistent treatment of all customer funds held outside the United States with respect to designated United States futures and options, the Commission has determined to apply certain limitations prospectively to foreign-domiciled customers whose funds relating to contracts traded on or subject to the rules of a contract market in the United States are held overseas. This interpretation modifies Commodity Exchange Authority Administrative Determination No. 238 (September 4, 1974) ("A.D. 238").

EFFECTIVE DATE: December 21, 1988.

FOR FURTHER INFORMATION CONTACT: John C. Lawton, Associate Director, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581, telephone: (202) 254–8955.

SUPPLEMENTARY INFORMATION: Section 4d(2) of the Act requires that each FCM:

> treat and deal with all money, securities, and property received by such [FCM] to margin, guarantee, or secure the trades or contracts of any customer of such [FCM], or accruing to such customer as the result of such trades or contracts, as belonging to such customers. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such [FCM] or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held.

The Commission and its predecessor agency, the Commodity Exchange Authority ("CEA"), have construed this provision to require that customer funds deposited with an FCM relating to futures or option trading on a designated contract market be kept in the United States unless the funds are being held for a foreign-domiciled customer. In Administrative Determination No. 238, the Administrator of the CEA stated that an FCM "cannot directly or indirectly shift regulated commodity customers' funds to foreign banks in order to permit the firm to better its business relations with such foreign banks or *for any other reason.*" (emphasis added) In monitoring segregation, the Commission consistently has applied this interpretation.[1]

The Commission has interpreted section 4d(2) and the regulations thereunder generally to preclude the use of foreign segregated depository accounts because permitting customer funds to be held offshore would expose them to risks which potentially could weaken the safeguards intended to be afforded by segregation.[2] For example, the Commission and self-regulatory organizations ("SROs") ordinarily would have less ready access to such depositories and, therefore, could encounter difficulties confirming balances and monitoring funds held in such depositories on an ongoing basis. An inability to detect potential problems quickly could hamper the ability of the Commission or an SRO to take steps to resolve incipient problems before they become more serious. The risk of shortfalls in these accounts also may be greater to the extent that these contracts attract foreign-based traders, since past experience indicates that FCMs find it more difficult to recover debit balances from defaulting foreign-based customers than from domestic customers. In addition, a foreign depository may not be responsive to Commission concerns when compliance by a regulatee with segregation requirements comes into question, or a court might refuse to enforce applicable provisions of the Commission's regulations that prohibit a foreign depository from offsetting obligations of the FCM against customer funds or from otherwise mishandling or permitting the mishandling of customer funds. Similarly, in the event of an FCM insolvency, deposits maintained at a foreign depository might not be handled or distributed in accordance with United States bankruptcy law. Finally, a foreign government could limit the use of, freeze, or confiscate assets held within its jurisdiction. As a result of any of these events, segregated funds might not be recoverable fully by customers upon demand, or in a bankruptcy or receivership.

The foregoing risks may be describe as sovereign or location risk. Currency exchange rate fluctuations, that is, currency risk, also can be a concern where deposits securing United States contracts are maintained in multiple currencies. Specifically, if an FCM becomes bankrupt or is placed in receivership while holding foreign currency-denominated deposits, both the size of the pool of funds available for distribution to customers and the size of individual claims against that pool may vary from day to day during the pendency of the proceeding. This could have the effect of exposing customers with dollar-denominated claims to currency risk.

The Commission currently has pending before it several applications from domestic exchanges to trade futures or option contracts on foreign financial instruments or indices.[3] The exchanges plan to price and settle the proposed contracts in the currency of the underlying instrument or index in order to enhance the effectiveness of t contracts for hedging purposes. The Board of Governors of the Federal Reserve System ("Federal Reserve"), however, has a policy which discourages banks from offering in the United States accounts denominated in foreign currencies.[4] Therefore, the CMI and CBT have requested that the Commission modify its interpretation regarding the deposit of customer funds in foreign banks.

The Commission believes that in ligh of the growing internationalization of the futures and option markets, modification of the Commission interpretation, as set forth in A.D. 238, concerning appropriate segregated depository accounts is warranted to the extent set forth herein. Accordingly, the Commission hereby is modifying that interpretation so as to permit FCMs to carry segregated funds of domestic customers in certain foreign depositorie if certain conditions are met.[5] These

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[1] *See* Foreign Options and Foreign Futures Transactions, 51 FR 12104, 12110, n.36 (April 8, 1986); *see also* Leverage Transactions, Comm. Fut. L. Rep. ¶ 21, 742 at p. 26,952, n.52 (May 25, 1983).

[2] The Commission's segregation requirements are set forth in Regulations 1.20–1.30, 1.32 and 1.36, 17 CFR 1.20–1.30, 1.32 and 1.36, which provide, among other things, that customer funds must be accounted for separately by the FCM, must not be commingled with the FCM's own funds, must be held for the benefit of customers, must be available to the customer and the FCM immediately upon demand, and must be handled in a manner that will prevent the use of one customer's funds to margin or secure another person's position or to margin or secure customer obligations other than with respect to contracts traded on or subject to the rules of a designated contract market.

[3] For example, the Chicago Mercantile Exchange ("CME") has applied to trade futures on the Nikkei Stock Average and the Chicago Board of Trade ("CBT") has applied to trade futures on Long-Term Japanese Government Bonds.

[4] *See* letter dated October 23, 1973, from Arthur F Burns, Chairman, Federal Reserve, to A.W. Clauser President, Bank of America.

[5] All funds held overseas pursuant to this interpretation must continue to be segregated from the proprietary funds of the FCM, from the foreign futures and options secured amount, and from any non-regulated accounts. Such funds must be held in accounts which clearly identify them as customer segregated funds and for which the depository has provided the appropriate acknowledgment. The form in which FCMs may accept such deposits, *i.e.*, whether certain securities such as yen bonds will b

Continue

conditions are designed to minimize the risks to customers incident to carrying their funds overseas and generally to prevent the dilution of customer funds held in segregation in the United States. The Commission intends to monitor experience under this interpretation and may determine to alter or supplement the conditions for keeping segregated funds offshore as such experience renders advisable.[6]

First, to be segregated properly, funds of U.S.-domiciled customers may be held offshore if such funds are used to margin, guarantee, or secure positions in a contract traded on a domestic contract market that is priced and settled in a foreign currency or accrue to such a customer as a result of positions in such contracts. The Commission believes that some flexibility is appropriate with regard to the amounts which may be deposited and the timeframe within which they may be deposited. For example, customers may have a business reason for depositing funds in advance of taking a position or in excess of margin requirements.

Nevertheless, the Commission also believes that some constraints are necessary to prevent the transfer of funds overseas for reasons unrelated to trading in the relevant contracts. An FCM must obtain specific written authorization from a customer to maintain funds offshore in that customer's segregated account to acquire and hold futures and option positions that are priced and settled in foreign currencies.[7] FCMs that carry these accounts also should establish written internal procedures for ensuring that segregated funds are held offshore solely for the above-stated purpose.[8] These procedures will be subject to SRO and Commission oversight.[9]

Second, the funds must be held in depositories that meet the criteria used by the Commission under Regulation 30.7(c) for foreign futures and opion depositories [10] and are located in the country of origin of the applicable currency or in a county with those applicable regulatory body the Commission has appropriate information sharing arrangements.[11] In addition, pursuant to Commission Regulations 1.20(a) and 1.20(b), each FCM and clearing organization must obtain from each such foreign depository an appropriate acknowledgment of the applicability of Commission regulations regarding customer segregated funds as is provided by domestic depositories.

Third, all FCMs, at all times, must segregate sufficient funds denominated in dollars in the United States to meet all dollar-denominated obligations to U.S.-domiciled customers. Any shortfall in the dollar account(s) would constitute a segregation violation regardless of whether there were excess funds in segregation in a foreign currency-denominated account.[12]

Fourth, before placing a customer's funds overseas, an FCM must obtain from the customer a subordination agreement in the form set forth below. The agreement would authorize the deposit of segregated funds into a foreign depository if such funds are used to margin, guarantee, or secure such contracts or accrue as a result of positions in such contracts. The agreement also would authorize the subordination of the customer's claim attributable to funds held offshore in a particular foreign currency to the claims of customers whose funds are held in dollars or other foreign currencies in the event the FCM is placed in bankruptcy or receivership [13] and there are insufficient funds available for distribution from the funds held in the particular currency to satisfy all customer claims against those funds. The subordination will apply whether the insufficiency is due to underfunding of the account or the inability to recover all funds in the account.[14]

Such an agreement generally will prevent an insufficiency of available funds in one foreign currency from diluting customer funds held in dollars or in other foreign currencies. It also will shield customers with dollar claims or claims in other foreign currencies from exposure to that currency's conversion risks during the pendency of the bankruptcy or receivership. The Commission believes that generally the risks attendant to holding funds in a particular currency should not be shared by customers whose funds are held in dollars or in different foreign currencies.

The subordination agreement will apply only to claims against *segregated*

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acceptable as margin, will continue to be governed by exchange and clearing house rules. Commission Regulation 1.25, which implements similar language in section 4d(2) of the Act, also will continue to require that customer funds in whatever currency deposited, may be invested by an FCM or clearing organization only in obligations of the United States, in general obligations of any State or of any political subdivision thereof, or in obligations fully guaranteed as to principal and interest by the United States.

[6] Development of information sharing arrangements with foreign regulators may assist the Commission in this regard.

[7] This authorization is included with the subordination agreement described below and must be retained by the FCM pursuant to Commission Regulation 1.31.

[8] When, by industry standards, funds cease to be held to margin, guarantee, or secure positions in the relevant contracts, an FCM should move such funds out of the foreign currency-denominated segregation account. Customer instructions pertinent to such transfers may be provided in advance as part of the customer agreement.

[9] In this connection, the Commission believes that the Joint Audit Committee, working with the futures industry, should develop uniform internal procedures and audit standards, consistent with this interpretation, to address the appropriate oversight of funds held offshore.

[10] *See* CFTC Advisory 87-5, Comm. Fut. L. Rep., ¶ 23,997 (December 3, 1987).

[11] *See, e.g.*, the information sharing arrangements established between the Commission and the Australian National Companies and Securities Commission in connection with granting the Sydney Futures Exchange relief under Part 30 of the Commission's rules and the Financial Information Sharing Memorandum of Understanding signed by, among others, the Commission and the United Kingdom Securities and Investments Board on September 1, 1986.

[12] In addition, to be in compliance with segregation requirements an FCM must maintain total funds in segregation sufficient to meet its total customer obligations in all currencies. An FCM, however, would be permitted to maintain such funds in dollars rather than in the currency of the obligation. The amount of dollars necessary to cover such obligations would change on a daily basis as the conversion rate changes. In any such case, the books and records of the FCM would have to identify clearly the extent to which funds were being held in dollars to satisfy obligations denominated in a foreign currency.

In the event of FCM insolvency, the trustee or receiver ordinarily should convert foreign currency denominated claims against such funds to dollars as soon as possible in order to avoid conversion risk during the remainder of the proceeding. *See* Commission Regulation 190.01(ff). To the extent that an FCM is holding dollars to satisfy its obligations to customers denominated in foreign currencies, the subordination agreement contained herein would not apply.

[13] In many cases where a firm's financial condition is impaired or a receivership is contemplated, it should be possible to transfer accounts from one clearing member to another clearing member pursuant to existing regulations notwithstanding the location of such segregated funds, provided there is no shortfall and all funds are in depositories which have supplied appropriate acknowledgments. Pre-bankruptcy transfers remain the preferred regulatory treatment for failing firms. The subordination contained herein is intended to facilitate the calculation of funds available with respect to dollar and foreign currency customers so that position transfers can take place where there are sufficient funds in a particular currency.

[14] Procedures for the liquidation of an FCM in bankruptcy and for the distribution of such FCM's assets to customers are set forth in Subchapter IV of Chapter 7 of the Bankruptcy Code, 11 U.S.C. 761, *et seq.*, and Part 190 of the Commission's regulations, 17 CFR 190.01, *et seq.* Generally, these procedures provide for the pro-rata distribution of assets among customers according to account class. Subordination agreements, however, are enforceable under the Bankruptcy Code. 11 U.S.C. 510(a). The Commission believes that the same distribution principles that are articulated in the code should apply in receiverships despite the lack of any express statutory scheme for receivership.

funds. All customers will retain an equal claim status as to claims against other assets of the FCM.[15]

The Commission notes that for many years it has permitted the funds of foreign-domiciled customers trading on domstic markets to be held overseas.[16] The Commission believes that in a bankruptcy or receivership these customers should be treated equivalently to other customers for whom funds are held offshore in segregated accounts. To the extent funds located offshore are segregated funds, the same potential exists for dilution of domestic segregated funds in the event of bankruptcy or receivership. Accordingly, the Commission will require that foreign-domiciled customers who desire to have funds relating to trading on a domestic market held in a foreign account also consent to subordinate their claims based on such funds. In order to give customers and FCMs the opportunity to make any adjustments necessitated by this change in policy, FCMs will be allowed six months from the date of this interpretation to bring themselves into compliance. Thereafter, an FCM will not be permitted to hold in a customer segregated account foreign currency deposited by a foreign-domiciled customer in connection with trading on or subject to the rules of a United States contract market, unless the customer has signed a subordination agreement as set forth below.[17]

The subordination agreement may be incorporated into the bankruptcy disclosure document required by Commission Regulation 190.10(c) or may be separately executed and retained by an FCM. The agreement must contain the following language:

Subordination Agreement

Funds of customers trading on United States contract markets may be held in accounts denominated in a foreign currency with depositories located outside the United States or its territories if the customer is domiciled in a foreign country or if the funds are held in connnection with contracts priced and settled in a foreign currency. Such accounts are subject to the risk that events could occur which would hinder or prevent the availability of these funds for distribution to customers. Such accounts also may be subject to the risk that events could occur which would hinder or prevent the availability of these funds for distribution to customers. Such accounts also may be subject to foreign currency exchange rate risks.

By signing the accompanying acknowledgment the customer authorizes the deposit of funds into such foreign depositories. For customers domiciled in the United States, this authorization permits the holding of funds in regulated accounts offshore only if such funds are used to margin, guarantee, or secure positions in such contracts or accrue as a result of such positions.

In order to avoid the possible dilution of other customer funds, a customer who has funds held outside the United States must further agree that his claims based on such funds will be subordinated as described below in the unlikely event *both* of the following conditions are met: (1) The customer's futures commission merchant is placed in receivership or bankruptcy, *and* (2) there are insufficient funds available for distribution denominated in the foreign currency as to which the customer has a claim to satisfy all claims against those funds.

By signing the accompanying acknowledgment the customer agrees that if both of the conditions listed above occur, the customer's claim against the futures commission merchant's assets attributable to funds held overseas in a particular foreign currency may be satisfied out of segregated customer funds held in accounts denominated in dollars or other foreign currencies only after each customer whose funds are held in dollars or in such other foreign currencies receives its pro-rata portion of such funds. It is further agreed that in no event may a customer whose funds are held overseas receive more than its pro-rata share of the aggregate pool consisting of funds held in dollars, funds held in the particular foreign currency, and non-segregated assets of the futures commission merchant.

This subordination arrangement is designed to effectuate the following principles. Subject to subordination, all customer segregated funds deposited in connection with trading on United States contract markets, whether held in the United States or overseas, are part of a single pool available to be distributed ratably to customers in the event of bankruptcy or receivership. However, no customer whose funds are held in the United States may receive less than his pro-rata share funds held in the United States as a result of the shortfall or unavailability of funds held outside the United States. No customer whose funds are held in a particular foreign currency may receive less than his pro-rata share of the funds held in that foreign currency as a result of the shortfall or unavailability of funds held in an account denominated in another foreign currency. No customer whose funds are held in a foreign currency may receive more than his pro-rata share of the pool consisting of funds held in dollars, funds held in the particular foreign currency, and non-segregated assets of the FCM. To illustrate the mechanics of such subordination the Commission offers the following examples:[18]

Example 1–Two Currencies; Sufficient Segregated Funds; Foreign Funds Available

Dollar Segregated Funds (held in U.S.) =150
Customer A claim = 50
Customer B claim = 50
Customer C claim = 50
Yen Segregated Funds (held in Japan) = 100 [19]
Customer D claim = 50
Customer E claim = 50
A,B,C,D,E distribution = 50 each

In this case, there are sufficient funds available to meet all claims. Thus, the subordination agreement would not come into play, and the bankruptcy or receivership distribution would proceed in the same fashion as a bankruptcy or receivership which does not involve funds held overseas.[20]

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[15] In cases where the subordination is triggered, it would be necessary for the bankruptcy trustee to modify the calculations under Part 190 of the Commission's regulations accordingly. For example, in calculating "funded balances" pursuant to Commission Regulation 190.07, the trustee would do separate calculations for segregated funds and for other assets of the FCM. With regard to segregated funds, the trustee generally would treat customers with claims denominated in different currencies as if they were members of different account classes. With regard to other assets of the FCM, the trustee would treat such customers as part of the same account class.

[16] *See* A.D. 238.

[17] To the extent foreign-domiciled customers deposit dollars in connection with United States futures or options, such funds should be held in the United States. The Commission perceives no administrative necessity for FCMs and customers to incur the location risks attendent to holding such dollar deposits overseas. If an FCM believes it has reasons for holding such deposits outside the United States, it may submit a request to the Division of Trading and Markets for relief from this requirement. Any such relief would include a requirement that such dollar deposits held overseas be subordinated to dollar deposits in the United States.

[18] Because the examples were designed to illustrate specific points about the mechanics of the subordination, the scenarios set forth are less complex than those which could be expected to occur in an actual bankruptcy. For instance, as noted above, a trustee or receiver would have to undertake separate calculations to allocate shares of non-segregated assets of the FCM. Moreover, some customers are likely to have claims for more than one currency. Thus, the differences in actual distributions among customers might be less marked than indicated by these examples.

[19] Although these funds would be held in yen, for purposes of calculating the total FCM segregation and net capital requirements the amount would be converted to dollars. Therefore, in each of these examples the amount of money held in the foreign currency account is expressed in dollars.

[20] Note, however, that customer A may have deposited yen and be entitled to receive yen in return while customer B may have deposited the dollar equivalent of that amount of yen and be entitled to receive dollars in return. The risk of this conversion would be borne by the customer in the

Continued

Example 2—Two Currencies; Sufficient Segregated Funds; Foreign Funds Unavailable

Dollar Funds = 150
A claim = 50
B claim = 50
C claim = 50
Yen Funds = 100
D claim = 50
E claim = 50
A,B,C, distribution = 50
D,E distribution = 0

In this case, assume a foreign court has frozen the yen account. The claims of Customers A, B, and C would be satisfied in full by the trustee from the dollar account. Customers D and E would receive nothing from customer segregated funds until the funds in the yen account became available.[21] However, as noted previously, unsatisfied customer claims could be paid from other assets of the FCM.

Example 3–Two Currencies; Insufficient Segregated Funds; Foreign Funds Available

Dollar Funds = 100
A claim = 50
B claim = 50
C claim = 50
Yen Funds = 50
D claim = 50
E claim = 50
A,B,C, distribution = 33.33
D,E distribution = 25

In this case, D and E's claims on dollars funds are subordinated to the claims of A,B, and C because there was a shortfall in yen funds. A,B, and C each receive 1/3 of the $100 available in the dollar account. D and E each receive their pro-rata share of the funds in the yen account. They receive nothing from the dollar account because it was insufficient to satisfy A,B, and C, who took priority.

Subordination protects dollar customers from sovereign or location risk and from currency risk. Location risk is present to the extent the shortfall in the yen account occurred or was undetected as result of the account's foreign location. Currency risk is present because the exchange rate can change during the pendency of a bankruptcy thereby causing claims on an underfunded account to grow more quickly than the assets available to meet such claims.

To illustrate the effect of currency risk in the absence of a subordination agreement, suppose that in Example 3 on the day of bankruptcy, one yen equals one dollar. A,B,C,D, and E each would have a claim at that time of $50. In the absence of subordination, each customer's pro-rata share would be equal to the ratio of his claim to total claims, or $50/$250, or 1/5. Therefore, each customer's pro-rata share would be 1/5 of the total available assets of $150, or $30.

Suppose further, however, that by the time the trustee had reviewed the records and marshalled the assets, one yen equalled two dollars. At that point, assets would total $200 ($100 + $100 worth of yen). Each yen customer's claim would grow to $100 (50 yen = $100). Each dollar customer's claim would remain $50. Each yen customer's pro-rata share would be equal to the ratio of his claim to total claims, or $100/$350, or 2/7. Each dollar customer's pro-rata share would be equal to the ratio of his claim to total claims, or $50/$350, or 1/7. Each dollar customer then would receive 1/7 of the total assets, or 1/7 × $200 or $28.57. Thus, each dollar customer's share would diminish as a result of currency risk.[22]

The subordination agreement insulates the dollar customers from such risks by effectively making the dollar and yen accounts separate account classes in the event of a yen shortfall.[23] All risks incident to holding funds overseas thus are imposed on those customers who have authorized such deposits.[24]

Example 4—Two Currencies; Insufficient Segregated Funds; Foreign Funds Available

Dollar Funds = 100
A claim = 50
B claim = 50
C claim = 50
Yen Funds = 50
D claim = 50
E claim = 50
A, B, C distribution = 33.33
D, E distribution = 0

In this case, there are insufficient funds in segregation *and* the yen account has been frozen by court order. D and E's claims on the dollar funds are

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absence of agreement otherwise between the FCM and the customer. Because the exchange margin requirement would be expressed in yen, an FCM who accepted dollars would be performing the additional service of currency conversion for his customer which should be treated as a separate transaction. Under Commission Regulation 1.55, any currency conversion risk inherent in trading a particular contract would be a material fact which an FCM would be required to disclose to its customers.

[21] For ease of comparison, all these examples involve different customers in the yen and dollar accounts. With one exception, the concepts illustrated, however, would be applicable equally if a single customer had claims against both accounts. Generally, in such a case, his claims would be treated separately, as if they belonged to two individuals. To see how a customer with claims against both accounts would fare, simply substitute A for E in each scenario. A's claim against the dollar funds would remain the same as currently set forth; A's claim against the yen funds would be the same as E's claim.

The exception would be the case where a customer has a claim against one account and a debit balance in the other, *i.e.*, the trustee has a claim against the customer in that account. Pursuant to Commission Regulations 190.07(b)(2) and (b)(3) these amounts would be netted. The Commission recognizes that this procedure could defeat the subordination if the debit balance is in the dollar account because in the netting process a customer could receive the full value of his foreign currency claim. The Commission notes, however, that an analogous situation can occur in a dollars-only bankruptcy where a customer effectively may receive as a result of netting an amount greater than what his pro-rata share otherwise would be. Such anomalies have been permitted in the interest of efficient administration of bankrupt estates. Absent such netting, estates could be forced to incur the expense and delay of litigation in order to recover claims against customers with respect to whom the firm is holding deposits.

[22] This currency risk is similar to the price risk which can occur in cases where an FCM becomes insolvent while holding customer deposits in forms which fluctuate in value, *e.g.*, Treasury securities. In such cases, customers who have deposited cash may be exposed to some extent to the market risks of these Treasury securities. However, there are several significant distinctions between this type of price risk and the currency risk discussed in the text which make it not inappropriate to treat the two situations differently. First, all customers of an FCM which accepts Treasury securities have the opportunity to post Treasury securities as margin while only customers trading certain contracts would have the opportunity to post foreign currency. Therefore, it is more equitable to spread the former risk among all customers in the event of bankruptcy than it is the latter. Second, shortfalls in foreign currency accounts, and thus potential exposure of third parties to currency risk, are more likely than shortfalls in the amount of Treasury securities held by an FCM. This is because currency accounts are subject to the location risks described above while Treasury securities held in the United States are not. In addition, since margin calls are denominated in cash, a customer failure to meet a foreign currency margin call could lead to a shortfall in the amount of foreign currency in the account, while a customer failure to meet a margin call in an account holding Treasury securities would lead to a shortfall in dollars not Treasury securities. Third, it may be easier and quicker for a trustee or receiver to convert Treasury securities held in the United States to cash than to convert foreign currency held overseas into dollars. Therefore, the pool of customer assets may be exposed to currency risk for a longer time than it is exposed to Treasury security market risks.

[23] The subordinate agreement, however, would not create separate account classes in all situations. Because the subordination is not reciprocal, dollar customers would have a claim on yen funds in the event of a dollar shortfall. Such a situation is illustrated in Example 7 below. The Commission may consider whether it would be appropriate to establish by regulation separate account classes in bankruptcy for each currency.

[24] Moreover, if proper segregation is maintained by an FCM with respect to overseas accounts, that is, all deficits are covered, no subordination should be required except in cases of theft or adverse sovereign action. In fact, there has been only one case in the last decade where a customer default led to a segregation deficit which was not covered by other assets of the carrying firm. *See Volume Investors Corporation*, Report of the Division of Trading and Markets (July 1985).

subordinated to the claims of A, B, and C because the yen funds are unavailable. The trustee would calculate A, B, and C's pro-rata share of the dollar funds as if the yen did not exist.

Example 5—Three Currencies; Insufficient Segregated Funds; Shortfall in One Foreign Currency

Dollar Funds = 150
A claim = 50
B claim = 50
C claim = 50
Yen Funds = 150
D claim = 50
E claim = 50
F claim = 50
Pound Funds = 100
G claim = 50
H claim = 50
I claim = 50
A, B, C, D, E, F distribution = 50
G, H, I distribution = 33.33

The claims of pound customers are subordinated to the claims of dollar and yen customers because there is a shortfall in the pound account. Dollar and yen customers are both shielded from currency risk in the underfunded pound account.

Example 6—Three Currencies; Insufficient Segregated Funds; Shortfall in Both Foreign Currencies

Dollar Funds = 150
A claim = 50
B claim = 50
C claim = 50
Yen Funds = 100
D claim = 50
E claim = 50
F claim = 50
Pound Funds = 50
G claim = 50
H claim = 50
I claim = 50
A, B, C, distribution = 50
D, E, F distribuiton = 33.33
G, H, distribution = 16.66

The claims of pound and yen customers are subordinated to the claims of dollar customers because there is a shortfall in both foreign currency accounts. Furthermore, because of these shortfalls, the foreign currency customers are subject to a reciprocal subordination to one another. That is, D, E, and F have priority as to yen while G, H, and I have priority as to pounds. Effectively, in this case the trustee would treat the funds as three separate pools.

Example 7—Three Currencies; Insufficient Segregated Funds; Shortfall in Dollars

Dollar Funds = 100
A claim = 50
B claim = 50
C claim = 50
Yen Funds = 150
D claim = 50
E claim = 50
F claim = 50
Pound Funds = 150
G claim = 50
H claim = 50
I claim = 50
A, B, C, D, E, F, G, H, I, distribution = 44.44

The case illustrates the asymmetry created by the subordination agreement. Customers with claims on the dollar account are *not* subordinated in the event of a shortfall in that account. This outcome is consistent with the usual principles of pro-rata distribution. The exception to those general principles created in the previous examples is appropriate there because of the unique risks discussed above that are created by the carrying of funds overseas.

The approach described in this interpretation is intended to facilitate growth and innovation in domestic futures markets without compromising existing standards of customer protection. This interpretation does not imply any position on the merits of pending contract designation applications. The Commission is reviewing independently each proposed contract to which this interpretation might apply. The Commission also is analyzing whether additional regulatory action beyond the scope of this interpretation is appropriate in connection with the holding of customer segregated funds offshore.

Issued in Washington, DC, on November 16, 1988 by the Commission.

Jean A. Webb,

Secretary.

[FR Doc. 88-26860 Filed 11-18-88; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF DEFENSE

Department of the Army

Chief of Staff's Special Commission to Review Honor Code and System; U.S. Military Academy; Meeting

Subject: Chief of Staff's Special Commission to Review the Honor Code and Honor System at the U.S. Military Academy.

Time: 8–9 December 1988.

Place: Superintendent's Conference Room, Building 600, 2nd Floor, U.S. Military Academy, West Point, New York.

Purpose: See agenda discussion items.

Summary of Agenda:

Date/Time	Open/ Closed to Public	Discussion Items
8 Dec/0900–1200	Open	Testimony from faculty, staff, and Cadets.
8 Dec/1300–1630	Closed	Private interviews and study of illustrative case histories.
9 Dec/0900–1200	Open	Committee Meetings.
9 Dec/1300–1430	Open	Report from Committees.
9 Dec/1430–1500	Open	Discussion of next possible steps.

The public may attend any of the meetings marked "Open".

The meeting being closed to the public is due to privacy act restrictions. Specific Honor cases will be presented to the Commission. In addition testimony will be taken which will provide personal information to the Commission.

The basis for the closed portion of the meeting is paragraph (6) of section 552b(c), Title 5, U.S. Code.

Point of contact is LTC James O. Younts III, 695–1983.

John O. Roach, II,

Army Liaison Officer with the Federal Register.

[FR Doc. 88-26900 Filed 11-18-88; 8:45 am]

BILLING CODE 3710-08-M

Department of the Air Force

USAF Scientific Advisory Board; Meeting

November 10, 1988.

The USAF Scientific Advisory Board Division Advisory Group (DAG) for Space Division (AFSC) will meet on 6–8 Dec 88 from 8:00 a.m. to 5:00 p.m. at Patrick AFB, FL 32925.

The purpose of this meeting is to review plans for the Space Test Range. This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697–4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88-27009 Filed 11-18-88; 8:45 am]

BILLING CODE 3910-01-M

USAF Scientific Advisory Board; Meetings

November 15, 1988.

Subcommittees of the USAF Scientific Advisory Board Ad Hoc Committee on Science and Technology (S&T) Roadmaps Review will meet as specified by the following schedule:

Wright-Patterson AFB, OH 45433—6–8 Dec 88
Tyndall AFB, FL 34204—9 Dec 88

The purpose of these meetings is to review the roadmaps for the programs in the Air Force S&T base. These meetings will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697–4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88–27010 Filed 11–18–88; 8:45 am]

BILLING CODE 3910–01–M

Corps of Engineers, Department of the Army

Intention To Prepare a Draft Supplemental Environmental Impact Statement (DSEIS) for Proposed Harbor at Kodiak, Kodiak Island, AK

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

ACTION: Notice of intent.

SUMMARY: The proposed plan is to build a 1,900-foot long rubblemound breakwater across the mouth of St. Herman Bay (formerly Dog Bay), Kodiak, Alaska; to provide vessel access to a 90-acre protected mooring area, necessary to aid navigation.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and DSEIS can be answered by: Mr. William D. Lloyd at (907) 753–2640 or by writing to the: U.S. Army Corps of Engineers, Alaska District, ATTN: CENPA–EN–PL–ER (LLOYD), P.O. Box 898, Anchorage, Alaska 99506–0898.

SUPPLEMENTARY INFORMATION:

1. Proposed Action

The proposed plan would consist of a 1,900-foot long, rubblemound breakwater across the mouth of St. Herman Bay (formerly called Dog Bay); a channel 930 feet long, 150 feet wide, and 20 feet deep, providing vessel access to a 90-acre protected mooring area; and the necessary aids to navigation.

2. Reasonable Alternatives

Alternatives to the proposed plan include development of Near Island Basin (Trident Basin) and modification of the breakwater to include an entrance channel between Grass and Gull Islands.

3. Scoping Process

a. Public Involvement

There are three public meetings scheduled in Kodiak during the planning process. A fourth meeting may be held during the comment period of the DSEIS, if warranted. Draft and Final Environmental Impact Statements were prepared and distributed for public review in 1976 and 1978 respectively. The project was authorized by Congress for construction in 1986.

b. Significant Issues

At present, significant issues to be addressed in depth in the DSEIS include impacts to water circulation and quality, migratory routes of fish and shellfish, bald eagle concentrations, social and economic effects on local residents, and effects on cultural resources.

c. Assignments

Other than normal coordination, no cooperating agency assignments have been made.

d. Environmental Review and Consultation Requirements

The DSEIS will be circulated for review and all comments will be incorporated into the final supplemental environmental impact statement.

4. Scoping Meeting

a. A public scoping meeting to be held in the city of Kodiak is tentatively scheduled for the second week in January, 1989. A public notice announcing the scoping meeting will be mailed to the project mailing list prior to the meeting.

b. An agency scoping meeting was held on October 13, 1988.

5. Availability

The DSEIS is expected to be available to the public by January, 1990.

William W. Kakel,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 88–26773 Filed 11–18–88; 8:45 am]

BILLING CODE 3710–NL–M

DEPARTMENT OF EDUCATION

Pell Grant Program

AGENCY: Department of Education.

ACTION: Publication of the 1988–89 Award Year Zero Student Aid Index (SAI) Charts.

SUMMARY: The Secretary publishes the Zero Student Aid Index (SAI) Charts for institutions to use when verifying application information under the Pell Grant Program. The use of the Zero SAI Charts is authorized by § 668.59(a)(2) of the Student Assistance General Provisions regulations, 34 CFR 668.59(a)(2).

SUPPLEMENTARY INFORMATION: The Pell Grant Program provides grant assistance to financially needy students to help them meet the cost of postsecondary education. In order to receive a Pell Grant, a student must submit an application to the Secretary that contains both financial and non-financial information which permits the Secretary to determine the student's expected family contribution (EFC). The EFC is an amount which the student and his or her family may be reasonably expected to contribute toward the student's cost of a postsecondary education. The EFC is called the Student Aid Index, or SAI, in the Pell Grant Program.

The Secretary notifies the student of his or her SAI on a document called a Student Aid Report (SAR). On the SAR, the Secretary also includes the information reported by the applicant on the application. The Secretary uses some of this information to calculate the student's SAI.

In order to assure that applicants for Pell Grants provide accurate information on their applications, the Secretary may require some applicants to verify and update that information, and he has published regulations governing this verification process in the Student Assistance General Provisions regulations, 34 CFR Part 668, Subpart E. Generally, under these regulations, if an applicant is required to change any of his or her application information, the applicant must make the changes on the SAR that he or she received and must resubmit that changed SAR to the Secretary. However, there are some circumstances where the changed application information will not change the student's SAI, and, under those circumstances, the Secretary does not require the applicant to resubmit the SAR.

Under § 668.59(a)(2) of the Student Assistance General Provisions

regulations, 34 CFR 668.59(a)(2), the Secretary does not require an applicant to resubmit the changed SAR to the Secretary if the applicant has an SAI of zero and the institution that the applicant is attending can determine that the applicant's SAI will remain at zero using verified information and the Zero SAI Charts.

The Zero SAI Charts are a simplified version of the formula the Secretary uses in calculating an applicant's SAI. The charts may be used only if:

- The applicant's dependency status does not change, and
- The applicant's (spouse's) income and assets and the parental income and assets of a dependent student do not exceed specified amounts.

An institution may use the Zero SAI Charts to calculate a Pell Grant applicant's SAI if the following criteria are satisfied. (These criteria are based upon sections 411A through 411F of the Higher Education Act of 1965, as amended (HEA).)

For Students Qualified To Use the Simplified Needs Test

1. The income of a single dependent student is less than $3,501 in calendar year 1987.
2. The income of a married dependent student and spouse is less than $5,101 in calendar year 1987.
3. The income of an unmarried independent student without dependent children is less than $5,301 in calendar year 1987.
4. The income of a married independent student without dependents is less than $6,701 in calendar year 1987, if the student is not qualified to use the full employment expense offset (EEO), or income is less than $8,201 if the student is qualified to use the full EEO.
5. The income of an unmarried independent student with one dependent is less than $8,201 in calendar year 1987.

For Dependent Students [1] Using the Regular Needs Test

1. The income of a single dependent student is less than $3,501.
2. The income of a married dependent student is less than $5,101.
3. Dependent student and spouse net assets equal zero.[2]
4. Net home assets of parents are less than $30,001.[2]
5. Net business assets (exclusive of farm assets) of parents are less than $80,001.
6. Net farm assets (or a combination of net farm assets and net business assets) of parents are less than $100,001.
7. Net parental assets, other than home, farm, or business assets are less than $25,001.
8. Combined parental net, business, home, and other assets are less than $110,001.[2]
9. Combined parental net, farm, home, and other assets are less than $130,001.[2]

For Independent Students [1] Using the Regular Needs Test

1. The income of an unmarried independent student without dependent children is less than $5,301.
2. The income of a married independent student without dependents is less than $6,701 in calendar year 1987, if the student is not qualified to use the full EEO or income is less than $8,201 if the student is qualified to use the full EEO.
3. The income of an unmarried independent student with one dependent is less than $8,201 in calendar year 1987.
4. The assets of an unmarried independent student without dependent children are equal to zero.[2]
5. Net home assets of an unmarried independent student with a dependent, or a married independent student without dependents, are less than $30,001.[2]
6. Net business assets (exclusive of farm assets) are less than $80,001.
7. Net farm assets (or a combination of net farm assets and net business assets) are less than $100,001.
8. The net value of assets, other than home, farm, or business assets are less than $25,001.
9. Combined net business, home, and other assets are less than $110,001.[2]
10. Combined net farm, home, and other assets are less than $130,001.[2]

Zero SAI—Chart A

Use if Applicant *Is* Eligible for Full Employment Expense Offset (EEO) [1]

An applicant's SAI is zero if	
The correct household size is:	and the verified effective family income (EFI) is *less* than:
2	$8,201
3	9,601
4	11,901
5	13,801
6	15,301
7	17,101
8	18,901
9	20,701
10	22,501
11	24,301
12	26,101
13	27,901

[1] Use this chart if—
For a dependent student:
(1) The parents of the student are married and both parents earned income of $3,000 or more; or
(2) The parent of the student qualified as a head of household for Federal income tax purposes and the parent earned income of $3,000 or more.
For an independent student:
(1) Both the student and the spouse earned income of $3,000 or more; or
(2) The student qualified as a head of household for Federal income tax purposes and the student earned income of $3,000 or more.

Zero SAI—Chart B

Use if Applicant *Is Not* Eligible for Full Employment Expense Offset (EEO)[1]

An applicant's SAI is zero if	
The correct household size is:	and the verified effective family income (EFI) is *less* than:
1	$5,301
2	6,701
3	8,101
4	10,401
5	12,301
6	13,801
7	15,601
8	17,401
9	19,201
10	21,001
11	22,801
12	24,601
13	26,401

[1] Use this chart if you cannot use Chart A.

Effective Family Income (EFI)

Effective family income equals total income minus the sum of (1) Federal income taxes paid, (2) the tax allowance calculated under the Tax Allowance Percentage Table included in this Notice, and (3) excludable income, as defined below.

Total income equals the adjusted gross income (determined for tax filers from the U.S. income tax return or income earned from work not reported on a U.S. income tax return in the case

[1] If a student, the student's spouse or parent(s) is a dislocated worker as defined in Title III of the Job Training Partnership Act, use calendar year 1988 expected year income. For all others use income received during calendar year 1987.

[2] If a student, student's spouse or parent is a dislocated worker as defined in Title III of the Job Training Partnership Act, or displaced homemaker as defined in section 480(e) of the HEA, the net asset value of a principal residence shall be considered zero.

[1] If a student or the student's spouse is a dislocated worker as defined in Title III of the Job Partnership Training Act, use calendar year 1988 expected income. For all other students, use income received in calendar year 1987.

[2] If a student or the student's spouse is a dislocated worker as defined in Title III of the Job Training Partnership Act, or a displaced homemaker as defined in section 480(e) of the HEA, the net asset value of a principal residence shall be considered zero.

of non-tax filers), the total untaxed income and benefits of the student's parents for a dependent student, or of the student and spouse for an independent student, and one-half of the student's VA educational benefits (under chapters 34 and 35 of title 38 of the United States Code).

Excludable Income

Excludable income includes:

- For a Native American student, individual payments of $2000 or less received by the student (and spouse) and the student's parents under the Per Capita or Distribution of Judgment Funds Act, and any income received under the Alaska Native Claims Settlement Act or the Maine Indian Claims Settlement Act.
- Income of a divorced or separated spouse of a student, or of a student's spouse who has died.
- Student financial assistance.
- Unemployment compensation received by a dislocated worker in accordance with Title III of the Job Training Partnership Act.

TAX ALLOWANCE PERCENTAGE TABLE

If state, or territory of residence is:	and total income is: less than $15,000	or	$15,000 or more
Alabama	.07		.06
Alaska	.03		.02
America Samoa	.04		.03
Arizona	.07		.06
Arkansas	.07		.06
California	.09		.08
Canada	.09		.08
Colorado	.08		.07
Connecticut	.08		.07
Delaware	.09		.08
District of Columbia	.11		.10
Federal States of Micronesia.	.04		.03
Florida	.05		.04
Georgia	.08		.07
Guam	.04		.03
Hawaii	.11		.10
Idaho	.09		.08
Illinois	.08		.07
Indiana	.07		.06
Iowa	.09		.08
Kansas	.08		.07
Kentucky	.08		.07
Louisiana	.04		.03
Marine	.10		.09
Marshall Islands	.04		.03
Maryland	.11		.10
Massachusetts	.11		.10
Mexico	.09		.08
Michigan	.12		.11
Minnesota	.12		.11
Mississippi	.07		.06
Missouri	.07		.06
Montana	.07		.06
Nebraska	.09		.08
Nevada	.04		.03
New Hampshire	.07		.06
New Jersey	.10		.09
New Mexico	.05		.04
New York	.14		.13

TAX ALLOWANCE PERCENTAGE TABLE—Continued

If state, or territory of residence is:	and total income is: less than $15,000	or	$15,000 or more
North Carolina	.09		.08
North Dakota	.06		.05
Northern Mariana Islands.	.04		.03
Ohio	.09		.08
Oklahoma	.07		.06
Oregon	.11		.10
Palau	.04		.03
Pennsylvania	.09		.08
Puerto Rico	.03		.02
Rhode Island	.11		.10
South Carolina	.09		.08
South Dakota	.05		.04
Tennessee	.05		.04
Texas	.04		.03
Utah	.09		.08
Vermont	.09		.08
Virgin Islands	.04		.03
Virginia	.09		.08
Washington	.06		.05
West Virginia	.07		.06
Wisconsin	.13		.12
Wyoming	.03		.02
Blank or Invalid State.	.09		.08

Sections 411C and 411D of the HEA.

FOR FURTHER INFORMATION CONTACT: Paula Husselmann, Chief, or Donald Conner, Program Analyst, Veritication Development Section, Student Vertification Branch, Division of Policy and Program Development, Office of Student Financial Assistance, Office of Postsecondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., ROB-3, Room 4613, Washington, DC 20202, Telephone: (202) 732-5579.

(20 U.S.C. 1094)

(Catalog of Federal Domestic Assistance No. 84.063 Pell Grant Program)

[FR Doc. 88-26897 Filed 11-18-88; 8:45 am]

BILLING CODE 4000-01-M

Meeting; Student Financial Assistance Advisory Committee

AGENCY: Advisory Committee on Student Financial Assistance.

ACTION: Notice of partially closed meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Committee on Student Financial Assistance. This notice also describes the functions of the Committee. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of the opportunity to attend.

DATES: December 8, 1988, beginning at 9:00 a.m. and ending at 5:30 p.m.; and December 9, 1988, beginning at 8:00 a.m. and ending at 1:30 p.m., but closed from 8:00 a.m. to 9:00 a.m.

ADDRESS: Wyndham Bristol Hotel, 2430 Pennsylvania Avenue NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Brian K. Fitzgerald, Staff Director, Advisory Committee on Student Financial Assistance, Room 4600, ROB-3, 7th & D Streets SW., Washington, DC 20202-7582 (202) 732-3439.

SUPPLEMENTARY INFORMATION: The Advisory Committee on Student Financial Assistance is established under section 491 of the Higher Education Act of 1965 as amended by Pub. L. 100-50 (20 U.S.C. 1098). The Advisory Committee is established to provide advice and counsel to the Congress and the Secretary of Education on student financial aid matters, including providing technical expertise with regard to systems of need analysis and application forms and making recommendations that will result in the maintenance of access to postsecondary education for low- and middle-income students.

The Advisory Committee will meet in Washington, DC, from 9:00 a.m. to 5:30 p.m. on December 8 and from 8:00 a.m. to 1:30 p.m. on December 9. On December 9, a portion of the meeting will be closed to the public from 8:00 a.m. to 9:00 a.m. to elect a new Chariman, a Vice-Chairman and to discuss the Committee's present and future staffing. This portion of the meeting will be closed under the authority of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. Appendix I) and under exemption (6) of section 552b(c) of the Government Sunshine Act (Pub. L. 94-409). The elections and ensuing discussions will touch upon matters that would disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy if conducted in open session.

A summary of the activities at the closed session and related matters which are informative to the public consistent with the policy of Title 5 U.S.C. 552b will be available to the public within fourteen days of the meeting.

The proposed agenda of the open portion of the meeting includes: (a) Institutional Lender Draft Study Plan; (b) Delivery System Issues; (c) Committee Research Agenda; and (d) a report on

Committee Organization and Administration.

Records are kept of all Committee proceedings, and are available for public inspection at the Office of the Advisory Committee on Student Financial Assistance, Room 4600, 7th and D Streets SW., Washington, DC, from the hours of 9:00 a.m. to 5:30 p.m., weekdays, except Federal holidays.

Dated: November 15, 1988.

Brian K. Fitzgerald,

Staff Director, Advisory Committee on Student Financial Assistance.

[FR Doc. 88-26791 Filed 11-18-88; 8:45 am]

BILLING CODE 4000-01-M

Office of Postsecondary Education

Availability of the 1988-89 National Defense and Perkins (National Direct) Student Loan Program Directory of Designated Low-Income Schools

AGENCY: Department of Education.

ACTION: Notice of availability of the 1988-89 National Defense and Perkins (National Direct) Student Loan Program Directory of Designated Low-Income Schools.

SUMMARY: The Secretary announces that the *1988-89 National Defense and Perkins (National Direct) Student Loan Program Directory of Designated Low-Income Schools* (Directory) is now available at institutions of higher education participating in the Perkins Loan Program, State and Territory Department of Education and the United States Department of Education. Under the National Defense, National Direct and Perkins Loan Programs, a borrower may have a portion of his or her loan cancelled if the borrower teaches full-time for a complete academic year in a selected elementary or secondary school having a high concentration of students from low-income families. In the 1988-89 Directory, the Secretary lists, on a State-by-State and Territory-by-Territory basis, the schools in which a borrower may teach during the 1988-89 school year to qualify for cancellation benefits.

DATE: The Directory is available.

ADDRESSES: Information concerning specific schools listed in the Directory may be obtained from Roland W. Allen, Campus-Based Program Branch, Division of Program Operations and Systems, Office of Postsecondary Education, U.S. Department of Education, 400 Maryland Avenue SW. (Room 4651, ROB-3), Washington, DC 20202-5453, Telephone (202) 732-3730.

FOR FURTHER INFORMATION CONTACT: Directories are available at (1) each institution of higher education participating in the Perkin Loan Program; (2) each of the fifty-seven (57) State and Territory Departments of Education; and (3) the U.S. Department of Education.

SUPPLEMENTARY INFORMATION: The Secretary selects the schools which qualify the borrower for cancellation under the procedures set forth in 34 CFR 674.52 and 674.54 of the National Defense, National Direct and Perkins Loan Program regulations.

The Secretary has determined that for the 1988-89 academic year, full-time teaching in the schools set forth in the 1988-89 Directory qualifies a borrower for cancellation.

The Secretary is providing the Directory to each institution participating in the Perkins Loan Program. Borrowers and other interested parties may check with their lending institution, the appropriate State Department of Education, or the Office of Postsecondary Education of the Department of Education concerning the identity of qualifying schools for the 1988-89 academic year.

The Office of Postsecondary Education will retain, on a permanent basis, copies of past, current, and future Directories.

(Catalog of Federal Domestic Assistance Number 84.037: National Defense, National Direct and Perkins Loan Cancellations.)

Dated: November 8, 1988.

Kenneth D. Whitehead,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 88-26898 Filed 11-18-88; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Proposed Amendment to the Model Conservation Standards Surcharge Policy Extension

AGENCY: Bonneville Power Administration (Bonneville or BPA), DOE.

ACTION: Notice of proposed amendments to Bonneville's Model Conservation Standards Surcharge Policy Extension and request for comments.

SUMMARY: This notice proposes two amendments to the recently adopted Model Conservation Standards (MCS) Surcharge Policy Extension (Policy). The first amendment, recommended by the Northwest Power Planning Council (Council), would change the method for calculating a surcharge. The calculation in the Policy would have resulted in a lower surcharge for noncompliance than was the Council's intent. The second amendment changes the level of energy savings which a residential sector code must achieve to be considered comparable to the Council's MCS.

DATE: Comments must be submitted on or before December 16, 1988.

ADDRESS: Written comments should be submitted to the Public Involvement Manager, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon, 97212.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Procter at 503-230-3961, or call BPA's Public Involvement office. Telephone numbers, voice/TTY, for the Public Involvement office are: 503-230-3478 in Portland: toll-free 800-452-8429 for Oregon outside of Portland; 800-547-6048 for Washington, Idaho, Montana, Utah, Nevada, Wyoming, and California. Information may also be obtained from:

Mr. George Gwinnutt, Lower Columbia Area Manager, Suite 288, 1500 Plaza Building, 1500 NE. Irving Street, Portland, Oregon 97232, 503-230-4551.

Mr. Ladd Sutton, Eugene District Manager, Room 206, 211 East Seventh Avenue, Eugene, Oregon 97401, 503-687-6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509-456-2518.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406-329-3060.

Mr. Ronald K. Rodewald, Wenatchee District Manager, Room 307, 301 Yakima Street, Wenatchee, Washington 98801, 509-662-4377.

Mr. Terence G. Esvelt, Puget Sound Area Manager, 201 Queen Anne Avenue North, Suite 400, Seattle, Washington 98109, 206-442-4130.

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, 101 West Poplar, Walla Walla, Washington 99362, 509-522-6226.

Mr. Robert N. Laffel, Idaho Falls District Manager, 531 Lomax Street, Idaho Falls, Idaho 83401, 208-523-2706.

Mr. Thomas H. Blankenship, Boise District Manager, Room 494, Federal Building, 550 W. Fort Street, Boise, Idaho 83724, 208-334-9137.

SUPPLEMENTARY INFORMATION: After the draft policy was released for public comment, on August 15, 1988, two substantive issues arose. First, the Council advised Bonneville that the present Policy does not reflect the Council's surcharge methodology contained in their Model Conservation Standards for New Residential and Commercial Construction (Plan

Amendment) of March 26, 1987. Second, in the process of reviewing the Policy and the Council's Plan Amendment, Bonneville became aware of another discrepancy between the Council's Surcharge recommendation and Bonneville's Policy.

When the draft Policy extension was released for public comment, Bonneville indicated that no policy changes were being proposed. At that time, Bonneville believed that the Policy was consistent with the Council's surcharge methodology and the Northwest Power Act. In order to provide for public comment on these issues, Bonneville decided to release the Policy extension with minor modifications and then proposed changes to the Policy. The separate release of the Policy extension in final form will assure policy continuity by providing utilities with information concerning plan submission and implementation dates.

In accordance with the Paperwork Reduction Act, Bonneville has determined that the submission requirements contained in the proposed amendment would require approximately 30 hours of staff time annually. Given the need to collect information useful in monitoring regional progress towards MCS adoption, Bonneville believes that the requirements do not place an undue burden on utilities. Bonneville is also seeking comment on this determination.

A. Surcharge Calculation

The Council noted, in their letter of October 6, 1988, that as a result of extensive public discussion on how the surcharge should be calculated, " * * * the Council concluded that the surcharge ought to be calculated on the total load of the non-conforming jurisdiction." As such, the Council stated that it was " * * * their intent that the surcharge be based on a customer's total firm load purchased from Bonneville to serve any non-complying jurisdiction, the surcharge should not be calculated on the basis of a non-complying end-use, such as the new residential sector."

To reflect the Council's intent, several changes would be required in sections 2 and 4 of the Policy. Proposed changes to data reporting requirements in section 2 will ensure that Bonneville has the appropriate information used to perform a surcharge calculation. Proposed changes in section 4 will affect the surcharge calculation.

The data reporting requirements contained in section 2 and the proposed new language are presented below.

The current language reads:

With their proposed plan, customers are to submit the following load information to the extent available: (a) total residential and commercial loads, (b) the portion of the customer's residential and commercial load covered by each of the conservation strategies contained in the appendices, and (c) total retail load.

The proposed language reads:

With their proposed plan, customers are to submit the following load information to the extent available: (a) total retail load, and (b) that portion of their total retail load in jurisdictions not covered by one or more of the conservation strategies contained in the appendices to this Policy. If a customer has retail loads in violation of the Policy for both sectors, the portion of their total load not in compliance with the Policy should be reported by sector for each noncomplying jurisdiction.

The current language in section 4 and the proposed new language are presented below.

The current language reads:

A. Not less than 30 days prior to a final decision on the imposition of a residential surcharge, the Administrator shall provide written notice to the customer including determination of the amount of a customer's load not covered by a Bonneville-approved MCS residential plan. The amount of the load not covered by a Bonneville-approved MCS residential plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in the appendices to this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

B. The level of the residential surcharge will be determined by dividing the customer's residential load not covered by a Bonneville-approved MCS residential plan by the customer's total retail load, rounding the result to the nearest one-tenth of a percent. This resulting percentage is multiplied by 0.10.

C. Not less than 30 days prior to a final decision on the imposition of a commercial surcharge, the Administrator shall provide written notice to the customer including a determination of the amount of the load not covered by a Bonneville-approved MCS commercial plan. The amount of the load not covered by a Bonneville-approved MCS commercial plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in the appendices to this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

D. The level of the commercial surcharge will be determined by dividing the customer's commercial load not covered by a Bonneville-approved MCS commercial plan by the customer's total retail load, rounding the result to the nearest one-tenth of a percent. This resulting percentage is multiplied by 0.10.

E. The resulting level of the residential or commercial surcharges will be applied to all power purchases and/or exchanges made by the customer under the applicable rate schedules, using the Council's surcharge methodology, and will be applied subsequent to any other rate adjustments.

F. At no time will a customer simultaneously be assessed a surcharge for failure to comply with the requirements in the residential sector and a surcharge for failure to comply with the requirements in the commercial sector.

G. The customer and other interested parties shall be afforded an opportunity to provide comments regarding the determinations made in sections 4(A) to 4(D). Such comments may be made in writing or orally at a public meeting convened by Bonneville at the request of the customer for this purpose. This public meeting will be held between the time of the written Notice of Intent to surcharge and the final surcharge decision. Included in the Intent to Surcharge will be an initial determination of the fraction of a customer's load subject to the surcharge, based on sections 4(A) to 4(D). Following the receipt and evaluation of comments, the Administrator shall provide written notice to the customer of the final surcharge decision.

H. Beginning with the effective date of a surcharge, the Administrator shall review the findings made in sections 4(A) to 4(D) after the customer, or a jurisdiction served by the customer, has taken an action that affects those findings. Customers may request such review by providing evidence in accordance with this section that the customer or a jurisdiction served by that customer has taken actions subsequent to the effective date of the surcharge.

The proposed language reads:

A. Not less than 30 days prior to a final decision on the imposition of a residential surcharge, the Administrator shall provide written notice to the customer including determination of the amount of a customer's total retail load in jurisdictions not covered by a Bonneville-approved MCS residential plan. The amount of the total retail load in jurisdictions not covered by a Bonneville-approved MCS residential plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in Section 2 of this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

B. Not less than 30 days prior to a final decision on the imposition of a commercial surcharge, the Administrator shall provide written notice to the customer including a determination of the amount of a customer's total retail load in jurisdictions not covered by a Bonneville-approved MCS commercial plan. The amount of the total retail load in jurisdictions not covered by a Bonneville-approved MCS commercial plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in Section 2 of this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

C. The fraction of a customer's total retail load in jurisdictions *not* covered by a Bonneville-approved MCS plan will be determined by dividing the customer's total retail load in jurisdictions not covered by a Bonneville-approved MCS plan, as determined in section 4(A) or 4(B), by the customer's total retail load.

D. The level of the surcharge for failure to implement the necessary Bonneville-approved MCS plans is 10 percent multiplied by the fraction of a customer's total retail load not covered by a Bonneville-approved MCS plan.

E. At no time will a customer simultaneously be assessed a surcharge for failure of a jurisdiction to comply with the requirements in the residential sector and a surcharge for failure of that same jurisdiction to comply with the requirements in the commercial sector.

F. The customer and other interested parties shall be afforded an opportunity to provide comments regarding the determinations made in sections 4(A) to 4(D). Such comments may be made in writing or orally at a public meeting convened by Bonneville at the request of the customer for this purpose. This public meeting will be held between the time of the written Notice of Intent to Surcharge and the final surcharge decision. Included in the Notice of Intent to Surcharge will be an initial determination of the fraction of a customer's load subject to the surcharge, based on sections 4(A) to 4(D). Following the receipt and evaluation of comments, the Administrator shall provide written notice to the customer of the final surcharge decision.

G. Beginning with the effective date of a surcharge, the Administrator shall review the findings made in section 4(A) to 4(D) after the customer, or a jurisdiction served by the customer, has taken an action that affects those findings. Customers may request such review by providing evidence in accordance with this section that the customer or a jurisdiction served by that customer has taken actions subsequent to the effective date of the surcharge.

B. Energy Savings Target for Code Evaluation

Referring to page 1–B–3 of the Council's Plan Amendment, the Council states that "The MCS for utility residential conservation programs requires utilities to implement, in accordance with the requirements detailed below, the Bonneville/utility residential MCS program, an equivalent alternative program, or rely on building codes improved to MCS levels." Similar language appears on page 1–B–8 for the Commercial Sector.

The Policy extension states in Appendix 5 that "An equivalent code must achieve at least the same level of total savings, in each sector separately, as would have been achieved by implementing Bonneville's Super GOOD CENTS Program in the residential sector, and the Council's commercial MCS." Similar language appears in Appendix 7.

Since the Council's Plan Amendment indicated that utilities could rely solely on codes to comply with the Policy, as long as those codes were at the level of full MCS, several additional changes to the Policy are proposed.

The current language reads:

Equivalent Code. In the residential sector, a code for a specific sector which can be expected to achieve at least the same level of total electrical savings within the jurisdiction as would have been achieved had the utility serving that jurisdiction participated in Bonneville's Super GOOD CENTS Program. For the commercial sector, the Council's MCS will be used. (Section 1, part F)

The proposed language reads:

Equivalent Code. In either the residential or commercial sectors, a code which is designed to achieve (within 5 percent) the level of total electrical savings that would have been achieved if that jurisdiction had adopted the Council's MCS for that sector.

The current language reads:

Utilities which rely on jurisdictional adoption of residential building codes, or which impose a residential service standard, to achieve additional energy savings in the residential sector will have to provide evidence supporting the claim that the code (or service standard) can be expected to achieve at least the same level of electrical savings within the jurisdiction (or utility, service area, depending on whether a code or service standard approach is used) as would have been achieved if the utility had participated in Bonneville's Super GOOD CENTS Program. (Section 3A, paragraph 2)

The proposed language reads:

Utilities which rely on jurisdictional adoption of residential building codes, or which impose a residential service standard, to achieve additional energy savings in the residential sector will have to provide evidence supporting the claim that the code (or service standard) can be judged to be an equivalent code, as equivalence is defined in this Policy.

The current language reads:

An equivalent code must achieve at least the same level of total savings, in each sector separately, as would have been achieved by implementing Bonneville's Super GOOD CENTS Program in the residential sector, and the Council's commercial MCS. (Appendix 5, paragraph 2)

The proposed language reads:

For a code to be judged equivalent to the MCS, it must meet the definition of equivalence as used in this Policy.

The current language reads:

If an equivalent utility service standard approach is pursued, a customer may choose to adopt a utility service standard which is not one of the codified versions, but which is expected to achieve, at least the same level of total electrical savings in each sector separately as would have been achieved by adopting Bonneville's Super GOOD CENTS Program in the residential sector, and the Council's MCS for the commercial sector. (Appendix 7, paragraph 1)

The proposed language reads:

If an equivalent utility service standard approach is pursued, a customer may choose to adopt a utility service standard which is not one of the codified versions, but which is determined to be equivalent to the Council's MCS, as equivalence is defined in this Policy.

Issued in Portland, Oregon, on November 9, 1988.

Jack Robertson,

Deputy Administrator.

[FR Doc. 88–26879 Filed 11–18–88; 8:45 am]

BILLING CODE 6450–01–M

Model Conservation Standards Surcharge Policy Extension

AGENCY: Bonneville Power Administration (Bonneville or BPA), DOE.

ACTION: Notice of Bonneville's Model Conservation Standards (MCS) Surcharge Policy Extension.

SUMMARY: Bonneville is releasing its MCS Surcharge Policy Extension (Policy). The Policy is a slightly modified version of Bonneville's Policy for 1988. The extenstion is necessary because the Policy for 1988 was scheduled to expire on December 31, 1988. Utilities have the same compliance options they had with the Policy for 1988. In addition, the standards used to evaluate utility alternative plans remain unchanged. Under this Policy, customers of Bonneville who are subject to the Policy are to submit plans by December 16, 1988, and implement those plans by January 16, 1989. It is Bonneville's intent to allow customers to rely on their current compliance approach to the extent that the customer chooses to and that approach has been achieving acceptable results. As such, the extended Policy will help encourage region wide adoption of building codes at MCS levels.

DATES: The Policy is effective November 21, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Procter at 503–230–3961. Or call BPA's Public Involvement Office. Telephone numbers, voice/TTY, for the Public Involvement office are: 503–230–3478 in Portland; toll-free 800–452–8429 for Oregon outside of Portland; 800–547–6048 for Washington, Idaho, Montana, Utah, Nevada, Wyoming, and California. Information may also be obtained from:

Mr. George Gwinnutt, Lower Columbia Area Manager, Suite 288, 1500

Plaza Building, 1500 NE. Irving Street, Portland, Oregon 97232, 503–230–4551.

Mr. Ladd Sutton, Eugene District Manager, Room 206, 211 East Seventh Avenue, Eugene, Oregon 97401, 503–687–6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509–456–2518.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406–329–3060.

Mr. Ronald K. Rodewald, Wenatchee District Manager, Room 307, 301 Yakima Street, Wenatchee, Washington 98801, 509–662–4377.

Mr. Terence G. Esvelt, Puget Sound Area Manager, 201 Queen Anne Avenue North, Suite 400, Seattle, Washington 98109, 206–442–4130.

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, 101 West Poplar, Walla Walla, Washington 99362, 509–522–6226.

Mr. Robert N. Laffel, Idaho Falls District Manager, 531 Lomax Street, Idaho Falls, Idaho 83401, 208–523–2706.

Mr. Thomas H. Blankenship, Boise District Manager, Room 494, Federal Building, 550 W. Fort Street, Boise, Idaho 83724. 208–334–9137.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background of Policy

A. Introduction

The Surcharge Policy is a response to recommendations made by the Northwest Power Planning Council (Council) in its 1986 Northwest Conservation and Electric Power Plan (Plan) and its Model Conservation Standards (MCS) for New Residential and Commercial Construction of March 26, 1987 (Plan Amendment). The purpose of this policy is to encourage utilities to achieve additional electrical savings through improved residential and commercial building construction which can ultimately result in region-wide adoption of the Council's MCS in building codes. There are two additional policy objectives: (1) To identify the criteria that will be used to evaluate a utility's proposed approach to achieving MCS level electrical savings; and (2) to identify the method for calculating and collecting a surcharge.

As the Council states in its Plan Amendment, "By the end of 1989, the Council expects the region to achieve residential sector savings equivalent to at least 85 percent of those that would be achieved with full implementation of the MCS." One long-run goal is to achieve MCS level savings through code adoption.

B. Statutory Direction

Section 4(e)(3) of the Pacific Northwest Electric Power Planning and Conservation Act (Act) provides for the development of MCS as part of the Council's Plan. The standards, as described in section 4(f)(1) of the Act, are to include standards applicable to new and existing structures and to utility and government conservation programs. Such standards should reflect geographic and climatic differences and produce all power savings that are cost effective for the region and economically feasible for consumers.

Section 4(f)(2) of the Act provides that the Council may recommend to the Bonneville Administrator the imposition of a surcharge on customers of the Administrator for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented the standards or other conservation measures that the Administrator determines achieve energy savings comparable to the standards. Finally, section 4(e)(3)(G) of the Act mandates that the Council develop a methodology for calculating the surcharge.

II. Past and Present Surcharge Policy Development Efforts

Part A of this section summarizes past MCS and surcharge actions undertaken by the Council. Part B summarizes Bonneville's past surcharge-related activities. Part C describes the Council's 1987 surcharge recommendation as contained in its Plan Amendment of January 30, 1987.

A. Council Activities to Date

On April 27, 1983, the Council adopted its first Plan. As required by the Act, the Council's 1983 Plan contained MCS for newly constructed residential and commercial buildings and for conversion of existing residential and commercial buildings to electric space heating and conditioning.

In the 1983 Two-Year Action Plan (chapter 10 of the 1983 Plan), the Council identified tasks to be undertaken by Bonneville, the Council, and other regional entities. That Plan mandated that Bonneville include in its surcharge policy a consistent procedure for certifying compliance with MCS and a procedure for review and evaluating alternative plans.

In accordance with the 1983 Plan, State governments, local governments, or utilities were to adopt and enforce the MCS as building codes or utility service standards by January 1, 1986. Where such standards were not adopted, an alternative plan to achieve comparable savings should have been in place by January 1, 1986. Where neither action had occurred, the Council recommended that the Administrator impose a surcharge.

The Council voted on October 31, 1984, to adopt an amendment which simplified the surcharge calculation. The Council recommended that a 10-percent surcharge be levied on the customer's power bill for that portion of its loads which were not complying with the standard.

On July 26, 1985, the Council proposed to enter rule making to amend the MCS. On December 4, 1985, the Council voted to amend that portion of the 1983 Plan dealing with MCS. The amended MCS thermal performance levels for both new residential and new commercial buildings were equivalent to the MCS set forth and amended by the Council in its 1983 Plan. The Council also recommended that Bonneville develop a surcharge policy based on MCS implementation and performance.

In the 1986 Action Plan, the Council identified specific actions that Bonneville should take towards region-wide implementation of the MCS.

Bonneville was to (1) have utilities submit to Bonneville a plan declaring how they intended to comply with the MCS, (2) design a process to collect utility-specific data on the savings that would be achieved if all buildings were constructed to MCS levels, (3) continue development and implementation of a procedure to measure compliance with the MCS, (4) review alternative plans for achieving compliance with the MCS, and (5) develop a new surcharge policy.

On November 20, 1986, the Council proposed to enter further rule making to amend part of its 1986 Plan dealing with MCS and the surcharge. After public comment, the Plan Amendment was published on January 30, 1987. Notice of the Plan Amendment, which included the Council's 1987 MCS, was published in the **Federal Register** on March 26, 1987 (52 FR 9738, March 26, 1987).

B. Bonneville Activities to Date

Bonneville began the development of a surcharge policy in early 1984 through a series of informal meetings with State government, local government, utility, and Council representatives. Bonneville staff informally discussed the various issues that might surround the development of a policy to implement the Council recommendation to impose a surcharge. These informal discussions formed the basis of a **Federal Register** Notice of Intent to Develop a Policy to Implement the Council Recommended Conservation Surcharge. The notice (49 FR 34891, September 4, 1984) was mailed to the public on August 28, 1984.

Bonneville elected to delay publication of a proposed policy until after final Council action on amendment of the surcharge methodology. Public review and comment on the proposed policy took place between March 13, 1985, and May 17, 1985.

Bonneville suspended action on the surcharge policy when the Council entered rule making to amend the MCS in the summer of 1985. After the Council amended its MCS recommendation in December 1985, Bonneville developed a revised proposed policy and received public comment on that proposal during July and August 1986.

As part of the Administrator's decision on whether to finalize the revised proposed surcharge policy, Bonneville undertook an analysis of the cost-effectiveness and consumer economic feasibility of the MCS contained in the Council's 1986 Plan. Bonneville concluded that some of the recommended measures were not cost effective, and on December 18, 1986, Bonneville's MCS findings were published.

Based in part on that analysis, the Council entered rule making to amend its MCS and surcharge recommendations. In Turn, Bonneville suspended the development of a final surcharge policy. Following publication of the Council's Plan Amendment on January 30, 1987, Bonneville undertook a second revision of the proposed surcharge policy.

On May 26, 1987, Bonneville released its proposed surcharge policy for public comment. The comment period closed on July 15, 1987. During the comment period there was one public meeting which was held on June 22, 1987. A number of changes were made in the proposed version of that policy, based on the public comment received. That policy, entitled "Model Conservation Standards Surcharge Policy," was Bonneville's response to Council recommendations to develop a surcharge policy.

In response to the 1988 Policy, utilities submitted plans for the residential and commercial sectors within their service areas. Those plans covered calendar year 1988. Since the Policy expires on December 31, 1988, Bonneville is now extending the Policy. This version of the Policy is substantially the same as the Policy for 1988.

C. Council's 1987 Surcharge Recommendation

The Council's Plan Amendment of January 30, 1987, made several major changes to its 1986 Plan. The most significant change in the surcharge recommendation was a move away from a performance-based surcharge, where utilities could face a surcharge if their performance was poor relative to the performance of other utilities. A summary of the Council's 1987 surcharge recommendation appears below.

1. *Residential Surcharge Recommendation.* The Council recommended that a 10 percent surcharge be imposed on utilities which do not submit, by a deadline set by Bonneville: (1) An initial plan for implementation of the Bonneville/Utility Residential MCS Program; (2) a plan for implementation of an alternative program which is approved by Bonneville as being equivalent; or (3) a declaration approved by Bonneville, that the MCS for residential buildings will be met by building codes. This surcharge would continue in effect until a utility has filed an initial plan and has obtained the necessary Bonneville approvals.

2. *Commercial Surcharge Recommendation.* The Council recommended that a 10 percent surcharge be imposed on utilities which do not submit, by a date set by Bonneville: (1) An initial plan for implementation of the Bonneville/Utility Commercial MCS Program; (2) a plan for implementation of an alternative program which is approved by Bonneville as equivalent to the Bonneville/utility MCS Program, or (3) a declaration, approved by Bonneville, that the MCS for commercial buildings will be met by building codes at the MCS levels. The council recommended that the surcharge continue in effect until a utility has filed an initial plan and has obtained the necessary Bonneville approvals.

3. *Conversion Surcharge Recommendation.* The Council's MCS for residential and commercial buildings converting to electric space heating/conditioning stated that State or local governments or utilities should take actions through codes and/or alternative programs to achieve electric power savings from buildings which convert to electric space heating/conditioning. The savings should be comparable to those savings that would be achieved if each building converting to electric space heating/conditioning were upgraded to include all cost-effective electricity conservation measures. The council recommended this conversion standard, but did not recommend that a surcharge be imposed for failure to adopt the standard.

4. *Combined Commercial/Residential Code.* One provision of the Plan Amendment allowed for a combined residential/commercial MCS strategy by a utility. This approach for less than MCS program savings to be achieved in one sector as long as the shortfall is recouped in the other sector. This alternative was to be applicable only to the submission of alternative codes or utility service standards.

5. *Exemptions.* The Council has determined that no exemptions are needed at this time.

6. *Federal Loads and Generic MCS.* The Council did not make any surcharge recommendation in these areas.

III. Surcharge Policy

Section 1: Definitions

A. *Administrator* Administrator of the Bonneville Power Administration or the Administrator's designated representative.

B. *Alternative Code.* Codes implemented in the residential and commercial sectors which, in aggregate, achieve total electrical savings at least as large as would have been expected had the council's illustrative MCS been implemented in the residential and

commercial sectors. The Council's illustrative MCS are contained in the Council's Plan Amendment of January 30, 1987, as published in the Federal Register on March 26, 1987.

C. *Alternative Utility Plan* Any plan which either partially or wholly relies on an approach to conservation savings discussed in appendices 2, 4, 5, 6, or 7 of this policy.

D. *Alternative Utility Program* For the residential sector, a utility operated MCS support program designed to achieve at least the same level of total expected electrical savings, while complying with the Indoor Air Quality (IAQ) and ventilation goals, of Bonneville's Super GOOD CENTS program. For the commercial sector, a utility MCS support program designed to promote at least the same MCS measures as contained in the Council's commercial MCS of March 26, 1987, and providing comparable design assistance services as contained in the Bonneville/Utility MCS support program as of the effective date of this policy.

E. *Customer* For purposes of this policy, a utility existing in the Pacific Northwest region which purchases firm power from Bonneville under a utility Metered or computed Requirements Contract, or a utility which purchases firm capacity under a pre-Act contract, or a utility which participates in the Residential Purchase and Sales Agreement/Exchange Transmission Credit Agreement, as an active exchanger or deemer.

F. *Equivalent Code* In the residential sector, a code for a specific sector which can be expected to achieve at least the same level of total electrical savings within the jurisdiction as would have been acheved if the utility serving that jurisdiction implemented the Council's residential MCS. For the commercial sector, the Council's MCS of March 26, 1987, will be used.

G. *Jurisdiction* For purposes of this policy, any unit of government including Indian Tribes, State and local governments, and municipal corporations.

H. *Region* The Pacific Northwest Region, region, or regional means the area consisting of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and any contiguous areas, not in excess of 75 air miles from the area referred to above, which are part of the service area of a rural electric cooperative customer, served by the Administrator on the effective date of the Act, which has a distribution system from which it serves both within and without such region.

I. *Service Area* The service area of a utility is that portion of its service territory which is both subject to the Surcharge Policy and to which the utility provides electric power service to the residential or commercial sectors.

J. *Total Retail Load* The number of firm kilowatt hours (kWh's) sold at retail by a customer during the 12-month period prior to the implementation date contained in Appendix 8 or during consecutive billing cycles covering a comparable period of time.

K. *Total Residential Load* The number of firm Kwh's sold at retail by the customer during either the most recent 12-month period prior to implementation date contained in Appendix 8, or during consecutive billing cycles covering a comparable period of time.

L. *Total Commercial Load* The total number of firm kWh's sold at retail by the customer during the 12-month period prior to the implementation date contained in Appendix 8, or during consecutive billing cycles covering a comparable period of time.

Section 2: Application of the Surcharge Policy

For this residential sector, by the plan submission date contained in Appendix 8, customers must submit either (a) a letter indicating that the approach being used to comply with the Policy in 1988 will be used to comply with the Policy for the plan coverage period indicated in Appendix 8, (b) a plan to implement the Super GOOD CENTS Program, or (c) an alternative utility program, or utility service standard for Bonneville approval, or (d) a plan indicating that jurisdictions within its service area will implement and enforce the MCS via participation in the Northwest Energy Code Program (NWECP) or adoption of a Bonneville-approved building code. A utility's residential sector plan may contain any combination of these approaches. Except as provided for in section 3(A) of this Policy, the utility's entire service area must be covered by some combination of the conservation strategies described in the appendices to this policy.

A utility's residential sector plan will be evaluated on the basis of the utility's proposed efforts for the residential sector during the plan coverage period indicated in Appendix 8 and its success with the approach(es) currently being used to comply with the Policy.

Customers who do not implement a Bonneville approved residential MCS plan by plan implementation date indicated in Appendix 8, will be subject to a surcharge as calculated in section 4 of this Policy. Customers who have been granted a grace period, as provided for either in section 3 or the appendix relevant to the utility's conservation strategy, will not face a surcharge until the end of any such period.

For the commercial sector, by the plan submission date indicated in Appendix 8, customers must submit either (a) a letter indicating that the approach currently being used to comply with the Policy will be used to comply with the Policy for the plan coverage period indicated in Appendix 8, (b) a plan to implement Bonneville's Commercial MCS Program, (c) an alternative utility commercial program or utility service standard in the commercial sector, or (d) a plan indicating that jurisdictions within its service area have met the Council's commercial MCS through codes. A utility's commercial sector plan may contain any combination of these approaches. Except as provided for in section 3(A), the utility's entire service area must be covered by some combination of the conservation strategies described in the appendices to this policy.

Customers who have not implemented a Bonneville-approved commercial MCS plan by the plan implementation date indicated in Appendix 8, are subject to a surcharge, as calculated in section 4 of this Policy. Customers who have been granted a grace period, as provided for in either section 3 or the appendix relevant to the utility's conservation strategy, will not face a surcharge until the end of such period.

Customers of Bonneville without service areas as defined in this Policy, need only submit evidence of their lack of such a service area by the plan submission date indicated in Appendix 8. This provision exists for those customers who have voluntarily adopted a policy not to serve the residential or commercial sectors, or who are prohibited from serving the residential or commercial sector. If the customer serves one of these two sectors, then this provision will only apply to the one sector not served.

Customers who have neither submitted this information, nor a plan for achieving conservation in these sectors, will be subject to a subcharge after the plan implementation date indicated in Appendix 8 has passed.

Each of the appendices to this policy represents a different approach to achieve electrical savings from improved construction practices. These appendices contain more specific submission and evaluation criteria for each of the MCS plan options and are part of this policy. It is very important

that customers carefully review this document including the appendices, to understand fully what actions utilities must take to achieve conservation savings in ways which also comply with this Policy.

Once any plan is approved and implemented, Bonneville will assume that the utility and/or jurisdiction(s) within its service areas will carry out that plan in good faith. During the period for which this Policy is in effect, Bonneville reserves the right to revisit any utility's approved plan if Bonneville has reason to believe that the utility has not implemented its plan in good faith. This same provision applies to utilities who rely on jurisdictional adoption and enforcement of codes to comply with this Policy.

With their proposed plans, customers are to submit the following load information to the extent available: (a) Total residential and commercial loads, (b) the portion of the customer's residential and commercial load covered by each of the conservation strategies contained in the appendices, and (c) retail load.

This Policy is in effect from the date it is signed by the Administrator until it is either amended or rescinded. In future years, Bonneville will announce the submission dates and timeframe which a submittal is to cover.

Section 3: Evaluation of Alternative Utility Plans

An alternative utility plan is any plan which relies wholly or in part on an approach to conservation savings presented in Appendix 2, 4, 5, 6, or 7 of this Policy. These plans will be evaluated using three criteria: (1) expected electrical savings, (2) enforcement, and (3) indoor air quality (IAQ) and ventilation. This section applies to all residential sector alternative plans and those commercial sector alternative plans relying on the adoption of commercial codes or commercial service standards.

If Bonneville concludes that the utility's proposed alternative plan cannot be accepted because of its failure to comply with any of the evaluation criteria described below, Bonneville will allow grace a period lasting at least as long as Bonneville took to evaluate the utility's initial proposal. Any subsequent grace period(s) may be allowed on a case-by-case basis.

A. Equivalent Electrical Savings

For the residential sector, if a utility is proposing to achieve electrical savings by implementing an alternative residential utility program, Bonneville will use the prospective total electrical savings of its Super GOOD CENTS Program to determine whether the utility's proposed approach will at least meet the appropriate residential electrical savings level for the period of time covered by a utility's plan. Part of the equivalence determination procedure for an alternative residential utility program will involve a comparison between the utility's proposed marketing program and the marketing program they would have pursued had they enrolled in the Super GOOD CENTS program for the period of time covered by the utility's plan.

Utilities which rely on jurisdictional adoption of residential building codes, or which impose a residential service standard, to achieve additional energy savings in the residential sector will have to provide evidence supporting the claim that the code (or service standard) can be expected to achieve at least the same level of electrical savings within the jurisdiction (or utility service area, depending on whether a code or service standard approach is used) as would have been achieved if the utility had participated in Bonneville's Super GOOD CENTS Program.

Utilities which rely on jurisdictional adoption of residential *and* commercial codes (or which impose residential and commercial service standards) to achieve additional savings beyond current practice, may "trade off" savings achieved in one sector towards a deficit in the other sector. The utility would have to present evidence supporting its claim that the residential and commercial codes, in aggregate, can be expected to achieve at least the same total level of electrical savings as would have been achieved had the jurisdiction adopted the Council's full illustrative commercial and residential MCS for that climate zone. Such sectoral trade-offs are only allowed using enhanced building codes or service standards.

In addition, a utility may obtain equivalent savings by allocating savings achieved by advanced building codes in a jurisdiction (or jurisdictions) within its service area to its entire service area. Such "jurisdictional trade-offs" are only allowed where the utility shows that the full Council MCS level of savings for both sectors are being attained, in aggregate, within the utility's service area.

Finally, those utilities relying on commercial code adoption by a jurisdiction within or covering their service area, or who will impose a commercial service standard, will have to provide evidence supporting their claim that the expected total electrical savings are at least equivalent to what would have been expected had the jurisdiction implemented the Council's illustrative commercial MCS. The only exception to these requirements is for utilities or jurisdictions who adopt a codified version of the Council's MCS, as discussed in Appendices 4 and 6, respectively.

Submittals in future years may be evaluated using different standards in the event that code advancement occurs and/or the MCS are changed. For the plan coverage period indicated in Appendix 8, Bonneville will analyze residential electrical savings from an alternative plan by assuming that, in the absence of MCS, a residence would have been built to one of the following: (1) In Oregon, 1983 energy code; (b) in Washington, 1983 energy code; or (c) in either Idaho or Montana, HUD Minimum Property Standards. Electrical savings in the commercial sector will be evaluated assuming: (a) 1986 code in Oregon and Washington, (b) 1983 National Energy Code in Montana, and (c) individual jurisdiction codes in Idaho.

All thermal performance evaluations will rely on accepted engineering practices. Bonneville will be guided by the assumptions, process, and housing prototypes contained in Bonneville's Code Equivalency Determination Procedures.

B. Enforcement

A utility will have more discretion in proposing an approach which will meet the second evaluation criterion on enforcement. Bonneville is recommending that any customer contemplating submission of an alternative utility plan refer to Bonneville's Super GOOD CENTS, NWECP and Commercial MCS Program descriptions for guidance. Alternative utility plans, excluding an alternative utility commercial program, must contain a requirement of site inspection consistent with the effective date of the surcharge.

Referring to alternative utility programs, a utility will have to provide evidence adequate to assure Bonneville that the energy savings which are being claimed are attributable to the utility's program. Part of the evidence is some enforcement method to assure that the conservation savings the utility is claiming are attributable to the measure they are promoting and inspecting.

C. Indoor Air Quality and Ventilation

For residential construction all alternative plans will be examined to determine if the construction practices being promoted or required, when combined with the comparable

monitoring, information, and mitigation strategies, are likely to assure that IAQ and ventilation rates are comparable to what is achieved in homes constructed to Super GOOD CENTS standards, which are designed to at least maintain 1983 levels of IAQ and ventilation.

For the commercial sector, IAQ measures designed to at least maintain 1983 levels of IAQ and ventilation are required. The IAQ requirements contained in the Council's Plan Amendment of March 1987 were designed to maintain those levels of IAQ and ventilation. These same standards are contained in Bonneville's Energy Smart Design Program and the codified version of the Council's commercial MCS.

Section 4: Calculating a Surcharge

A. Not less than 30 days prior to a final decision on the imposition of a residential surcharge, the Administrator shall provide written notice to the customer including determination of the amount of a customer's load not covered by a Bonneville-approved MCS residential plan. The amount of the load not covered by a Bonneville-approved MCS residential plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in the appendices to this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

B. The level of the residential surcharge will be determined by dividing the customer's residential load not covered by a Bonneville-approved MCS residential plan by the customer's total retail load, rounding the result to the nearest one-tenth of a percent. This resulting percentage is multiplied by 0.10.

C. Not less than 30 days prior to a final decision on the imposition of a commercial surcharge, the Administrator shall provide written notice to the customer including a determination of the amount of the load not covered by a Bonneville-approved MCS commercial plan. The amount of the load not covered by a Bonneville-approved MCS commercial plan shall be based on information submitted by the utility in accordance with the reporting requirements listed in the appendices to this policy. In the event that a utility has not provided that information, the Administrator may rely on the best information available to Bonneville.

D. The level of the commercial surcharge will be determined by dividing the customer's commercial load not covered by a Bonneville-approved MCS commercial plan by the customer's total retail load, rounding the result to the nearest one-tenth of a percent. This resulting percentage is multiplied by 0.10.

E. The resulting level of the residential or commercial surcharges will be applied to all power purchases and/or exchanges made by the customer under the applicable rate schedules, using the Council's surcharge methodology, and will be applied subsequent to any other rate adjustments.

F. At no time will a customer simultaneously be assessed a surcharge for failure to comply with the requirements in the residential sector and a surcharge for failure to comply with the requirements in the commercial sector.

G. The customer and other interested parties shall be afforded an opportunity to provide comments regarding the determinations made in sections 4(A) to 4(D). Such comments may be made in writing or orally at a public meeting convened by Bonneville at the request of the customer for this purpose. This public meeting will be held between the time of the written Notice of Intent to surcharge and the final surcharge decision. Included in the Intent to Surcharge will be an initial determination of the fraction of a customer's load subject to the surcharge, based on sections 4(A) to 4(D). Following the receipt and evaluation of comments, the Administrator shall provide written notice to the customer of the final surcharge decision.

H. Beginning with the effective date of a surcharge, the Administrator shall review the findings made in sections 4(A) to 4(D) after the customer, or a jurisdiction served by the customer, has taken an action that affects those findings. Customers may request such review by providing evidence in accordance with this section that the customer or a jurisdiction served by that customer has taken actions subsequent to the effective date of the surcharge.

Section 5: Collecting a Surcharge

A. Those customers receiving a final written notice of a load subject to a surcharge shall be billed for the surcharge beginning with the first full billing period following issuance of such notice.

B. Any power purchases or exchanges made on or after the effective date of the surcharge, but before receipt of final notice finding the load subject to a surcharge, may be retroactively billed to the effective date of the surcharge. Such retroactive billing shall collect the retroactive surcharge over a like number of billing periods as elapsed from the effective date of the surcharge to the receipt of final written notice of a surcharge.

C. The level of surcharge is applied to all power purchases and/or exchanges made by the customer under the applicable rate schedules and/or exchanges pursuant to the residential Purchase and Sales Agreement/ Exchange Transmission Credit Agreement, using the Council's surcharge methodology, and is applied subsequent to any other rate adjustment.

1. For firm requirements customers purchasing firm power under the rate schedules subject to the surcharge, the surcharge shall be applied monthly to the billing charges for all power purchased under these rate schedules during the billing period.

2. For customers participating in the residential exchange program, the surcharge shall be applied to the charges for determining the cost to the purchaser of buying firm power from Bonneville under the terms and conditions of the Residential Purchase and Sale Agreement.

3. For those firm requirements customers that both purchase power from Bonneville and participate in the Residential Purchase and Sales Agreement or Exchange Transmission Credit Agreement, the surcharge shall be applied in the following manner to avoid surcharging the same load twice:

a. All power purchases under a utility's Power Sales Contract at rates subject to the surcharge shall include a surcharge, as calculated in the previous section, added to the billing charges for the billing period; and,

b. The surcharge applied to the utility's total exchange load shall be adjusted by multiplying the surcharge level by the percentage of a utility's exchange load served by a utility's own resources. The percentage of exchange load served by a utility's own resources shall be based on the difference between the utility's total retail load and firm power purchases from Bonneville divided by the total retail load and rounded to the nearest one-tenth of a percent. The adjustment surcharge level shall be applied to the charges for determining the cost to the purchaser of buying firm power from Bonneville under the terms and conditions of the Residential Purchase and Sales Agreement or in conformance with Exhibit E of the Exchange Transmission Credit Agreement.

D. If a customer participating in the Residential Exchange is currently in a deemer status, the surcharge shall be accumulated in the account established for this purpose as specified in the

respective agreement and shall be included in the obligation a utility must repay prior to receiving a direct payment from Bonneville. If a customer is not in a deemer status, the surcharge shall be included in the determination of the net payment made by Bonneville.

E. The collection of the surcharge shall continue until the Administrator determines that the surcharge is no longer required under the terms of this Policy.

F. Surcharges collected on purchases for periods in which loads are subsequently found to be in compliance with this Policy shall be credited to the customer in the first full billing period following final written notice of such finding. Surcharges on loads which are subsequently found not to have been in compliance with the terms of this Policy for specified periods shall be billed to the customer in the first full billing period following final written notice of such findings.

Appendix 1: Achieving Electrical Savings by Adopting the Bonneville/ Utility MCS Support Program

A. Residential Sector

Bonneville customers opting for this path are assured that enrollment in and subsequent good faith implementation of the Super GOOD CENTS Program throughout their service areas will result in avoidance of a residential surcharge under the current surcharge policy. A customer which is considered a Super GOOD CENTS Program participant, but is only operating that program in a portion of its service area subject to the Policy, will have to take actions to assure that those portions of its service territory not covered by Super GOOD CENTS are covered by some combination of the other conservation strategies presented in these appendices. Those customers which implement the MCS measures contained in the Super GOOD CENTS Program, implement incentives equal to Bonneville's Super GOOD CENTS incentive level, and implement an advertising strategy considered by Bonneville to be consistent with the Super GOOD CENTS licensing and grant requirements will be considered a full participant in the Super GOOD CENTS Program for purposes of Surcharge Policy compliance. A Bonneville-approved advertising strategy must include, but is not limited to, use of the Super GOOD CENTS logo and participation in the region wide Super GOOD CENTS advertising campaign, in a Bonneville-approved manner. Customers which choose to adopt an advertising strategy and/or incentives which Bonneville concludes are not consistent with Super GOOD CENTS requirements for surcharge Policy compliance will be treated as filing an alternative plan. Those customers should refer to Appendix 2 for a discussion of that option.

For customers which on average over the last 3 years have had no more than (a) five site-built housing starts, and (b) 2,000 residential accounts will be considered small utilities for purposes of this policy. These utilities will have the option of enrolling in Bonneville's Super GOOD CENTS Program for small utilities, referred to as the Small Utility Program. If a utility believes it qualifies for this option, the utility is encouraged to contact the nearest Bonneville Area or District Office to obtain more information on this program option.

If a customer is currently relying on Super GOOD CENTS participation to comply with the Policy, the utility's submittal for the plan coverage period indicated in Appendix 8 can consist of a letter indicating that the utility plans to continue participation in Super GOOD CENTS for that period of time.

Otherwise, those customers wishing to enroll in Super GOOD CENTS as a way of avoiding a surcharge must indicate this to Bonneville by the plan submission date indicated in Appendix 8. In addition, the utility shall have signed a Super GOOD CENTS grant agreement by the plan implementation date indicated in Appendix 8. Bonneville will consider Super GOOD CENTS Program implementation to have occurred when the utility is engaging in activities, particularly marketing and promotion activities, which can be considered consistent with the utility's agreement.

Bonneville will consider offering a grace period if Bonneville has not completed the customer's Super GOOD CENTS grant award by the plan implementation date indicated in Appendix 8. Any such grace period will be provided in the event that Bonneville has received a plan by the plan submission date indicated in Appendix 8, and the approval delay is due solely to Bonneville internal delay.

Finally, as is indicated in the Super GOOD CENTS Program, participants are to submit the following data:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

b. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated homes constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

To comply with the Policy, customers are to collect and provide that data to Bonneville by January 30 of the following year.

B. Commercial Sector

Bonneville customers opting for this path are assured that enrollment in, and subsequent good faith implementation of Bonneville's Smart Design Program throughout the utility's service area will result in avoidance of a commercial surcharge under the current Surcharge Policy. All customers wishing to avoid a surcharge under this path must agree to comply with the IAQ and data reporting requirements and other technical specifications of that program, applicable to the customer.

If a customer is currently relying on Smart Design participation to comply with the Policy, the utility's submittal can consist of a letter indicating that the utility plans to continue participation in Smart Design for the plan coverage period indicated in Appendix 8.

Those new customers electing to participate in Smart Design to comply with the Policy must agree by the plan submission date indicated in Appendix 8 to enroll in the commercial program and must have enrolled in the program no later than the plan implementation date indicated in Appendix 8. Bonneville will consider offering a grace period if Bonneville has not completed the customer's grant award, if applicable, by the plan implementation date indicated in Appendix 8. Any such grace period will be provided in the event that Bonneville had received a plan by the plan submisison date indicated in Appendix 8 and the approval delay is due solely to Bonneville internal delay.

Appendix 2: Achieving Electrical Savings by Adopting an Alternative Utility Program

If a utility is currently relying on an approved alternative plan to comply with the Policy, for either or both the residential and commercial sectors, the utility can submit a letter indicating its intentions to continue to rely on that approach for the plan coverage period indicated in Appendix 8.

A. Residential

An Alternative Utility Residential Program is the customer's proposed approach to meeting the standards of Bonneville's Super GOOD CENTS Program. In order for Bonneville to verify that the proposed program will provide equivalent savings, the information listed below must be submitted.

1. The conservation measures that will be promoted.

2. Analysis of the thermal performance of the conservation measures using Bonneville's input assumptions and Bonneville prototypes. These results will be compared to the Super GOOD CENTS illustrative path for that climate zone, using a WATTSUN analysis. If alternative assumptions or prototypes are used, acceptance of those alternative assumptions or prototypes will depend on the general acceptability of the assumptions and whether the prototypes represent typical dwellings certified in the utility's service area.

3. A list of activities to be undertaken to achieve the targeted penetration, such as: promotion and sales, advertising, incentives (type and level), technical assistance, certification, and any other applicable information. In addition, customers will be required to submit quarterly reports listing the activities undertaken and resources utilized in the marketing effort.

4. A plan showing how the utility will collect and provide the following data to Bonneville by January 30 of the following year:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

b. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated homes constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

5. Information on how the utility and/or jurisdiction plans to achieve IAQ and ventilation rates at least comparable to those achieved in Super GOOD CENTS homes, which are designed to at least maintain 1983 levels of IAQ and ventilation.

The Alternative Utility Program path is not generally recommended for utilities without prior experience in operating such programs. An established track record with a well-defined package of measures will be extremely helpful, if not essential, in obtaining Bonneville approval for Alternative Utility Programs. Nonetheless, Bonneville staff will work with customers interested in pursuing this path to help explain the data submission requirements and other complexities involved in this approach.

Because of these complexities, utilities intending to use this path for policy compliance should submit their proposals to Bonneville at the earliest possible date after the final adoption of the Surcharge Policy. An approved program shall be implemented by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the Policy, has been granted.

B. Commercial

An alternative Utility Commercial Program is the customer's proposed approach to meeting the standards of the Bonneville/Utility Commercial MCS Program. A proposed alternative program will be evaluated relative to the (1) level and type of activities and services to be offered, (2) method of marketing and performing the services, (3) penetration levels expected for the proposed program activities, and (4) proposed inspection method. The types of design assistance offered in Bonneville's program will be used to evaluate the type of design assistance a utility is proposing to offer in its own commercial MCS design assistance program. The types of design assistance which Bonneville's Commercial MCS Program contains are:

—Promotion of services to commercial customers;
—Screening to determine design assistance needs;
—Depending on the size of the utility and the type of commercial construction, provision of building design handbooks, computer energy modeling, clearinghouse referral, or other building design analysis; and
—Designer recognition for specified levels of energy efficiency.

To perform the necessary review, Bonneville will require the following information:

1. A list of activities and services the customer intends to offer (e.g., modeling, design assistance, design handbook, information services, and training opportunities) to achieve the targeted penetration;

2. Management and oversight consistent with Bonneville practices;

3. A proposed method to submit to Bonneville quarterly reports listing the activities undertaken and resources used in the marketing effort;

4. A plan showing how the utility will collect and provide the following data to Bonneville by January 30 of the following year;

a. Total number of new commercial buildings, major remodels, and retrofits (all fuels) constructed in the utility's service area during the past calendar year, listed by Bonneville prototype;

b. Total number of electrically heated newly constructed, major remodels, and retrofit commercial buildings in the utility's service area during the past calendar year, listed by Bonneville prototype; and

c. Total number of electrically heated newly constructed commercial buildings, major remodels, and retrofits, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, listed by Bonneville prototype.

Those customers intending to use this path for Surcharge Policy compliance shall submit their proposed plan by the plan implementation date indicated in Appendix 8, and shall have implemented the approved program no later than the plan implementation date indicated in Appendix 8, unless a grace period, provided for in section 3 of the policy has been granted.

Appendix 3: Achieving Electrical Savings by Participating in the Northwest Energy Code Program (NWECP)

This is a pre-approved path for avoidance of the surcharge if all the jurisdictions within the customer's service area, subject to the surcharge policy, are NWECP (formerly Early Adopter Program) participants. Except for the one exception noted below, if there are jurisdiction's within a customer's service area which are not NWECP participants, then the customer will be subject to a surcharge unless those jurisdictions have implemented a Bonneville-approved building code or the utility has implemented a Bonneville-approved utility program or a Bonneville-approved service standard.

Customers serving areas containing jurisdictions that have adopted advanced building codes may seek to allocate savings achieved by those jurisdictional codes to portions of their service areas are not covered by another approved option. This will be permitted only if the utility shows that the full Council MCS level of savings for both

sectors are being attained, in aggregate, within that utility's service area. In other words, the utility must achieve at least the same level of total electrical savings as would be achieved had the Council's full commercial and residential MCS been implemented throughout the utility's service areas.

The essential feature of the NWECP is the adoption by a jurisdiction of the MCS contained in the NWECP description. Additional program features include specific activities to ensure that no degradation in IAQ results, some form of enforcement method to assure MCS construction, and some data reporting requirements.

A customer currently relying on jurisdictional participation in the NWECP as at least part of its Policy compliance approach, must submit a letter by the plan implementation date shown in Appendix 8 indicating that it wishes to continue to rely on that program participation to comply with the Policy for the plan coverage period indicated in Appendix 8.

A. Residential

1. Customers with jurisdictions within their service area that are currently participating in the NWECP, must submit a letter indicating (a) the jurisdictions that are NWECP participants, and (b) the award for each jurisdiction. In addition, customers must indicate what fraction of its residential load lies within NWECP jurisdictions. This information shall be submitted to Bonneville by the plan submission date indicated in Appendix 8.

2. Any jurisdiction considering adoption shall adopt and enforce the code by the plan implementation date indicated in Appendix 8, for the utility to avoid a surcharge, if the utility will not be operating an approved utility MCS program or residential service standard at that time.

3. Bonneville will consider offering a grace period if Bonneville has not completed the NWECP grant award process by the plan implementation date indicated in Appendix 8. Any such grace period will be considered in the event that Bonneville has received a plan by the plan submission date indicated in Appendix 8, and the approval delay is due to Bonneville internal alone.

4. Finally, the utility shall collect and provide to Bonneville the following data by Janaury 30 of the following year:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units.)

b. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (single-family broken out by site built, modular, and HUD-code homes, and total multifamily units).

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

B. Commercial

1. To avoid surcharge, customers with jurisdictions within their services area considering enrolling in this program shall notify Bonneville by the plan implementation date indictated in Appendix 8, of the jurisdiction's intent to enroll in the program. The jurisdiction shall have officially adopted and be able to enforce the MCS by the plan implementation date indicated in Appendix 8, if the utility is not operating an approved Commercial MCS Program or commercial service standard.

2. Customers with jurisdictions within their service area that are currently participating in the NWECP, shall provide a copy of Bonneville's letter of approval or grant award number.

3. Finally, the utility shall collect and provide to Bonneville by January 30 of the following year:

a. Total number of new commercial buildings, major remodels, and retrofits (all fuels) constructed in the utility's service area during the past calendar year.

b. Total number of electically heated newly constructed, major remodels, and retrofits commercial buildings constructed in the utility's service area during the past calendar year.

c. Total number of newly constructed, major remodels, and retrofit commercial buildings in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, broken out by Bonneville prototype.

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

Those customers wishing to avoid a surcharge under this path shall agree by the plan submission date indicated in Appendix 8, to enroll in the commercial program and shall have enrolled in the program no later than the plan implementation date indicated in Appendix 8. Bonneville will consider offering a grace period if Bonneville has not completed its NWECP grant award process by the plan implementation date indicated in Appendix 8. Any such grace period will be considered in the even that Bonneville has received a plan by the plan submission date indicated in Appendix 8, and the approval delay is due to Bonneville internal delay alone.

NWECP application materials can be obtained by contacting your nearest Bonneville Area or District Office.

Appendix 4: Achieving Electrical Savings by Adopting a Codified Version of the MCS

Several codified vesions of the MCS have been developed. These are pre-approved codified versions of the Council's illustrative MCS paths. The options discussed in this appendix pertain to jurisdictions considering adopting, or who have adopted a codified version of the MCS, but are not participating in the NWECP.

Under this alternative, the customer must submit the codified vesion of the MCS which any jurisdiction in its service area is proposing for adoption or which has been adopted. The enforcement methods should be specified.

The statute or ordinance shall have been adopted and enforced by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the Policy, has been granted.

Finally, the utility shall collect and provide to Bonneville the following data by January 30 of the following year:

a. Total number of new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by site built, modular, and HUD-code homes, and total multifamily units).

b. Total number of new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by site built, modular, and HUD-code homes, and total multifamily units).

c. Total number of new electrically heated buildings constructed, in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken out by site built, modular, and HUD-code homes, and total multifamily units).

Customers who are operating a utility program and/or utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

B. Commercial

Under this alternative, the customer must submit the codified version of the MCS which a jurisdiction in its service area is proposing for adoption or which has been adopted. The enforcement methods must be specified. In addition, the customer must indicate what steps the jurisdiction will take to address IAQ and ventilation requirements of Bonneville's NWECP.

By the plan submission date indicated in Appendix 8, the customer must submit the above information to Bonneville. The statute or ordinance must be operative no later than the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in Section 3 of the policy, has been granted.

Finally, the utility shall collect and provide the following data to Bonneville by January 30 of the following year:

1. Total number of newly constructed, major remodels, and retrofitted (all fuels) commercial buildings in the utility's service area during the past calendar year.

2. Total number of electically heated newly constructed, remodeled, and retrofitted commecial building in the utility's service area during the past calendar year.

3. Total number of electrically heated new, remodeled, and retrofitted commercial buildings in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan, broken out by Bonneville prototype.

Appendix 5: Achieving Electrical Savings by Adopting Alternative or Equivalent Building Codes

An alternative code is designed to achieve total electical savings which, when both sector's savings are combined, are at least as large as the electical savings expected had the Council's residential and commercial MCS been implemented. A jurisdiction proposing to adopt an alternative code, in which one sectors' total electrical savings is expected to exceed the target electrical savings level for that sector, can use those excess electrical savings to offset electical savings below the target in the other sector. The alternative code path may be pursued by a jurisdiction only when the sum of each sectors' savings at least equals the aggregate electrical savings target, which itself is based on the sum of the level of savings for the two sectors calculated using the Council's MCS. Section 3 of this policy discusses how the utility should approach the electrical savings equivalency analysis.

As compared to alternative codes, equivalent codes examine each sector individually. They differ from the pre-approved codified versions mentioned earlier, but provide equivalent savings. An equivalent code must achieve at least the same level of total savings, in each sector separately, as would have been achieved by implementing Bonneville's Super GOOD CENTS Program in the residential sector, and the Council's commercial MCS.

A customer must submit a copy of the alternative or equivalent code which a jurisdiction has proposed. In addition, the customer must indicate how the jurisdiction plans on maintaining IAQ and ventilation at 1983 levels. Bonneville staff will attempt to assist customers and jurisdictions wishing to formulate improved building codes.

If an alternative code path is pursued, customers are encouraged to submit their alternative codes at the earlies possible date, but no later than the plan submission date indicated in Appendix 8. Both codes would have to be implemented and enforced by the plan implementation date indicated in Appendix 8.

A customer currently relying on jurisdictional participation in the NWECP as at least part of its Policy compliance approach must submit a letter indicating that it intends to continue to rely on that program participation to comply with the Policy for the plan coverage period indicated in Appendix 8.

For either the equivalent or alternative code approaches, the customer must submit its residential and commercial plans by the plan submission date indicated in Appendix 8. The codes must be implemented and enforced by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in Section 3 of the Policy, has been granted. Finally, the utility shall collect and provide to Bonneville by January 30 of the following year:

A. Total new homes (broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings, (new, major remodels, and retrofits) (all fuels) constructed in the utility's service area during the past calendar year.

B. Total new electrically heated homes (broekn out by single-family modular, HUD-code homes, site built, and multifamily) and commercial buildings (new construction, retrofits, and remodels) in the utility's service area during the past calendar year.

C. Total new electrically heated homes (broken out by single-family modular, HUD-code homes, site built, and total multifamily) and commercial buildings (broken out by new construction, major remodels, and retrofits by Bonneville prototype by square footage) in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan.

Customers who are operating a utility program and/or a utility service standard should take all necessary steps in order to avoid double-counting when reporting the above information.

For a more complete discussion of the date required to evaluate an alternative or equivalent code, refer to the latest version of Bonneville's MCS Code Equivalency Determination Procedures A copy of these procedures can be obtained by contacting your nearest Bonneville Area or District Office.

Appendix 6: Achieving Electrical Savings by Adopting a Codified Version of the MCS as a Utility Service Standard [1]

If a utility is currently relying on a utility service standard as at least part of its Policy compliance approach, all the utility need do is submit a letter indicating that it wishes to continue to rely on that approach to comply with the Policy for the plan coverage period indicated in Appendix 8.

A. Residential

This path essentially involves adoption of a legally enforceable electric utility hook-up standard for new electrically heated residential buildings. The customer would simply decline to serve new electrically heated buildings not built to the standard's specifications. A grace period would be allowed for buildings considered by Bonneville to be "under construction" at the time the standard was adopted. The adoption of a utility service standard may qualify the utility for participation in Bonneville's NWECP.

Customers wishing to avoid a surcharge with this approach shall submit a residential plan by the plan submission date indicated in Appendix 8, and the residential service standard

[1] Many customers have questioned whether they have legal authority, under State laws to impose such a service requirement. Bonneville has examined this question under the State laws of Oregon, Washington, Idaho, and Montana and has reached the tentative conclusion that no clear legal impediments exist in these States to conservation-oriented utility service requirements. While Bonneville does not offer legal advice to customers, particularly on questions of State law, Bonneville legal staff are available to discuss these preliminary conclusions with customers and their legal counsel. Any utility considering such a path should obtain independent legal advice on this question

shall be adopted and enforced by the plan implementation date indicated in Appendix 8. A plan must contain: (1) A copy of the standard to be imposed, (2) how the customer plans on monitoring compliance with the standard, and (3) what IAQ measures and activities will be pursued to at least achieve IAQ and ventilation levels of Super GOOD CENTS construction, which is designed to at least maintain 1983 levels of IAQ and ventilation.

No surcharge will be imposed on any customer relying on such a service requirement which is subsequently enjoined or invalidated by a court. In such an event, the customer will be given a reasonable period of time to choose and implement another option.

Finally, the customer shall submit to Bonneville the following data by January 30 of the following year:

1. Total new homes (all fuels) constructed in the utility's service area during the past calendar year (broken out by single-family modular, HUD-code homes, site built, and multifamily).

2. Total new electrically heated homes constructed in the utility's service area during the past calendar year (broken out by single-family modular HUD-code homes, site built, and multifamily).

3. Total new electrically heated homes constructed in the utility's service area during the past calendar year to the standard(s) described in the customer's plan (broken out by single-family modular, HUD-code homes, site built, and multifamily).

B. Commercial

This path essentially involves adoption of a legally enforceable electric utility hook-up standard for new electrically heated commercial buildings at least equal to the Council's commercial MCS. The customer would simply decline to service new electrically heated buildings not built to the standard's specifications. A grace period would be allowed for buildings considered by Bonneville to be "under construction" at the time the standard was adopted.

Customers wishing to avoid a surcharge with this approach shall submit a Commercial plan by the plan submission date indicated in Appendix 8, and the commercial service standard shall be adopted and enforced by the plan implementation date indicated in Appendix 8, unless a grace period, as provided for in section 3 of the policy, has been granted. A plan must: (1) Contain a copy of the standard to be imposed, and (2) indicate how the customer plans on monitoring compliance with the standard.

No surcharge will be imposed on any customer relying on such a service requirement which is subsequently enjoined or invalidated by a court. In such an event, the customer will be given a reasonable period of time to choose and implement another option.

Finally, the customer shall submit to Bonneville the following data by January 30 of the following year:

1. Total new commercial buldings, major remodels, and retrofits (all fuels) constructed in the utility's service area during the past calendar year.

2. Total electrically heated new, remodeled, and retrofitted commercial buildings constructed in the utility's service area during the past calendar year (broken out by Bonneville prototype).

3. Total electrically heated new, remodeled, and retrofitted commercial buildings constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan (broken out by Bonneville prototype).

Appendix 7: Achieving Electrical Savings by Adopting an Alternative or Equivalent Utility Service Standard

This path is actually two alternative paths. If an equivalent utility service standard approach is pursued, a customer may choose to adopt a utility service standard which is not one of the codified versions, but which is expected to achieve at least the same level of total electrical savings in each sector separately as would have been achieved by adopting Bonneville's Super GOOD CENTS Program in the residential sector, and the Council's MCS for the commercial sector. Alternatively, the customer may choose to adopt utility service standards for the residential and commercial sectors which when taken together, achieves at least the same level of total electrical savings as would have been achieved had the customer adopted the Council's commercial and residential MCS. This latter option is referred to as an alternative utility service standard.

If a utility is currently relying on a utility service standard as at least part of its Policy compliance approach, all the utility need do is submit a letter indicating that it wishes to continue to rely on that approach to comply with the Policy for the plan coverage period indicated in Appendix 8.

If an alternative or equivalent utility service standard approach is pursued, a customer shall submit to Bonneville (1) a copy of the proposed service standard(s); (2) a description of the enforcement method(s); (3) a description of the methods used to at least achieve IAQ and ventilation levels of Super GOOD CENTS construction, which is designed to at least maintain 1983 levels of IAQ and ventilation; and (4) a copy of the analysis used to verify that the proposed service standard(s) will achieve the required total electrical savings. This material shall be submitted by the plan submission date indicated in Appendix 8, and both service standards shall be adopted and enforced by the plan implementation date indicated in Appendix 8.

Finally, the customer shall submit to Bonneville the following data by January 30 of the following year:

A. Total new homes (broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings (all fuels broken out by new construction, major remodels, and retrofits) in the utility's service area during the past calendar year.

B. Total new electrically heated homes (for single-family, broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings (broken out by new construction, remodel, and retrofits) in the utility's service areas during the past calendar year.

C. Total new electrically heated homes (for single-family, broken out by site built, modular, HUD-code homes, and total multifamily units) and commercial buildings (new construction, remodels, and retrofits) constructed in the utility's service area during the past calendar year, to the standard(s) described in the customer's plan by Bonneville's prototype).

For a detailed description of the data required to evaluate an alternative or equivalent code, and the evaluation criteria, the customer and/or jurisdiction is advised to consult the latest version of Bonneville's MCS Code Equivalency Determination Procedures. A copy of these procedures can be obtained by contacting your local Bonneville Area or District Office.

Appendix 8: Submittal and Implementation Schedule for MCS Surcharge Policy

Plan Submission Date: December 16, 1988

Plan Implementation Date: January 16, 1989

Plan Coverage Period: Calendar Year 1989

Issued in Portland, Oregon, on November 9, 1988.

Jack Robertson,

Deputy Administrator.

[FR Doc. 88-26880 Filed 11-18-88; 8:45 am]

BILLING CODE 6450-01-M

Economic Regulatory Administration

[ERA Docket No. 88-47-NG]

Dome Petroleum Corp.; Order Granting Authorization To Import Natural Gas

AGENCY: Economic RegulatoryAdministration, DOE.

ACTION: Notice of order granting authorization to import natural gas.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) gives notice that it has issued an order granting Dome Petroleum Corporation (Dome Petroleum) authorization to import Canadian natural gas. The order issued in ERA Docket No. 88-47-NG authorizes Dome Petroleum to import up to 166.1 Bcf of natural gas for sale, under a long-term gas purchase contract, to Northern States over a term beginning November 1, 1988, through October 31, 2001.

A copy of this order is available for inspection and copying in the Natural Gas Division Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, November 14, 1988.

Constance L. Buckley,

Acting Director, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 88-26882 Filed 11-18-88; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Project No. 10199-000]

City of Klamath Falls, OR; Intention to Prepare an Environmental Impact Statement, and Notice of Public Scoping Meetings

November 14, 1988.

The Federal Energy Regulatory Commission (FERC) has received an application for license for the construction and operation of the proposed Salt Caves Project, FERC No. 10199-000, on the Klamath River in Klamath County, Oregon. The FERC staff has determined that licensing the proposed project would constitute a major federal action significantly affecting the quality of the human environment. Therefore, the staff intends to prepare an environmental impact statement (EIS) on the proposed hydroelectric project in accordance with the National Environmental Policy Act. The staff's EIS will objectively consider both site specific and cumulative environmental impacts of the proposed project and reasonable alternatives, and will include an economic, financial and engineering analysis.

A draft EIS will be issued in July 1989 and circulated for review by all the interested parties. All comments filed on the draft EIS will be analyzed by the staff and considered in a final EIS. The staff's conclusions and recommendations will then be presented for the consideration of the Commission in reaching its final licensing decision.

Scoping Meetings

On Tuesday, December 20, 1988, the staff will conduct a public scoping meeting in Klamath Falls, from 7 p.m. to 10 p.m., at the Klamath County Fairgrounds, Main Exhibit Building, 3531 South 6th Street. The next day, Wednesday, December 21, 1988, the staff will conduct a scoping session oriented toward agencies and regional interests in Portland, from 10 a.m. to 2 p.m., at the Red Lion Inn Lloyd Center, 1000 NE. Multnomah Street.

All interested individuals, organizations, tribes, and agencies are invited to attend and assist the staff in identifying the scope of environmental issues that should be analyzed in the upcoming EIS.

Objectives

At the scoping meetings the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the planned EIS, (2) encourage statements from the public and experts on the issues that should be analyzed in the EIS, including points of view in opposition to, or in support of, the staff's preliminary views; and (3) solicit from the meeting participants all available information, especially quantified data, on the resources at issue.

Procedures

The meetings will be recorded by a stenographer and thereby become a part of the formal record of the Commission proceeding on the proposed Salt Caves Project. Individuals presenting statements at the meetings will be asked to clearly identify themselves for the record.

Organizations, agencies and individuals with environmental expertise and concerns are encouraged to attend the meetings and to assist the staff in defining and clarifying the issues to be addressed in the EIS.

Persons choosing not to speak at the meetings, but who have views on the issues or information relevant to the issues, may submit written statements for inclusion in the public record. In addition, written scoping comments may be filed with the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, until January 20, 1989. All correspondence should clearly show the following caption on the first page: Salt Caves Project, Oregon, Docket No. P-10199-000.

A preliminary EIS scoping document outlining subject areas to be addressed at the meeting will be distributed by mail to all interested parties.

All those that are formally recognized by the Commission as intervenors in the Salt Caves Project proceeding are asked to refrain from engaging the staff in discussion of the merits of the project outside of the announced meetings.

For further information please contact Frank Karwoski at (202) 376-9284.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26815 Filed 11-18-88; 8:45am]

BILLING CODE 6717-01-M

[Docket No. RP89-19-000]

Colorado Interstate Gas Co.; Petition for Tariff Waiver

November 16, 1988.

Take Notice that on November 7, 1988, Colorado Interstate Gas Company ("CIG"), 2 North Nevada Avenue, Colorado Springs, Colorado 80903 ("Applicant"), filed in Docket No. RP89-19-000 a Petition for Waiver of Tariff Provisions pursuant to Rule 207 of the Federal Energy Regulatory Commission's ("Commission") Regulations.

CIG seeks waiver of § 24.3 of the General Terms and Conditions of CIG's F.E.R.C. Gas Tariff, Original Volume No. 1. As set forth more fully in the Petition, grant of the petition will allow CIG to waive the requirement that filings to change the Gas Research Institute ("GRI") Adjustment Charge be made at least 45 days prior to the proposed effective date. CIG states this waiver is necessary due to the timing of the Commission's action in Docket No. RP88-182-000 where the Commission has stated that it intends to establish the level of GRI funding on or before November 30, 1988.

Copies of this filing have been served on all of CIG's jurisdictional sales customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before Nov. 23, 1988. 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. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26810 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA89-1-4-000, TM89-2-4-000]

Granite State Gas Transmission, Inc.; Proposed Changes in Rates

November 16, 1988.

Take notice that on November 8, 1988, Granite State Gas Transmission, Inc. (Granite State), 120 Royall Street, Canton, Massachusetts 02021 tendered for filing with the Commission Thirteenth Substitute Twenty-First Revised Sheet No. 7 in its FERC Gas Tariff, First Revised Volume No. 1 containing changes in rates for its wholesale jurisdictional services for effectiveness on January 1, 1989. In the same filing, Granite State tendered Sixteenth Revised Sheet No. 8 and Seventeenth Revised Sheet No. 8 containing changes in the rates for storage service under its Rate Schedule GSS in its FERC Gas Tariff, First Revised Volume No. 1, for effectiveness on October 1, 1988 and January 1, 1989, respectively.

According to Granite State, the rate changes on Thirteenth Substitute Twenty-First Revised Sheet No. 7 reflect revised purchase gas costs and its first annual purchased gas adjustment filing under the regulations prescribed in Order Nos. 483 and 483-A. Granite State further states that data in the filing contain an assessment of past performance, required by the regulations. It is stated that Granite State's actual purchase costs exceeded projected gas costs for one month, June, 1988, by 103 percent because of unanticipated changes in customer requirements for storage deliveries. Also, Granite State states that the instant filing reflects the purchase of Canadian gas for the first time on a firm basis from Shell Canada Limited through the facilities authorized in Docket No. CP87-39-000 and a purchase contract approved by the Economic Regulatory Administration in Opinion and Order No. 187.

According to Granite State, the revised rates on Thirteenth Substitute Twenty-First Revised Sheet No. 7 are applicable to wholesale sales to its two jurisdictional customers, Bay State Gas Company (Bay State) and Northern Utilities, Inc. (Northern Utilities).

Granite State further states that the revised rates for its Rate Schedule GSS storage service track changes in CNG Transmission Corporation's Rate Schedule GSS that Granite State is authorized to track on a current basis. It is said that the Rate Schedule GSS storage service is rendered for Bay State.

According to Granite State copies of its filing were served upon its customers, Bay State and Northern Utilities, and the regulatory commissions of the States of Maine, Massachusetts and New Hampshire.

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 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests in Docket No. TA89-1-4-000 should be filed on or before December 6, 1988, and all such motions or protests in Docket No. TM89-2-4-000 should be filed on or before November 23, 1988. 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. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26811 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-225-001]

Inter-City Minnesota Pipelines Ltd., Inc.; Compliance Filing

November 15, 1988.

Take notice that on November 4, 1988, Inter-City Minnesota Pipelines Ltd., Inc. ("Inter-City"), 245 Yorkland Boulevard, North York, Ontario, Canada MJ2 1R1, tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1, to comply with the order issued in this docket on August 26, 1988 and October 5, 1988:

Substitute Thirty-First Revised Sheet No. 4
First Substitute Thirty-First Revised Sheet No. 4
Second Revised Sheet No. 55
Fourth Revised Sheet No. 56
Substitute Second Revised Sheet No. 56-A
Substitute Original Sheet No. 56-B
Substitute Third Revised Sheet Nos. 57 and 58
Substitute Original Revised Sheet No. 58-A
Substitute Fourth Revised Sheet No. 59
Substitute Fifth Revised Sheet No. 60
Substitute Sixth Revised Sheet No. 61
Substitute Second Revised Sheet Nos. 61-A and 61-B
Substitute Third Revised Sheet No. 61-C
Substitute Second Revised Sheet No. 61-D
Substitute Third Revised Sheet No. 62
Substitute Fourth Revised Sheet No. 63
Substitute Second Revised Sheet No. 64
Original Sheet Nos. 64-A, 64-B, 64-C, 64-D
Substitute First Revised Sheet No. 65

Those orders required Inter-City to file revised tariff sheets to comply with Order Nos. 483 and 483-A.

Inter-City states that copies of the filing have been mailed to all of its customers and affected state regulatory commissions. Any persons 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 208 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before November 22, 1988. 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. Any person wishing to become a party must file a motion to intervene; provided, however, that any person who had previously filed a motion to

intervene in this proceeding is not required to file a further petition. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26812 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-20-000]

Jupiter Energy Corp.; Petition for Waiver

November 14, 1988.

Take notice that on November 7, 1988, Jupiter Energy Corporation (Jupiter) filed a petition for waiver under Order Nos. 493 and 493-A requiring electronic media when submitting FERC filing and forms.

Jupiter states that it does not have the computer capability to file the information required on electronic media and that acquiring this capability would cause Jupiter severe economic hardship.

Jupiter states that it operates an offshore gas gathering system which consists of four pipelines comprising a total of 20.9 miles. Jupiter states that a total of four operating employees monitor and maintain the system. Due to the limited operations, Jupiter's accounting records are maintained manually and all FERC filings are prepared manually.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1988)). All such motions or protests should be filed on or before November 22, 1988. 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. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26813 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP86-52-011]

Kentucky West Virginia Gas Co.; Proposed Change in FERC Gas Tariff

November 16, 1988.

Take notice that Kentucky West Virginia Gas Company ("Kentucky West") on November 7, 1988, tendered for filing with the Federal Energy Regulatory Commission ("Commission") First Revised Sheets Nos. 5 and 6 to its FERC Gas Tariff, Second Revised Volume No. 1, to become effective March 2, 1986.

Kentucky West states that its proposed tariff changes are in compliance with the Commission's order in these proceedings dated June 22, 1988, requiring that Kentucky West eliminate the minimum commodity bill from its Rate Schedule PLS-1, effective March 2, 1986.

Kentucky West further states that by its filing, it does not waive any rights to collect amounts, nor the right to collect interest or carrying charges applicable thereto, to which it may become entitled after a final Commission decision on all issues in these proceedings or as a result of a final decision in Kentucky West Virginia Gas Company v. FERC, Nos. 87-1837 and/or 88-1769 (D.C. Cir.), or as a result of any other judicial and/or Commission decisions.

Kentucky West goes on to state in its filing that it is placing its Rate Schedule PLS-1 customers on notice that it intends to pursue its right to the effectiveness of the minimum commodity bill in its Rate Schedule PLS-1 from March 2, 1986, forward, and that if, as a result of final Commission or judicial action in any proceeding, it is determined that Kentucky West should have been allowed to retain the minimum commodity bill, or any modification thereof, in its Rate Schedule PLS-1, for any period from March 2, 1986, forward, Kentucky West will demand recovery of any amounts to which it is entitled.

Kentucky West states that a copy of its filing has been served upon each of its 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 §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.322 and 385.214). All such motions or protests should be filed on or before November 23, 1988. Protests will be considered by the Commission in determining appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26814 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-21-000]

National Fuel Gas Supply Corp.; Proposed Changes in FERC Gas Tariff

November 16, 1988.

Take notice that on November 9, 1988, National Fuel Gas Supply Corporation ("National") tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets:

Substitute Fourth Revised Sheet No. 69
Fourth Revised Sheet No. 71, page 1 of 2
Fourth Revised Sheet No. 71, page 2 of 2
First Revised Sheet No. 71-A, page 1 of 2
First Revised Sheet No. 71-A, page 2 of 2
First Revised Sheet No. 71-B, page 1 of 2
First Revised Sheet No. 71-B, page 2 of 2
First Revised Sheet No. 71-C
Fourth Revised Sheet No. 72, page 1 of 2
Fourth Revised Sheet No. 72, page 2 of 2
First Revised Sheet No. 72-A, page 1 of 3
First Revised Sheet No. 72-A, page 2 of 3
First Revised Sheet No. 72-A, page 3 of 3
First Revised Sheet No. 72-B, page 1 of 2
First Revised Sheet No. 72-B, page 2 of 2
First Revised Sheet No. 72-C
First Revised Sheet No. 72-D

National states that the purpose of this filing is to update the amount of take-or-pay charges approved by the Federal Energy Regulatory Commission to be billed to National by its pipeline-suppliers and to be recovered by National by operation of Section 20 of the General Terms and Conditions to National's FERC Gas Tariff, First Revised Volume No. 1. National further states that its pipeline-suppliers which have received approval to flow-through take-or-pay charges to National are: Tennessee Gas Pipeline Company, Texas Eastern Transmission Corporation, CNG Transmission Corporation, Columbia Gas Transmission Corporation and Transcontinental Gas Pipe Line Corporation.

Copies of National's filing were served on National's jurisdictional customers and on the 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 Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before November 23, 1988. 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. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26816 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA89-1-41-000]

Paiute Pipeline Co.; Technical Conference

November 15, 1988.

Pursuant to the Commission letter order which issued on October 31, 1988, a technical conference will be held to resolve the issues raised in the above-captioned proceeding. The conference will be held on Thursday, December 8, 1988 at 10:00 a.m. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426.

All interested persons and Staff are permitted to attend.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26819 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-257-001]

Sea Robin Pipeline Co.; Compliance Tariff Filing

November 16, 1988.

Take notice that on November 10, 1988 Sea Robin Pipeline Company (Sea Robin) in accordance with the Commission's Order of October 31, 1988 in Docket No. RP88-257 submitted the following revised tariff sheets:

Substitute First Revised Sheet No. 29
Substitute First Revised Sheet No. 30
Substitute First Revised Sheet No. 31
Substitute First Revised Sheet No. 40
Substitute First Revised Sheet No. 42
Substitute Second Revised Sheet No. 51
Substitute Second Revised Sheet No. 52
Substitute First Revised Sheet No. 53
Substitute First Revised Sheet No. 54
Substitute First Revised Sheet No. 55
Substitute First Revised Sheet No. 57
Substitute First Revised Sheet No. 58
Substitute First Revised Sheet No. 59
Substitute First Revised Sheet No. 62
Substitute Second Revised Sheet No. 63
Substitute Second Revised Sheet No. 65
Substitute First Revised Sheet No. 67
Substitute First Revised Sheet No. 70
Substitute First Revised Sheet No. 71
Substitute Second Revised Sheet No. 72
Substitute Second Revised Sheet No. 73
Substitute First Revised Sheet No. 74
Substitute Second Revised Sheet No. 75
Substitute First Revised Sheet No. 78
Substitute First Revised Sheet No. 81
Substitute Second Revised Sheet No. 84
Substitute First Revised Sheet No. 87
Substitute First Revised Sheet No. 94
Substitute First Revised Sheet No. 95
Substitute First Revised Sheet No. 96
Substitute First Revised Sheet No. 104
Substitute First Revised Sheet No. 106

Sea Robin states that this filing is made pursuant to Ordering Paragraph B of the Commission's Oct. 31, 1988 Order in Docket No. RP88-257.

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 §§ 385.214 and 385.211 of the Commission's Regulations. All such motions to intervene or protest should be filed on or before November 23, 1988.

Protests will be considered by the Commission in determining appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26817 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-267-002]

South Georgia Natural Gas Co.; Proposed Changes in FERC Gas Tariff

November 16, 1988.

Take notice that on November 7, 1988, South Georgia Natural Gas Company (South Georgia) tendered for filing the following tariff sheet to its FERC Gas Tariff to be effective October 1, 1988:

Substitute Original Sheet No. 4C

South Georgia states that the proposed tariff sheet is being submitted in compliance with the Commission's order of October 28, 1988 in Docket Nos. RP88-267-000 and RP88-267-001, South Georgia's proceeding to flow through take-or-pay buy-out and buy-down charges allocated to it by Southern Natural Gas Company. The aforesaid tariff sheet reflects revised charges based upon the inclusion of interruptible customers in the cost allocation calculations.

South Georgia states that copies of the filing were mailed to all of its jurisdictional purchasers and interested state commissions, as well as the parties to this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest to the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 285.211 or 385.214). All such motions to protest should be filed on or before November 23, 1988. 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. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-26818 Filed 11-18-88; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings And Appeals

Proposed Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of proposed implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for disbursement of $3,764.93 plus accrued interest obtained by the DOE under the terms of a Remedial Order issued to Tom O'Neal, owner of O'Neal's Service Center (O'Neal). The funds will be available to customers who purchased motor gasoline from O'Neal during the period August 1, 1979 through July 24, 1980.

DATE AND ADDRESS: Comments must be filed in duplicate on or before December 21, 1988, and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. All comments should display a reference to case number KEF-0117.

FOR FURTHER INFORMATION CONTACT: Richard W. Dugan, Associate Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–2860.

SUPPLEMENTARY INFORMATION: In accordance with 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute funds obtained from O'Neal. The funds are being held in an interest-bearing escrow account pending distribution by the DOE.

The Proposed Decision sets forth the procedures and standards that the DOE has tentatively formulated to distribute the escrow account funded by O'Neal pursuant to the Remedial Order. The DOE has tentatively established procedures under which purchasers of O'Neal's motor gasoline during the audit period (August 1, 1979 through July 24, 1980) may file claims for refunds.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to provide two copies of their submissions. Comments must be submitted within 30 days of publication of this notice in the **Federal Register** and should be sent to the address set forth at the beginning of this notice. All comments received in this proceeding will be available for public inspection between the hours of 1 p.m. and 5 p.m., Monday through Friday, except Federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in Room 1E–234, 1000 Independence Avenue, SW., Washington, DC 20585.

Dated: November 14, 1988.

George B. Breznay,

Director, Office of Hearings and Appeals.

November 14, 1988.

Implementation of Special Refund Procedures

Name of Firm: O'Neal's Service Center.

Date of Filing: September 19, 1988.

Case Number: KEF–0117.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special procedures to distribute funds received as a result of an enforcement proceeding in order to remedy the effects of actual or alleged violations of the DOE regulations. *See* 10 CFR Part 205, Subpart V. On September 19, 1988, the ERA filed a Petition for the Implementation of Special Refund Procedures in connection with a Remedial Order issued by the DOE to Tom O'Neal, the owner of O'Neal's Service Center (O'Neal).

I. Background

O'Neal was a "retailer" of motor gasoline as that term was defined in 10 CFR 212.31 and operated a retail outlet in Corona, California during the period of price controls. An ERA audit of O'Neal's records revealed that between August 1, 1979 and July 24, 1980 (the audit period), O'Neal committed possible price violations with respect to its retail sales of motor gasoline in violation of 10 CFR 212.93. On February 24, 1981, the ERA issued a Proposed Remedial Order (PRO) to Tom O'Neal d/b/a O'Neal's Service Center alleging that the firm had overcharged its customers and that Mr. O'Neal was personally liable for the violations and should remit the amount of $7,310.55 plus interest.

Mr. O'Neal filed a Statement of Objections to the PRO on August 23, 1981. On September 29, 1982, the DOE denied the Statement of Objections and issued the PRO as a final Remedial Order (RO). *Tom O'Neal,* 10 DOE ¶ 83,011 (1982). The RO was subsequently affirmed by the Federal Energy Regulatory Commission on November 4, 1983. *Tom O'Neal,* 25 FERC ¶ 51,215 (1983), *aff'g* 23 FERC ¶ 62,308 (1983) (Proposed Decision). In July 1987, the ERA agreed to accept $3,764.93 in full settlement of O'Neal's refund obligation under the RO.[1] *See* July 30, 1987 letter from Richard L. Farman of the ERA to Randolf W. Katz, Counsel for O'Neal. On Agugust 15, 1988, the final payment was received by the DOE and placed in an escrow account maintained by the U.S. Treasury. This Decision concerns the distribution of the funds in the O'Neal escrow account, plus accrued interest.

II. Jurisdiction and Authority

The procedural regulations of the DOE set forth general guidelines by which the OHA may formulate and implement a plan of distribution for funds received as a result of an enforcement proceeding. 10 CFR Part 205, Subpart V. The DOE policy is to use the Subpart V process to distribute such funds. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds obtained as part of settlement agreements, *see Office of Enforcement,* 9 DOE ¶ 82,553 (1982), and *Office of Enforcement,* 9 DOE ¶ 82,508 (1981); *Office of Enforcement,* 8 DOE ¶ 82,597 (1981),

We have considered the record in the present case and have determined that a Subpart V proceeding is an appropriate mechanism for distributing the O'Neal Remedial Order fund. We will therefore grant the ERA's petition and assume jurisdiction over this fund.

III. Proposed Refund Procedures

A. Showing of Injury

We propose that, in order to be eligible for a refund, an applicant must establish that it was injured as a result of O'Neal's overcharges. *See* 10 CFR 205.280. As previously stated, O'Neal sold motor gasoline to retail customers. Therefore, only end-users, or ultimate consumers, of O'Neal motor gasoline who were injured by the overcharges will be eligible for refunds in this proceeding. *See, e.g., Clean Machine, Inc.,* 17 DOE ¶ 85,251 (1988). In order to demonstrate injury, end-user applicants will be required to document the volume of motor gasoline that they purchased from O'Neal during the August 1, 1979 through July 24, 1980 audit period. Unlike regulated firms in the petroleum industry, end-users generally were not subject to price controls during the regulatory period. They were therefore not required to keep records which would show whether they passed through cost increases in sales of other products or services. An analysis of the impact of the alleged overcharges on the final prices of goods and services which were not covered by the petroleum price regulations would therefore be beyond the scope of a special refund proceeding. *See Texas Oil & Gas Corp.,* 12 DOE ¶ 85,069 at 88,209 (1984), and cases cited therein. Consequently, end-users of O'Neal's motor gasoline will not be required to make a detailed demonstration of injury in order to establish eligibility for a refund. They will only be required to document their purchase volumes from O'Neal.

B. Calculation of Refund Amounts

In order to determine the potential refund amounts for applicants in this proceeding, we propose to adopt a volumetric refund presumption. The volumetric refund presumption treats

[1] This amount, representing one-half of the principal overcharge amount of $7,319.55 plus a three percent penalty, was orginally offered to Mr. O'Neal in 1982. In the July 30, 1987 letter, the ERA acknowleged that Mr. O'Neal had been willing to accept the earlier settlement offer in 1982 if certain matters had been clarified.

O'Neal's overcharges as if they were spread equally over all gallons of motor gasoline that O'Neal sold during the audit period. In the present case, we propose to use this methodology for reasons of administrative efficiency since, during the 12-month audit period, there were a large number of separate pricing periods with differenct per gallon overcharge amounts for each grade of motor gasoline.

Under the volumetric method, a claimant that adequately demonstrates its purchase volumes will be eligible to receive a refund equal to the number of gallons of motor gasoline that it purchased from O'Neal during the audit period times the volumetric factor.[2] The volumetric factor in this case equals $0.00678 per gallon.[3] In addition, a successful claimant will receive a proportionate share of the interest that has accrued in the O'Neal escrow account.

As in previous cases, we propose to establish a minimum amount of $15 for refund claims.[4] We have found through our experience in prior refund cases that the cost of processing claims for refunds of less than $15 outweighs the benefits of restitution in those situations. *See, e.g., Uban Oil Co.*, 9 DOE ¶82,541 at 85,225 (1982). *See also*, 10 CFR 205.286(b).

Applications for Refund should not be filed at this time. Before implementing the procedures outlined in this Proposed Decision, we intend to publicize it in order to solicit comments from any interested parties. All comments must be filed with the Office of Hearings and Appeals within 30 days of the publication of this Proposed Decision in the **Federal Register**.

Any funds that remain after all first stage claims have been decided will be distributed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA). 15 U.S.C.A. §§ 4501–4507. The PODRA requires that the Secretary of Energy determine annually the amount of oil overcharge funds that will not be required to refund monies to injured parties in Subpart V proceedings and make those funds available to state governments for use in four energy conservation programs. The Secretary has delegated these responsibilities to the OHA, and any funds in the O'Neal escrow account that the OHA determines will not be needed to effect direct restitution to injured O'Neal customers will be distributed in accordance with the provisions of PODRA.

It Is Therefore Ordered That:

The refund amount remitted to the Department of Energy by Tom O'Neal (O'Neal Service Center) pursuant to the Remedial Order issued on September 29, 1982 will be distributed in accordance with the foregoing decision.

[FR Doc. 88–26884 Filed 11–18–88; 8:45 am]

BILLING CODE 6450–01–M

[2] The volumetric refund presumption is rebuttable. Because we realize that the impact on an individual claimant may have been greater than the volumetric amount, a claimant may submit evidence detailing the specific overcharges that it incurred in order to be eligible for a larger refund. *See, e.g., Standard Oil Co. (Indiana)/Army and Air Force Exchange Service*, 12 DOE ¶85,015 (1984).

[3] We computed this figure by dividing the $3,764.93 settlement amount by the 555,012 gallons of motor gasoline sold by O'Neal during the audit period.

[4] Under the volumetric method we have proposed in this proceeding, we calculate that an applicant must have purchased at least 2,211 gallons of motor gasoline from O'Neal during the twelve-month audit period in order to qualify for the minimum $15 refund. In contrast, according to Energy Information Administration data, the average motorist consumed approximately 590 gallons of motor gasoline per car during the audit period. *Consumption Patterns of Household Vehicles, June 1979 to December 1980*, DOE/EIA–0319 at 12 and 13. Accordingly, we anticipate that although many individual motorists who purchased motor gasoline from O'Neal may have legitimate claims, most of those claims will fall below the $15 threshold. However, it is possible that there are governmental entities or businesses with multiple vehicles that purchased motor gasoline from O'Neal on a regular basis and in sufficient quantities to qualify for a refund

ENVIRONMENTAL PROTECTION AGENCY

[FRL–3479–6]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer at EPA (202) 382–2740.

SUPPLEMENTARY INFORMATION:

Office of Air and Radiation

Title: Motor Vehicle Exclusion Requests (EP ICR #0012). This is a request for renewal of an existing collection.

Abstract: Motor vehicle manufacturers that request the Environmental Protection Agency to determine whether a particular type of vehicle is excluded from coverage under the Clean Air Act must submit specifications of the vehicle, including its size, use, and top speed.

Burden Statement: The estimated public reporting burden for this collection of information is 2 hours per response including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Respondents: Vehicle Manufacturers.

Estimated No. of Respondents: 10.

Estimated Total Annaul Burden on Respondents: 40 hours.

Frquency of Collection: On Occasion.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (FM–223), 401 M Street SW., Washington, DC 20450;

and

Nicolas Garcia, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503, (Telephone (202) 395–3084).

Dated: November 7, 1988.

Paul Lapsley,

Director, Information and Regulatory Systems Division.

[FR Doc. 88–26792 Filed 11–18–88; 8:45 am]

BILLING CODE 6570–50–M

[FRL–3479–5]

Chesapeake Bay Program; 1987 Chesapeake Bay Agreement; Proposal for Review

The 1987 Chesapeake Bay Agreement signed by the Governors of Maryland, Virginia and Pennsylvania, the Mayor of the District of Columbia, the Chairman of the Chesapeake Bay Commission and the Administrator of the U.S. Environmental Protection Agency for the Federal Government, requires signatories to adopt Development Policies and Guidelines by January 1989. A draft document to fulfill this commitment will be available for public review in certain libraries throughout the Bay Basin for a 30-day period starting November 21, 1988, and ending December 20, 1988. For more information about the locations where

the document may be reviewed, call the Chesapeake Regional Information Service toll-free by dialing 800/662–CRIS. In the Washington metropolitan area, you may call 881–8678.

Charles S. Spooner,

Director, Chesapeake Bay Liaison Office.

[FR Doc. 88–26793 Filed 11–18–88; 8:45 am]

BILLING CODE 6560–50–M

[OPP–00270; FRL–3479–4]

State-FIFRA Issues Research and Evaluation Group (SFIREG); Open Meeting of Working Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a two-day meeting of the State FIFRA Issues Research and Evaluation Group (SFIREG). The meeting will be open to the public.

DATE: Monday, December 12 and Tuesday, December 13, 1988, beginning at 8:30 a.m. each day and ending by 3:30 p.m. on Tuesday December 13.

ADDRESS: The meeting will be held at: Hyatt Regency—Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202, (703) 486–1234.

FOR FURTHER INFORMATION CONTACT: By mail: John Tice, Office of Pesticide Programs (TS–787C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 712C, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 557–7410.

SUPPLEMENTARY INFORMATION: This will be the thirty-second meeting of the full Group. The tentative agenda thus far includes the following topics:

1. Action items from the July 1988 meeting of SFIREG.
2. Regional reports.
3. Working Committee reports.
4. Other topics which may arise.

Dated: November 14, 1988.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 88–26794 Filed 11–18–88; 8:45 am]

BILLING CODE 6560–50–M

[FRL–3479–7]

Environmental Effects, Transport and Fate Committee; Open Meeting

Under the Federal Advisory Committee Act, Pub. L. 92–463, notice is hereby given that a two-day meeting of the Environmental Effects, Transport and Fate Committee of the Science Advisory Board (SAB) will be held on December 1 and 2, 1988. The meeting will begin at 9:00 a.m. and will be held in the Administrator's Conference Room, Room 1103, at the Environmental Protection Agency, Waterside Mall, West Tower, 401 M Street SW., Washington, DC. The meeting will adjourn no later than 5:00 p.m. on December 2.

Several objectives will be accomplished at this meeting. First, the Environmental Effects, Transport and Fate Committee (EET&FC) will be brought up to date on the activities of the various Subcommittees it oversees, including the Water Quality Advisories Subcommittee, the Long-Range Ecological Research Needs Subcommittee, and the Sediment Criteria Subcommittee. The Committee will also be informed of activities ongoing under the Research Strategies Committee, and the Global Climate Change Subcommittees.

In addition, three briefings will be provided from Agency staff. First, Tudor Davies, Director of the Office of Marine and Estuarine Protection, will discuss the current status of Ocean Dumping Regulations. Second, Don Nantes, Office of General Counsel, will brief the Committee on ethics regulations. Third, Marion Mlay, Director of the Office of Ground Water Protection, will discuss the current priorities of her Office, as well as future plans, and opportunities for SAB interaction.

The final objective for the meeting is to review Guidelines for Exposure-Related Measurements promulgated by the Agency's Office of Research and Development. These guidelines provide the general principles of exposure assessment along with a logical process to follow in assessing exposure. They include guidance on the measurement of pollutant concentrations in various environmental media, and the use of exposure-related measurements. Notice of availability for the document to be reviewed, Guidelines for Exposure-Related Measurements, will appear shortly in the **Federal Register**. Mr. John Segna, EPA, ORD/Office of Health and Environmental Assessment, can also be contacted at (202) 475–8909 concerning document availability.

The meeting will be open to the public. Any member of the public who wishes to attend, present information, or receive further details should contact Ms. Janis C. Kurtz, Executive Secretary or Mrs. Lutithia Barbee, Staff Secretary (A–101 F) Science Advisory Board, U.S. EPA, 401 M Street SW., Washington, DC, Telephone (202) 382–2552 or FTS–8–382–2552. Written comments will be accepted and can be sent to Ms. Kurtz at the address above. Persons interested in making statements before the Subcommittee must contact Ms. Kurtz no later than November 28, 1988, to be assured of space on the agenda.

Date: November 9, 1988.

Donald G. Barnes,

Director, Science Advisory Board.

[FR Doc. 88–26795 Filed 11–18–88; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL HOME LOAN BANK BOARD

[No. AC–751]

Mutual Savings and Loan Association of Charlotte, NC; Final Action Approval of Conversion Application

Date: November 8, 1988.

Notice is hereby given that on November 3, 1988, the Office of General Counsel and the Office of Regulatory Activities, or their respective designees, acting pursuant to delegated authority, approved the application of Mutual Savings and Loan Association of Charlotte, North Carolina, Charlotte, North Carolina ("Mutual"), for permission to convert to the stock form of organization pursuant to a voluntary supervisory conversion and the acquisition of Mutual by Catawba SavShares, Inc., New Bern, North Carolina.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88–26770 Filed 11–18–88; 8:45 am]

BILLING CODE 6720–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–200172.

Title: Port Authority of New York and New Jersey Terminal Agreement.

Parties: Port Authority of New York and New Jersey (Authority), Sea-Land Service, Inc. (Sea-Land).

Synopsis: The agreement provides that the Authority will pay Sea-Land $25.00 per import container with cargo and $50.00 per export container with cargo loaded or unloaded from Sea-Land's vessels at a marine terminal in the Port of New York/New Jersey. The payment applies only to containers for which Sea-Land is required to pay a railroad for transportation by rail to or from points more than 260 miles from a terminal within the Port and have a prior or subsequent move by water through a marine terminal in the Port.

Agreement No.: 224–200173.

Title: Port Authority of New York/New Jersey Container Incentive Agreement.

Parties: Port Authority of New York/New Jersey (Port), Bermuda Container Line, Ltd. (Carrier).

Synopsis: The agreement establishes a container incentive program whereby the Port, pursuant to the terms and conditions of the agreement, will pay to the Carrier twenty-five dollars per import container with cargo and fifty dollars per export container with cargo loaded or unloaded from Carrier's vessels at a marine terminal in the Port. The payment applies only to containers for which Carrier is required to pay a railroad for transportation by rail to or from points more than 260 miles from a terminal within the Port and have a prior or subsequent move by water through a marine terminal in the Port.

Agreement No.: 224–200174.

Title: Port Authority of New York/New Jersey Container Incentive Agreement.

Parties: Port Authority of New York/New Jersey (Port), Maersk Incorporated (Carrier).

Synopsis: The agreement establishes a container incentive program whereby the Port, pursuant to the terms and conditions of the agreement, will pay to the Carrier twenty-five dollars per import container with cargo and fifty dollars per export container with cargo loaded or unloaded from Carrier's vessels at a marine terminal in the Port. The payment applies only to containers for which Carrier is required to pay a railroad for transportation by rail to or from points more than 260 miles from a terminal within the Port and have a prior or subsequent move by water through a marine terminal in the Port.

Agreement No.: 224–200175.

Title: City of Richmond, California Terminal Agreement.

Parties: The City of Richmond and Richmond Redevelopment Agency, California Stevedore Ballast Co.

Synopsis: The agreement provides for the ten year lease of Terminal No. 3 in the City of Richmond, California for a marine terminal operation.

Agreement No.: 224–200171.

Title: Port Authority of New York and New Jersey Terminal Agreement.

Parties: Port Authority of New York and New Jersey (Authority), Gdynia America Line, Inc. (Gdynia).

Synopsis: The agreement provides that the Authority will pay Gdynia $25.00 per import container with cargo and $50.00 per import container with cargo loaded or unloaded from Gdynia's vessels at a marine terminal in the Port of New York/New Jersey. The payment applies only to containers for which Gdynia is required to pay a railroad for transportation by rail to or from points more than 260 miles from a marine terminal within the Port and have a prior or subsequent move by water through a marine terminal in the Port.

By Order of the Federal Maritime Commission.

Dated: November 15, 1988.

Joseph C. Polking,

Secretary.

[FR Doc. 88–26769 Filed 11–18–88; 8:45 am]

BILLING CODE 6730–01–M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 207–011157–002

Title: Safbank Joint Venture Agreement

Parties:

The Bank Line Limited
The South African Marine Corporation Limited
Safbank Line Limited
Bank Line East Africa Limited

Synopsis: The proposed modification would permit Safbank Line Limited to assume any liability of Bank Line or Safmarine to multi-employer pension plans for the trade. The parties have requested a shortened period of review.

By Order of the Federal Maritime Commission

Joseph C. Polking,

Secretary.

Dated: November 16, 1988.

[FR Doc. 88–26895 Filed 11–18–88; 8:45 am]

BILLING CODE 6730–01–M

Security for the Protection of the Public Indemnification of Passengers for Nonperformance of Transportation; Issuance of Certificate (Performance) to Epirotiki Lines, Inc.

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation pursuant to the provisions of Section 3, Pub. L. 89–777 (80 Stat. 1357, 1358) and Federal Maritime Commission General Order 20, as amended (46 CFR Part 540): Epirotiki Lines, Inc./Hellenic Co. Overseas Cruise Vessels, S.A., 551 Fifth Avenue, New York, New York 10176. Vessel: World Renaissance.

Date: November 16, 1988.

Joseph C. Polking,

Secretary.

[FR Doc. 88–26873 Filed 11–18–88; 8:45 am]

BILLING CODE 6730–01–M

GENERAL SERVICES ADMINISTRATION

Performance Review Board; Membership; Senior Executive Service

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: Notice is hereby given of the names of the members of the Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Gregory Knott, Deputy Director of Personnel, General Services Administration, 18th and F Streets, NW., Washington, DC 20405 (202) 566–0398.

SUPPLEMENTARY INFORMATION: Section 4313(c) (1) through (5) of Title 5 U.S.C. requires each agency to establish in accordance with regulations prescribed by the Office of Personnel Management one or more performance review boards. The boards shall review the performance rating of each senior

executive's performance by the supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive.

The members of the Performance Review Board are:

1. David F. Godfrey, Acting Deputy Administrator.
2. Robert C. MacKichan, Jr., General Counsel.
3. Richard H. Hopf III, Associate Administrator For Acquisition Policy.
4. George P. Cordes, Regional Administrator, Region 3.
5. Roger D. Daniero, Deputy Commissioner, Federal Supply Service.
6. Richard M. Hadsell, Regional Administrator, National Capital Region.
7. Duncan L. Howard, Commissioner, Public Buildings Service.
8. Earl E. Jones, Commissioner, Federal Property Resources Service.
9. Patricia A. Szervo, Commissioner, Information Resources Management Service.

Dated: November 4, 1988.

Gregory L. Knott,

Deputy Director of Personnel.

[FR Doc. 88-26778 Filed 11-18-88; 8:45 am]

BILLING CODE 6820-34-M

[GSA Bulletin FPMR A-40, Supp. 30]

Changes to Federal Travel Regulations

AGENCY: Federal Supply Service, GSA.

ACTION: Notice of Changes to Federal Travel Regulations (FTR).

SUMMARY: GSA has issued GSA Bulleting FPMR A-40, Supplement 30, transmitting a changed page to amend FPMR 101-7, Federal Travel Regulations (FTR), Chapter 2, Part 6, by increasing the maximum dollar amount for reimbursement of allowable real estate sale and purchase expenses incident to change of official station.

EFFECTIVE DATE: The revised provisions in Part 6 of Chapter 2 of the FTR are effective for employees whose effective date of transfer is on or after October 1, 1988. For purposes of these regulations, the effective date of transfer is the date on which the employee reports for duty at the new official station.

FOR FURTHER INFORMATION CONTACT: Raymond F. Price, Jr., Travel and Transportation Regulations Staff (FBR), FTS 557-1253 or Commercial (703) 557-1253.

SUPPLEMENTARY INFORMATION: The General Services Administration has determined that this rule is not a major rule for the purposes of Executive order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs to consumers or others; or significant adverse effects. The General Services Administration has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

Section 118 of Pub. L. 98-151 (97 Stat. 977), November 14, 1983, which amended the statutory authority for the employee relocation allowances contained in subchapter II of chapter 57, title 5, United States Code, enacted into law dollar limitations for reimbursement of expenses for the sale and/or purchase of a residence incident to an employee's transfer to a new official station.

5 U.S.C. 5724(a)(4)(B) provides for an annual update in the maximum dollar amounts applicable to reimbursement of expenses incurred by an employee for the sale and purchase of a residence. The law requires that the dollar amount be increased effective October 1 of each year based on the percent change, if any, in the Consumer Price Index for All Urban Consumers, United States City Average, Housing Component for December of the preceding year over that published for December of the second preceding year.

Explanation of Changes

Paragraph 2-6.2g(1) and (2) are amended to reflect a 3.7 percent increase in the dollar maximums for reimbursement of allowable expenses incurred for the sale of the residence at the old official station from $17,177 to $17,813 and for the purchase of a new residence at the new official station from $8,589 to $8,907. Agencies should make a pen and ink change to annotate the real estate expenses section of page 6 of Table 2 in Appendix 2-A to reflect the new dollar amounts and the effective date.

Accordingly, the Federal Travel Regulations are amended as follows:

Chapter 2. Relocation Allowances

PART 6—ALLOWANCES FOR EXPENSES INCURRED IN CONNECTION WITH RESIDENCE TRANSACTIONS

1. **Authority:** (Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); 5 U.S.C. 5707; Executive Orders No. 11609, July 22, 1971, No. 12466, February 27, 1984, and No. 12522, June 24, 1985).

2. Paragraph 2-6.2g is revised to read as follows:

2-6.2. *Reimbursable and nonreimbursable expenses.*

* * * * *

g. *Overall limitations.* The total amount of expenses that may be reimbursed is as follows:

(1) In connection with the sale of the residence at the old official state, reimbursement shall not exceed 10 percent of the actual sale price or $17,813, whichever is the lesser amount.

(2) In connection with the purchase of a residence at the new official station, reimbursement shall not exceed 5 percent of the purchase price or $8,907, whichever is the lesser amount.

* * * * *

Dated: November 3, 1988.

Richard G. Austin,

Acting Administrator of General Services.

[FR Doc. 88-26776 Filed 11-18-88; 8:45 am]

BILLING CODE 6820-24-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 88N-0390]

Drug Export; Symcor® (Tiamenidene HCl) Bulk New Drug Substance

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Hoechst-Roussel Pharmaceuticals, Inc., has filed an application requesting approval for the export of the human drug Symcor® (tiamenidine HCl) Bulk New Drug Substance of the Federal Republic of Germany.

ADDRESS: Relevant information on this application may be directed to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, and to the contact person identified below. Any future inquiries concerning the export of human drugs under the Drug Export Amendments Act of 1986 should also be directed to the contact person.

FOR FURTHER INFORMATION CONTACT: Rudolf Apodaca, Division of Drug Labeling Compliance (HFD-310), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8063.

SUPPLEMENTARY INFORMATION: The Drug Export Amendments Act of 1986 (Pub. L. 99-660) (section 802 of the

Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 382)) provides that FDA may approve applications for the export of drugs that are not currently approved in the United States. The approval process is governed by section 802(b) of the act. Section 802(b)(3)(B) of the act sets forth the requirements that must be met in an application for approval. Section 802(b)(3)(C) of the act requires that the agency review the application within 30 days of its filing to determine whether the requirements of section 802(b)(3)(B) have been satisfied. Section 802(b)(3)(A) of the act requires that the agency publish a notice in the **Federal Register** within 10 days of the filing of an application for export to facilitate public particiaption in its review of the application. To meet this requirement, the agency is providing notice that Hoechst-Roussel Pharmaceuticals, Inc., Route 202–206 North, Sommerville, NJ 08876, has filed an application requesting approval for the export of the drug Symcor® (tiamenidine HCl) Bulk New Drug Substance of the Federal Republic of Germany. This drug is to be used in the treatment of hypertension. The application was received and filed in the Center for Drug Evaluation and Research on November 7, 1988, which shall be considered the filing date for purposes of the act.

Interested persons may submit relevant information on the application to the Dockets Management Branch (address above) in two copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. These submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

The agency encourages any person who submits relevant information on the application to do so by December 1, 1988, and to provide an additional copy of the submission directly to the contact person identified above, to facilitate consideration of the information during the 30-day review period.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sec. 802, Pub. L. 99–660 (21 U.S.C. 382)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Center for Drug Evaluation and Research (21 CFR 5.44).

Dated: November 10, 1988.

Daniel L. Michels,

Director, Office of Compliance, Center for Drug Evaluation and Research.

[FR Doc. 88–26828 Filed 11–18–88; 8:45 am]

BILLING CODE 4160–01–M

National Institutes of Health

National Cancer Institute; Establishment of the National Committee to Review Current Procedures for Approval of New Drugs for Cancer and AIDS

Pursuant to the Federal Advisory Committee Act of October 6, 1972, (Pub. L. 92–463, 86 Stat. 770–776), and the Health Research Extension Act of 1985 (Pub. L. 99–158), the National Institutes of Health, announces the establishment by Acting Director, National Cancer Institute of the National Committee to Review Current Procedures for Approval of New Drugs for Cancer and AIDS.

The National Committee to Review Current Procedures for Approval of New Drugs for Cancer and AIDS shall assist and advise the Director of the National Cancer Institute, the Chair and members of the President's Cancer Panel, and the Vice-President of the United States in the review of current procedures for approval of new drugs for cancer and AIDS.

This Committee shall terminate on December 15, 1990, unless renewed by appropriate action as authorized by law.

Dated: November 15, 1988.

James B. Wyngaarden,

Director, NIH.

[FR Doc. 88–26853 Filed 11–18–88; 8:45 am]

BILLING CODE 4140–01–M

Public Health Service

National Toxicology Program Board of Scientific Counselors Meetings-Announcement of Draft Technical Reports Projected for Public Peer Review from March 1989 through June 1990

To earlier inform the public and allow interested parties to comment or obtain information on toxicology and carcinogenesis studies prior to public peer review, the National Toxicology Program (NTP) again publishes in the **Federal Register** a current listing of draft Technical Reports projected for evaluation by the Peer Review Panel during their next five meetings from March 1989 through June 1990. The listing will be updated with announcements in the **Federal Register** approximately twice a year. The meeting dates for 1989 are: March 13–14, June 27–28, and November 20–21. Specific dates for the 1990 meetings will be established at a later time.

The attachment gives draft Technical Reports of studies on chemicals listed alphabetically within known or estimated dates of reviews and includes Chemical Abstracts Service registry numbers, responsible staff scientists with telephone numbers, NTP report numbers (if assigned), uses, species, routes of administration, and exposure levels used in the chronic studies.

Those interested in having more information about any of the studies listed in this announcement, or wanting to provide input, should contact the particular NTP staff scientist as early as possible by telephone or by mail to: NIEHS, P.O. Box 12233, Research Triangle Park (RTP), North Carolina 27709. The staff scientists would welcome receiving toxicology and carcinogenesis data from completed, ongoing or planned studies by others as well as current production data, human exposure information, and use and use patterns.

The Executive Secretary, Dr. Larry G. Hart, NTP, P.O. Box 12233, RTP, North Carolina 27709, telephone (919–541–3971), FTS (629–3971), will furnish final agendas, and other program information prior to a meeting, and summary minutes subsequent to a meeting.

Dated: November 14, 1988.

David P. Rall,

Director, National Toxicology Program.

NTP Toxicology and Carcinogenesis Studies Chemicals Projected for Peer Review

Chemical name/Cas No.	Use [1]	Study Scientist	Route [2]	Species [3]	Exposure levels	NTP TR No.
Chemicals Tentatively Scheduled for Peer Review March 13-14, 1989						
Benzofuran; 271-89-6	INTR	R. Irwin; 919-541-3340	GAV	RM	FR&MM: 0, 60, 120, MR: 0, 30, 60, FM: 0, 120,240 MG/KG.	370
N, N=Dimethylaniline; 121-69-7	SOLV	K. Abdo; 919-541-7819	GAV	RM	R: 0, 3, 30, M: 0, 15, 30 MG/KG	360
Alpha=Methylbenzyl Alcohol; 98-85-1	COSM	M. Dieter; 919-541-3368	GAV	RM	R&M: 0, 375, 750 MG/KG	369
Nalidixic Acid; 389-08-2	PHAR	R. Morrissey; 919-541-5-35	FEED	RM	R&M: 0, 2000, 4000 PPM	368
Phenylbutazone; 50-33-9	PHAR	F. Kari; 919-541-2926	GAV	RM	R: 0, 50, 100, M: 0, 150,300 MG/KG	367
Toluene; 108-88-3	INTR	J. Huff; 919-541-3780	INHAL	RM	R: 0, 600, 1200, M: 0, 120, 600, 1200 PPM	362
Vinyl Cyclohexene Diepoxide; 106-87-6	INTR	R. ChhABRA; 919-541-3386	SP	RM	R: 0, 50, 100, M: 0, 25, 50, 100 MG/ML	362
Chemicals Tentatively Scheduled for Peer Review June 27-28, 1989						
Allyl Glycidyl Ether; 106-92-3	SOLV	G. Boorman; 919-541-3440	INHAL	RM	R&M: 0, 5, 10, PPM	
Chloroacetophenone (CN); 532-27-4	MLTR	R. Melnick; 919-541-4142	INHAL	RM	R: 0, 1, 2, M: 0, 2, 4, MG/M3	
O-Chlorobenzalmalononitrile (CS); 2698-41-1	MLTR	K. Abdo; 919-541-7819	INHAL	RM	R: 0, .075, .25, .75, M: 0, .75, 1.5 MG/M3	
C.I. Direct Blue 15; 2429-74-5	DYE	D. Morgan; 919-541-2264	WATER	R	0, 0.063, 0.125, 0.25 %	
3,3-Dimethoxybenzidine; 119-90-4	DYE	D. Morgan; 919-541-2264	WATER	R	R: 0, 80, 170, 330 PPM	
Epinephrine Hydrochloride; 55-31-2	PHAR	D. Dietz; 919-541-2272	INHAL	RM	R: 0, 1.5, 5.0, M: 0, 1.5, 3.0 MG/M3	
Succinic Anhydride; 108-30-5	FOOD	R. Melnick; 919-541-4142	GAV	RM	MM: 0, 38, 75, FM: 0, 75, 150 R: 0, 50, 100 MG/KG.	
Chemicals Tentatively Scheduled for Peer Review November 20-21, 1989						
Benzaldehyde; 100-52-7	INTR	J. Bishop; 919-541-1876	GAV	RM	R&MM: 0, 200, 400, FM: 0, 300, 600 MG/KG	
D-Carvone; 2244-16-8	COSM	J. Roycroft; 919-541-3627	GAV	M	R: 0, 175, 375, M: 0, 375, 750 MG/KG	
Glycidol; 556-52-5	PHAR	R. Irwin; 919-541-3340	GAV	RM	R: 0, 38, 75, M: 0, 25, 50 MG/KG	
Sodium Azide; 26628-22-8	PHAR	K. Adbo; 919-541-7819	GAV	R	0, 5, 10 MG/KG	
Tetranitromethane; 509-14-8	FUEL	J. Bucher; 919-541-4532	INHAL	RM	R: 0, 2, 5, M: 0, 0.5, 2 PPM	
Vinyl Toluene; 25013-15-4	SOLV	G. Boorman; 919-541-3440	INHAL	RM	R: 0, 100, 300, M: 0, 10, 25 PPM	
Chemicals Tentatively Scheduled for Peer Review February, 1990						
Amphetamine Sulfate; 60-13-9	PHAR	J. Dunnick; 919-541-4811	FEED	RM	0, 20, 100 PPM	
Ethylene Thiourea (ETU); 96-45-7	PEST	R. Chhabra; 919-541-3386	FEED	RM	R: 0, 25, 83, 250, M: 0, 100, 333, 1000 PPM	
Furfural; 98-01-1	INTR	R. Irwin; 919-541-3340	GAV	RM	R: 0, 30, 60, M: 0, 50, 100, 175, MG/KG	
Probenecid; 56-66-9	PHAR	S. Stefanski; 919-541-5739	GAV	RM	0, 100, 400 MG/KG	
Tris (2-Chloroethyl) Phosphate; 115-96-8	FLAM	H. Matthews; 919-541-3252	GAV	RM	R: 0, 44, 88, M: 0, 175, 350 MG/KG	

NTP TOXICOLOGY AND CARCINOGENESIS STUDIES CHEMICALS PROJECTED FOR PEER REVIEW—Continued

Chemical name/Cas No.	Use [1]	Study Scientist	Route [2]	Species [3]	Exposure levels	NTP TR No.
Chemicals Tentatively Scheduled for Peer Review June, 1990						
C.I. Acid Red 114; 6459-94-5	DYE	D. Morgan; 919-541-2264	WATER	R	MR: 0, 70, 150, 300, FR: 0, 150, 300, 600 PPM..	
2, 3-Dibromo-1-Propanol; 96-13-9	FLAM	R. Melnick; 919-541-4142	FEED	RM	R: 0, 188, 375, M: 0, 88, 177 MG/KG	
3, 3-Dimethylbenzidine; 119-93-7	DYE	D. Morgan; 919-541-2264	WATER	R	0, 30, 70, 150 PPM	
Diphenylhydantoin (Phenytoin); 57-41-0	PHAR	R. Chhabra; 919-541-3386	FEED	RM	R: 0, 240, 800, 2400, MM: 0, 30, 100, 300, FM: 0, 60, 200, 600 PPM.	
Methyl Bromide; 74-83-9	FUME	R. Yang; 919-541-2947	INHAL	M	0, 10, 33, 100 PPM	
Resorcinol; 108-46-3	PHAR	R. Irwin; 919-541-3340	GAV	RM	MR&M: 0, 112, 225 FR: 0, 50, 100, 150, MG/KG.	
Titanocene Dichloride; 1271-19-8	LABC	M. Dieter; 919-541-3368	GAV	R	0, 25, 50 MG/KG	

[1] Abbreviations used: USE Primary Use Category: COSM Cosmetics; DYE As or in Dyes; FLAM Flame Retardants; FOOD Food and Food Additives; FUEL As or in Fuel; FUME Fumigants; INTR Chemical Intermediate or Catalyst; LABC Unspecified Chemical Uses not Fitting into SOLV, INTR, or REAG categories; MLTR Used for Military or Policing Purposes; PEST Pesticides, General or Unclassified; PHAR Pharmaceuticals or Intermediates; REAG Laboratory Reagent; SOLV Vehicles and Solvents.

[2] ROUTE Route of Administration: FEED Oral in Feed; GAV Oral, Gavage; INHAL Inhalation; SP Skin Paint; WATER Oral with Water.

[3] SPEC Species: R=Rats; M=Mice.

[FR Doc. 88-26862 Filed 11-18-88; 8:45 am]

BILLING CODE 4140-01-M

Centers for Disease Control; Statement of Organization, Functions, and Delegation of Authority

Part H, Chapter HC (Centers for Disease Control) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772-67776, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 53 FR 43041, October 25, 1988) is amended to reflect the following changes within the Office of the Director, Center for Environmental Health and Injury Control: (1) Transfer the information management and services activities from the Office of Planning, Legislation, and Information Management to the Office of the Dirtector; and (2) change the name of the Office of Planning, Legislation, and Information Management to Office of Planning, Evaluation, and Legislation.

Section HC-B, Organization and Functions, is hereby amended as follows:

After the heading and statements for the *Center for Environmental Health and Injury Control (HCN),* make the following changes:

1. Change the title of the *Office of Planning, Legislation, and Information Management (HCN13)* to *Office of Planning, Evaluation, and Legislation (HCN13).*

2. Amend the statements for the *Office of Planning, Evaluation, and Legislation (HCN13)* as follows: (a) In item (1) insert the word "program" before "objectives," (b) delete items (5) and (6), and (c) renumber item (7) as (5).

Dated: November 8, 1988.

Wilford J. Forbush,

Director, Office of Management/PHS.

[FR Doc. 88-26821 Filed 11-18-88; 8:45 am]

BILLING CODE 4160-18-M

Health Resources and Services Administration; Statement of Organization, Functions and Delegation of Authority

Part H, Chapter HB (Health Resources and Services Administration) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (47 FR 38409-24, August 31, 1982, as amended most recently as 53 FR 34588, September 7, 1988), is amended to reflect a new function in the Office of Program and Policy Development (HBC12), Bureau of Health Care Delivery and Assistance.

Under *Section HB-10, Organization and Functions,* amend the *Bureau of Health Care Delivery and Assistance (HBC),* as follows:

(1) Under functional statement for the *Office of Program and Policy Development (HBC12)* make the following changes: (1) Delete the word "and" after item number 12; and (2) change the period to a semicolon after item number 13 and add the following "and (14) provides the focus for the Bureau's program for prepaid indigent health care and provides coordination and liaison with the Office of the Administrator and the Health Care Financing Administration."

Date: November 8, 1988.

Wilford J. Forbush,

Director, Office of Management, PHS.

[FR Doc. 88-26820 Filed 11-18-88; 8:45 am]

BILLING CODE 4160-16-M

Health Resources and Services Administration; Delegation of Authority

Notice is hereby given that in furtherance of the delegation of authority to the Administrator, Health Resources and Services Administration, on November 8, 1988, by the Assistant Secretary for Health, the Administrator has delegated all of the authorities under section 315 of the Public Health Service Act, as amended, pertaining to the Grants for Treatment Drugs for Acquired Immune Deficiency Syndrome, to the Director, Bureau of Maternal and Child Health and Resources Development, with authority to redelegate.

Redelegation: These authorities may be redelegated.

Effective Date: This delegation became effective on November 8, 1988.

Date: November 8, 1988.

John H. Kelso,

Acting Administrator.

[FR Doc. 88-26829 Filed 11-18-88; 8:45 am]

BILLING CODE 4160-15-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT-020-0-4111-08]

Montana; Management Framework Plans, etc.

AGENCY: Bureau of Land Management, Miles City District Office, Interior.

ACTION: Notice of intent to prepare a resource management plan-management framework plan amendment/environmental impact statement for oil and gas and hold scoping meetings, Montana and South Dakota.

SUMMARY: A Districtwide planning amendments/Environmental Impact Statement will be prepared on the oil and gas leasing program, including all surface disturbing activities from geophysical activity through exploration, development, reclamation and abandonment.

The amendment is being done to fully describe and analyze two or more alternative proposals for the oil and gas leasing program that comply with the Bureau of Land Management Supplemental Program Guidance and the National Environmental Policy Act. The action will encompass 3.8 million federal surface and 12.6 million federal subsurface acres in the States of Montana, South Dakota and Wyoming. Most of the acreage lies in Montana. The action will entail requests to industry for pertinent data, mailing of a scoping brochure to interested or affected parties and public meetings to gather oil and gas data and public opinions or concerns. Subsequent notice will be published in the **Federal Register** concerning release dates and review periods of the draft EIS.

DATES: The 45-day public scoping period will begin on November 20 and end on January 4. There will be informational open houses at the district's four resource area offices as follows:

South Dakota Resource Area, 310 Roundup Street, Belle Fourche, South Dakota 57717
8 am–5 pm and 7–9 pm Tuesday, December 6

Big Dry/Powder River Resource Area, Miles City Plaza, Miles City, Montana 59301
8 am–5 pm and 7–9 pm Thursday, December 8

Billings Resource Area, 810 East Main, Billings, Montana 59301
8 am–5 pm and 7–9 pm Tuesday, December 13

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Attention: Oil Gas Project Manager, 810 East Main, Billings, Montana 59105, Phone: (406) 657-6262.

SUPPLEMENTARY INFORMATION: Currently the oil and gas leasing program involves issuance of leases under standard stipulations that protect the environment from undue or excessive degradation. There are also some areas that are leased with additional special stipulations which further contain surface disturbing activities to protect sensitive resources. These special stipulations may designate areas of no surface occupancy or disturbance. The amendment/EIS will examine whether or not the BLM should issue oil and gas leases and the use of standard terms, standard stipulations and special stipulations (including timing and no surface occupancy stipulations) to protect surface resources. It will also examine the impacts of these stipulations on fluids hydrocarbon removal. Decisions on the use of these stipulations will be displayed on maps.

Descriptions of on-the-ground impacts to be anticipated and mitigation stipulations will be accomplished. Mitigations will be based on both potential and cumulative impacts. Future oil and gas development scenarios will be displayed by alternative. The amendment/EIS will incorporate recent planning and environmental assessment guidance.

Mat Millenbach,

District Manager.

[FR Doc. 88-26863 Filed 11-18-88; 8:45 am]

BILLING CODE 4310-DN-M

[ID-943-09-4212-13; I-22682]

Issuance of Land Exchange Conveyance Document; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Exchange of public and private lands.

SUMMARY: The United States has issued an exchange conveyance document to John V. and Eva C. Chatburn of Albion, Idaho 83311, for the following-described lands under Section 206 of the Federal Land Policy and Management Act of 1976:

Boise Meridian

T. 12 S., R. 25 E.,
Sec. 3, N½SW¼, NW¼SE¼
Comprising 120.00 acres of public land.

In exchange for these lands, the United States acquired the following-described lands:

Boise Meridian

T. 11 S., R. 25 E.,
Sec. 27, SE¼NE¼, E½SE¼.
Comprising 160.00 acres of private land.

The purpose of the exchange was to acquire the non-federal land to make a more economical managable unit. The public interest was well served through completion of this exchange.

The values of the federal public land and the non-federal land in the exchange were both appraised at the equal value of $9,000.00.

John Davis,

Deputy State Director for Operations.

Dated: November 8, 1988.

[FR Doc. 88-26782 Filed 11-18-88; 8:45 am]

BILLING CODE 4310-GG-M

[ES-030-09-4212-11; ES-00157-002]

Realty Action; Sale of Public Land in St. Louis County, MN; Correction

SUMMARY: This notice corrects the meridian number in the legal description of the land offered for direct sale to Glen V. Shafer as published in the **Federal Register** on December 24, 1987, Volume 52, No. 247, page 48770. It is the 4th Principal Meridan, Minnesota.

Chris Hanson,

Acting, District Manager.

[FR Doc. 88-26787 Filed 11-18-88; 8:45 am]

BILLING CODE 4310-GJ-M

[ID-943-09-4214-11; I-016413]

Proposed Continuation of Withdrawal; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Forest Service, Department of Agriculture proposes that 67.80 acres of land withdrawn for the Youth Conservation Corps O'Hara Camp, continue for an additional 50 years. The land is now being used as an administrative site by the Selway Ranger District. These lands will remain closed to surface entry, and mining, but have been and will remain open to mineral leasing.

DATE: Comments should be received by February 20, 1989

FOR FURTHER INFORMATION CONTACT: Larry R. Lievsay, Idaho State Office, BLM, 3380 Americana Terrace, Boise, Idaho 83706, 208–334–1735.

The U.S. Forest Service proposes that the existing land withdrawal made by Public Land Order No. 3813 for the Youth Conservation Corps O'Hara Camp, be continued for a period of 50 years pursuant to section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, insofar as it affects the following-described land:

Boise Meridian

T. 32 N., R. 7 E.,
Sec. 23, lot 4, W½NW¼NW¼SE¼, S½NW¼SE¼, W½W½SE¼SE¼.

The area described contains 67.80 acres in Idaho County.

The withdrawal is essential for protection of substantial capital improvements on the Administrative Site. The withdrawal closed the described land to surface entry and mining but not to mineral leasing. No change in the segregative effect or use of the land is proposed by this action.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed withdrawal continuations may present their views in writing to the Idaho State Director at the above address.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demands for the land and its resources. A report will also be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether or not the withdrawals will be published in the **Federal Register**. The existing withdrawals will continue until such final determination is made.

Dated: November 10, 1988.

William E. Ireland,

Chief, Realty Operations Section.

[FR Doc. 88–26785 Filed 11–18–88; 8:45 am]

BILLING CODE 4310–66–M

[MT–930–09–4214–10; MTM 166; MTM 18888]

Termination of Proposed Withdrawals and Reservation of Land, Opening Order; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice terminates in their entirety two proposed withdrawals of National Forest System lands for use by the U.S. Forest Service in connection with three administrative sites and recreation areas in Beaverhead National Forest. The applicant agency has canceled its applications. This action will open the lands to mineral location and entry.

EFFECTIVE DATE: December 21, 1988.

FOR FURTHER INFORMATION CONTACT: James Binando, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–657–6090.

SUPPLEMENTARY INFORMATION:

1. Notice of the Department of Agriculture's application for withdrawal MTM 166 was published in the **Federal Register** on August 19, 1966, Volume 31, No. 161, pages 11039 through 11040, and republished in the **Federal Register**, on June 16, 1977, Volume 42, No. 115, pages 30692 through 30693. Notice of application for withdrawal MTM 18888 was published in the **Federal Register** on July 22, 1971, Volume 36, No. 141, page 13623, and republished in the **Federal Register** on July 20, 1977, Volume 42, No. 139, page 37257.

2. The applications have been canceled in their entirety as a result of the relinquishment filed on October 21, 1988. The lands affected are described as follows:

Principal Meridian, Montana

Beaverhead National Forest

(MTM 166)

Dinner Station Campground

Unsurveyed, but which probably will be when surveyed:

T. 5 S., R. 11 W.,
Sec. 1, W½SE¼NE¼ and E½SW¼NE¼.

Total area—40 acres.

Canyon Creek Campground

Unsurveyed, but which probably will be when surveyed:

T. 2 S., R. 11 W.,
Sec. 34, NW¼NE¼NE¼.

Total area—10 acres.

Reservoir Lake Campground

T. 8 S., R. 15 W.,
Sec. 21, E½W½NW¼SW¼, E½NW¼SW¼, and W½NE¼SW¼.

Total area—50 acres.

Aspen Campground

T. 5 S., R. 10 W.,
Sec. 4, S½SW¼SW¼SW¼.

Total area—5 acres.

Mono Creek Camp

Unsurveyed, but which probably will be when surveyed:

T. 3 S., R. 12 W.,
Sec. 34, NW¼NW¼NW¼.

Total area—10 acres.

Little Joe Camp

Unsurveyed, but which probably will be when surveyed:

T. 3 S., R. 12 W.,
Sec. 21, S½SE¼NE¼SW¼ and N½NE¼SE¼SW¼.

Total area—10 acres.

May Creek Camp

T. 2 S., R. 18 W.,
Sec. 13, SW¼SW¼SW¼;
Sec. 14, SE¼SE¼SE¼;
Sec. 23, E½NE¼NE¼; and
Sec. 24, W½NW¼NW¼.

Total area—60 acres.

Pintlar Falls Camp

Unsurveyed, but which probably will be when surveyed:

T. 1 N., R. 15 W.,
Sec. 2, S½S½SW¼SW¼;
Sec. 10, NE¼NE¼NE¼; and
Sec. 11, NW¼NW¼, N½SW¼NW¼, and N½S½SW¼NW¼.

Total area—90 acres.

Branham Lakes Campground

T. 4 S., R. 3 W.,
Sec. 5, SE¼SE¼NE¼, E½SW¼SE¼NE¼, and N½NE¼NE¼SE¼.

Total area—20 acres.

West Fork Administrative Site

Unsurveyed, but which probably will be when surveyed:

T. 12 S., R. 2 W.,
Sec. 7, W½SW¼SE¼NE¼, E½SE¼SW¼NE¼, W½NW¼NE¼SE¼, and E½NE¼NW¼SE¼.

Total area—20 acres.

Willow Creek Campground

T. 3 S., R. 3 W.,
Sec. 22, NE¼NE¼SW¼ and N½NW¼SE¼.

Total area—30 acres.

Upper Sureshot Lake Picnic Area

T. 3 S., R. 3 W.,
Sec. 25, NW¼SW¼NE¼, E½SW¼NE¼, and W½SE¼NE¼.

Total area—50 acres.

(MTM 18888)

Minneopa Lake Recreation Area

Unsurveyed, but which probably will be when surveyed:

T. 5 S., R. 11 W.,
Sec. 16, S½SW¼NE¼SE¼, S½SE¼NW¼SE¼, W½SE¼SE¼, E½SW¼SE¼, and E½SW¼SW¼SE¼; and
Sec. 21, NW¼NE¼NE¼, N½SW¼NE¼NE¼, NE¼NW¼NE¼, E½NW¼NW¼NE¼, and N½SE¼NW¼NE¼.

The areas described aggregate 485 acres in Deer Lodge, Beaverhead, and Madison Counties, Montana.

3. At 9 a.m. on December 21, 1988, the lands shall be opened to location and entry under the United States mining laws. Appropriations of lands described in this order under the general mining

laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

November 9, 1988.

John E. Moorhouse,

Acting Deputy State Director, Division of Lands and Renewable Resources.

[FR Doc. 88-26786 Filed 11-18-88; 8:45 am]

BILLING CODE 4310-DN-M

Fish and Wildlife Service

Comprehensive Conservation Plan, Environmental Impact Statement, and Wilderness Review for the Alaska Maritime National Wildlife Refuge, AK

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of record of decision.

SUMMARY: The U.S. Fish and Wildlife Service (the Service) has issued a Record of Decision (Decision) on the Comprehensive Conservation Plan, Environmental Impact Statement, and Wilderness Review (Plan) for the Alaska Maritime National Wildlife Refuge, Alaska, pursuant to sections 304(g)(1), 1008, and 1317 of the Alaska National Interest Lands Conservation Act of 1980 (Alaska Lands Act); section 3(d) of the Wilderness Act of 1964; and section 102(2)(C) of the National Environmental Policy Act of 1969.

DATES: This Decision on the Plan will be implemented immediately with specific management plans undergoing development and regulations proposed for promulgation.

FOR FURTHER INFORMATION CONTACT: William Knauer, Refuges and Wildlife, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503; telephone (907) 786-3399.

Copies of the Decision will be sent to all persons and organizations on the mailing list. Others wishing to receive a copy of the Decision may obtain one by contacting Mr. Knauer.

SUPPLEMENTARY INFORMATION: The Service has selected Alternative C, with several changes, for implementation. As described in the Plan, Alternative C is the alternative preferred by the Service. The Service is recommending 109,648 acres for addition to the National Wilderness Preservation System.

Alternative C provides a high degree of resource protection and a good opportunity for achieving the purposes set forth in the Alaska Lands Act, including conservation of fish and wildlife populations and habitats.

Date: November 4, 1988.

Walter O. Stieglitz,

Regional Director.

[FR Doc. 88-26783 Filed 11-18-88; 8:45 am]

BILLING CODE 4310-55-M

Minerals Management Service

Development Operations Coordination Document; Koch Exploration Co.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the receipt of a proposed Development Operations Coordination Document (DOCD).

SUMMARY: Notice is hereby given that Koch Exploration Company has submitted a DOCD describing the activities it proposes to conduct on Lease OCS-G 9460, Block 233, East Cameron Area, offshore Louisiana. Proposed plans for the above area provide for the development and production of hydrocarbons with support activities to be conducted from an existing onshore base located at Cameron, Louisiana.

DATE: The subject DOCD was deemed submitted on September 16, 1988. Comments must be received on or before December 6, 1988 or 15 days after the Coastal Management Section receives a copy of the plan from the Minerals Management Service.

ADDRESSES: A copy of the subject DOCD is available for public review at the Public Information Office, Gulf of Mexico OCS Region, Minerals Management Service, 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). A copy of the DOCD and the accompanying Consistency Certification are also available for public review at the Coastal Management Section Office located on the 10th Floor of the State Lands and Natural Resources Building, 625 North 4th Street, Baton Rouge, Louisiana (Office Hours: 8 a.m. to 4:30 p.m., Monday through Friday). The public may submit comments to the Coastal Management Section, Attention OCS Plans, Post Office Box 44487, Baton Rouge, Louisiana 70805.

FOR FURTHER INFORMATION CONTACT: Ms. Angie D. Gobert, Minerals Management Service, Gulf of Mexico OCS Region, Field Operations, Plans, Platform and Pipeline Section, Exploration/Development Plans Unit; Telephone (504) 736-2876.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to inform the public, pursuant to section 25 of the OCS Lands Act Amendments of 1978, that the Minerals Management Service is considering approval of the DOCD and that it is available for public review. Additionally, this notice is to inform the public, pursuant to § 930.61 of Title 15 of the CFR, that the Coastal Management Section/Louisiana Department of Natural Resources is reviewing the DOCD for consistency with the Louisiana Coastal Resources Program.

Revised rules governing practices and procedures under which the Minerals Management Service makes information contained in DOCDs available to affected States, executives of affected local governments, and other interested parties became effective May 31, 1988 (53 FR 10595).

Those practices and procedures are set out in revised § 250.34 of Title 30 of the CFR.

Date: November 8, 1988.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 88-26780 Filed 11-18-88; 8:45 am]

BILLING CODE 4310-MR-M

Outer Continental Shelf Official Leasing Maps

AGENCY: Minerals Management Service, Interior.

ACTION: Notice.

SUMMARY: Publication of New and/or Revised Outer Continental Shelf Official Leasing Maps.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, effective with this publication, the following OCS Leasing Maps, last revised or newly issued on June 1, 1988, are on file and available, for information only, in the Gulf of Mexico OCS Regional Office, New Orleans, Louisiana. In accordance with Title 43, Code of Federal Regulations, these Leasing Maps are the basic record for the description of mineral and oil and gas lease offers in the geographic areas they represent.[1]

[1] Changes in CFR notations are not considered as revisions. Sabine Pass Area, LA Map 12, is currently being revised. Completion date is unknown.

Revised Maps [1]

Description

Index
West Cameron Area, LA 1
West Cameron Area West Addition, LA 1A
West Cameron Area South Addition, LA 1B
East Cameron Area, LA 2
East Cameron Area South Addition, LA 2A
Vermilion Area, LA 3
South Marsh Island Area, LA 3A
Vermilion Area South Addition, LA 3B
South Marsh Island Area South Addition, LA 3C
South Marsh Island Area North Addition, LA 3D
Eugene Island Area, LA 4
Eugene Island Area South Addition, LA 4A
Ship Shoal Area, LA 5
Ship Shoal Area South Addition, LA 5A
South Timbalier and Bay Marchand Areas, LA 6
South Timbalier Area South Addition, LA 6A
Grand Isle Area, LA 7
Grand Isle Area South Addition, LA 7A
West Delta Area, LA 8
West Delta Area South Addition, LA 8A
South Pass Area, LA 9
South Pass Area South and East Addition, LA 9A
Main Pass Area, LA 10
Main Pass Area South and East Addition, LA 10A
Chandeleur Area, LA 11
Chandeleur Area East Addition, LA 11A

New Maps

The following Louisiana Leasing Maps are new. These were parts of South Timbalier, South Pelto, and Bay Marchand Areas, LA 6, and Main Pass and Breton Sound Areas, LA 10.

Description

South Pelto Area, LA 6B
Breton Sound Area, LA 10B.

Copies of these Leasing Maps may be purchased for $32.00 per set from Minerals Management Service, Gulf of Mexico OCS Regional office, Public Information, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394 (504) 736–2519.

Technical comments or questions pertaining to these maps should be directed to Office of Leasing and Environment, Supervisor, Sales and Support Unit (504) 736–2761.

Date: November 8, 1988.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 88–26781 Filed 11–18–88; 8:45 am]

BILLING CODE 43310-MR-M

DEPARTMENT OF JUSTICE

Consent Decree Pursuant to Clean Air Act; Jefferson Smurfit Corp.

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on November 9, 1988, a proposed Consent Decree in *United States* v. *Jefferson Smurfit Corp.*, Civil Action No. 87–83–CIV–J–16 was lodged with the United States District Court for the Middle District of Florida. The Complaint, as amended, sought the imposition of injunctive relief and civil penalties under the Clean Air Act against the defendant for violations of numerous testing, reporting and monitoring requirements under the New Source Performance Standards regulations promulgated under the Clean Air Act. The violations in issue occurred at a certain coal-fired power boiler at defendant's Containerboard Mill Division paper mill in Jacksonville, Florida.

The Consent Decree requires defendant to pay a civil penalty totalling $67,000. The Decree also requires defendant to undertake certain remedial measures to ensure its future compliance with applicable testing, reporting and monitoring requirements contained in the New Source Performance Standards.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments concerning the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States* v. *Jefferson Smurfit Corporation*, D.J. Ref. 90–5–2–1–1033.

The proposed Consent Decree may be examined at any of the following offices: (1) The United States Attorney for the Middle District of Florida, 409 Post Office Building, 311 West Monroe Street, Jacksonville, Florida; (2) the U.S. Environmental Protection Agency, Region 4, 345 Courtland Street, Atlanta, Georgia; and (3) the Environmental Enforcement Section, Land & Natural Resources Division, U.S. Department of Justice, 10th & Pennsylvania Avenue NW. Washington, DC. Copies of the proposed Decree may be obtained by mail from the Environmental Enforcement Section of the Department of Justice, Land and Natural Resources Division, P.O. Box 7611, Benjamin Franklin Station, Washington, DC 20044–7611, or in person at the U.S. Department of Justice Building, Room 1517, 10th Street and Pennsylvania Avenue NW., Washington, DC. All requests for copies of the proposed Consent Decree must be accompanied by a check for copying costs totalling $1.50 ($0.10 per page) made payable to "United States Treasurer."

Roger J. Marzulla,

Assistant Attorney General, Land & Natural Resources Division.

[FR Doc. 88–26774 Filed 11–18–88; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree; Alcan Aluminum Corp., et al.

In accordance with Departmental policy, 28 CFR 50.7, section 122(d)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9622(d)(2), and section 7003(d) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6973(d), notice is hereby given that on October 26, 1988 a proposed consent decree in *United States v. Alcan Aluminum Corporation, et al.*, Civil Action No. 88–4646, was lodged with the United States District Court for the District of New Jersey. The proposed consent decree involves claims by the United States for recovery of clean-up costs incurred and to be incurred at the Renora Superfund Site in Edison, New Jersey as well as claims for injunctive relief. These claims were brought against a group of 38 defendants pursuant to CERCLA.

The proposed consent decree requires the defendants to perform the remedial action selected in the Record of Decision issued by the United States Environmental Protection Agency ("EPA") on September 28, 1987, which specifies excavation and off-site disposal of soils contaminated with polychlorinated biphenyls ("PCBs") and on-site bioremediation of soils contaminated with polynuclear aromatic hydrocarbons ("PAHs"). The estimated cost for the government to perform this remedial action is approximately $1.5 million. The defendants are also required to pay $50,000 to the EPA and $26,973 to the state of New Jersey for past costs expended at the Site. In addition, the defendants have agreed to reimburse the governments for response costs, other than removal costs, which are not recovered from nonsettlors. In return, the defendants are given a release from claims for past removal costs at the Site (approximately $89,000) and a special convenant not to sue for the PAH remediation pursuant to section 122(f)(2)(B) of CERCLA. The defendants are also given a release for certain natural resource damage claims.

The Department of Justice will receive for a period of thirty (30) days from the date of publication comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Alcan Aluminum Corp., et al.*, D.J. Ref. No. 90-11-3-113.

The proposed consent decree may be examined at the Office of the United States' Attorney for the District of New Jersey, Federal Building, 970 Broad Street, Room 502, Newark, New Jersey 07102 and at the Region II Office of the United States Environmental Protection Agency, 126 Federal Plaza, New York, New York 10278. Copies may also be examined at the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice, Room 1517, Washington, DC 20503. A copy of the proposed consent decree may be obtained in person or by mail from the Environmental Enforcement Section, Land and Natural Resources Division of the Department of Justice. In requesting a copy, please enclose a check in the amount of $22.00 (10 cents per page reproduction cost) payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-26847 Filed 11-18-88; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance; Accurate Parts Co. et al.

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than December 1, 1988.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than December 1, 1988.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC this 7th day of November 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Accurate Parts Co. (Workers)	Kokomo, IN	11/7/88	10/25/88	21,546	Tarter motors.
Alpha Seismic (Company)	Houston, TX	11/7/88	10/18/88	21,547	Oil and gas.
Artel Chemical Corp. (Workers)	Nitro, WV	11/7/88	9/27/88	21,548	Chemicals.
B.C. Tong Service dba B.C. Service Co. (Company).	Wickett, TX	11/7/88	10/7/88	21,549	Oil and gas.
B.J. Titan Services Inc. (Workers)	Houston, TX	11/7/88	10/19/88	21,550	Do.
BTA Oil Producers (Company)	Midland, TX	11/7/88	10/4/88	21,552	Do.
Benton Casing Service (Workers)	Victoria, TX	11/7/88	10/4/88	21,553	Do.
Do	Lake Charles, LA	11/7/88	10/4/88	21,553	Do.
Do	Winnie, TX	11/7/88	10/4/88	21,554	Do.
Do	Houma, LA	11/7/88	10/4/88	21,555	Do.
Cantex Drilling Co. (Workers)	Andrews, TX	11/7/88	10/6/88	21,556	Do.
Chapman Services, Inc. (Company)	Odessa, TX	11/7/88	10/6/88	21,557	Do.
Dia-log Company (Workers)	Natches, MS	11/7/88	9/12/88	21,558	Oil.
Do	Kilgore, TX	11/7/88	9/12/88	21,559	Do.
Do	Hammond, LA	11/7/88	9/12/88	21,560	Do.
Dover Resources, Inc. Norris Sucker Rod Div. (Workers).	Tulsa, OK	11/7/88	10/24/88	21,561	Oil and Gas.
ERC Industries, Inc. (Company)	Houston, TX	11/7/88	10/20/88	21,562	Oil Equipment.
Enserch Exploration Rocky Mnt District (Workers)	Denver, CO	11/7/88	10/18/88	21,563	Oil and Gas.
FWA Drilling Co., Inc. (Workers)	Victoria, TX	11/7/88	10/12/88	21,564	Oil.
Gas Equipment Co., Inc. (Company)	Houston, TX	11/7/88	10/6/88	21,565	Sell Pumps, Compressors.
Hamman Oil & Refining Co. (Workers)	Houston, TX	11/7/88	10/19/88	21,566	Oil and Gas.
Hrubetz Operating Co. (Company)	Forsan, TX	11/7/88	10/10/88	21,567	Oil.
Joy Technologies, Inc., Wheeling Fittings Div (Workers).	Cambridge, OH	11/7/88	10/21/88	21,568	Pipe Fittings.
Do	Woodlake, CA	11/7/88	10/21/88	21,569	Do.
KRW Energy Systems, Inc. (Workers)	Madison, PA	11/7/88	10/18/88	21,570	Synthetic Fuels.
Kestran, Inc. (Workers)	Stafford, TX	11/7/88	10/17/88	21,571	Oil Equipment.
Lafarge Corporation (Workers)	Dallas, TX	11/7/88	10/8/88	21,572	Cement.
Lee Apparel Co. (The) (Workers)	Pulaski, VA	11/7/88	10/20/88	21,573	Childrens mens, ladies Jeans.
Liberty Oil & Gas Corp (Company)	New Roads, LA	11/7/88	10/18/88	21,574	Oil and Gas.
Lily Kids, Inc. (ILGWU)	Harrison, NY	11/7/88	10/21/88	21,575	Childrens wear.
Louson Knitting Mill (ILGWU)	Philadelphia, PA	11/7/88	10/18/88	21,576	Sweaters.
Manville Forest Products (UBC)	Huttig, AR	11/7/88	10/1/88	21,577	Plywood, Lumber.
Maxus Energy Corp (Workers)	Amarillo, TX	11/7/88	10/19/88	21,578	Oil and Gas.
McInay & Associates (Company)	Casper, WY	11/7/88	10/19/88	21,579	Do.

APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Moranco Drilling Co. (Workers)	Hobbs, NM	11/7/88	10/21/88	21,580	Do.
Norcal Crosetti Frozen Foods, Inc (Workers)	Watsonville, CA	11/7/88	10/12/88	21,581	Frozen Foods.
Petrograph Mudlogging (Workers)	Giddings, TX	11/7/88	9/19/88	21,582	Oil Services.
Pittsburgh & Lake Erie Railroad (IAMAW)	Pittsburgh, PA	11/7/88	9/26/88	21,583	Railroad Services.
Revlin Drilling, Inc. (Company)	Russell, KS	11/7/88	10/21/88	21,584	Oil and Gas.
Rig Supplies, Inc. dba Sun Supply (Workers)	Billings, MT	11/7/88	9/27/88	21,585	Do.
Stone Safety Corp. (UE)	Wallingford, CT	11/7/88	10/25/88	21,586	Heating & air condition Units for Mass Transit.
TK Valve Manufacturing Inc. (Workers)	Hammond, LA	11/7/88	10/21/88	21,587	Ball Valves.
Texas Primate Center (Company)	Alice, TX	11/7/88	10/25/88	21,588	Monkeys.
Three Star Drilling (Workers)	Lawrenceville, IL	11/7/88	10/21/88	21,589	Oil.
Unit Flow Thru Terminal (Workers)	Flint, MI	11/7/88	10/17/88	21,590	Warehouse/auto parts.
Vanguard Oil Co., Inc. (Company)	Mt. Carmel, IL	11/7/88	10/21/88	21,591	Oil.
W.E. Myers Drilling Co. (Workers)	Midland, TX	11/7/88	10/19/88	21,592	Do.
Weatherford Oilfield Services	Laurel, MS	11/7/88	10/17/88	21,593	Casing Services.

[FR Doc. 88-26876 Filed 11-18-88; 8:45 am]

BILLING CODE 4510-30-M

Job Training Partnership Act; Program Guidance and Annual Planning Schedule for Implementation of the New Economic Dislocation and Worker Adjustment Assistance Act for Program Year 1989

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice; request for comments.

SUMMARY: The Department of Labor is requesting comments on its proposed program guidance and annual planning schedule for implementation of the new Economic Dislocation and Worker Adjustment Assistance (EDWAA) Act for Program Year 1989 (July 1, 1989–June 30, 1990). The information requested is needed to ensure that the State's programs will be operated in compliance with the Act and regulations.

DATES: Written comments are invited from the public. Comments must be submitted on or before December 21, 1988.

ADDRESS: Comments shall be addressed to Assistant Secretary for Employment and Training, U.S. Department of Labor, Room N-4703, 200 Constitution Avenue NW., Washington, DC 20210, Attention: Robert N. Colombo.

FOR FURTHER INFORMATION CONTACT: Mr. Robert N. Colombo, Director, Office of Employment and Training Programs, Telephone: (202) 535-0577 (this is not a toll free number).

SUPPLEMENTARY INFORMATION: The Department of Labor is proposing planning guidance for the implementation of the new Economic Dislocation and Worker Adjustment Assistance (EDWAA) Act program for Program Year 1989.

1. Background

On August 23, President Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988 (OTCA). EDWAA, enacted as Subtitle D of Title VI of OCTA, revised Title III of the Job Training Partnership Act (JTPA) replacing the existing dislocated workers program with a new worker adjustment program, to be operational by July 1, 1989. Part 3 of Subtitle D of Title I of OTCA also makes major revisions in the Trade Adjustment Assistance (TAA) program concerning services for workers dislocated by foreign trade.

EDWAA authorizes a new comprehensive program to assist dislocated workers and also introduces a number of new and innovative approaches, including State dislocated worker units to assist communities and workers undergoing permanent plant closings and substantial layoffs.

Part 631 of Title 20, CFR, the regulations for JTPA Title III, as revised by OTCA, were published in the **Federal Register** on October 24, 1988, at 53 FR 41572, effective November 1, 1988.

Pursuant to section 311(a) of Title III of the JTPA, as amended by OTCA, and 20 CFR Part 631 of JTPA regulations, this document provides: (1) Instructions to the States for the submission of the State Plan; and (2) instructions to affected States for submission of the plan where there is a Single Substate Grantee.

The planning guidance calls for the development of a biennial "State Plan" and a "Plan" where there is a Single Substate Grantee. The initial biennial "State Plan" will cover a one-year transition period (July 1, 1989 to June 30, 1990). In conjunction with the State's biennial planning for JTPA this would put the planning cycle in conformity with the overall planning process for JTPA Title II-A and II-B.

2. Planning Documents

A. State Plan

Section 311(a) of the JTPA and § 631.36 of the JTPA regulations require that in order to receive funds under JTPA section 302(b) the State shall submit to the Secretary of labor (Sectreary), in accordance with instructions issued by the Secretary on a biennial basis, a biennial State Plan describing in detail the programs and activities that will be assisted with funds provided under JTPA Title III. The State Plan shall be submitted on or before the first day of May immediately preceding the program year for which funds are first to be made available under Title III. The initial biennial Plan will cover a one-year transition period (July 1, 1989 to June 30, 1990).

State plans are to be submitted using the OMB-approved format contained in Attachment I. The State Plan must describe the planned use of all resources for the transition period (July 1, 1989 to June 30, 1990).

The document also must contain a discription of the State's performance standards and incentive policy for Title III. Instructions for performance standards and incentive policy will be issued in accordance with the schedule included in Section 8 of this Notice.

The Department of Labor (Department) will review the State Plan and any comments submitted by the State Job Training Coordinating Council and will notify the State of any deficiencies in the Plan within 30 days after submission. Unless a State has been so notified, the Plan will be approved iwthin 45 days after submission.

Any Plan submitted under Title III may be modified to describe changes in or additions to the program and activities set forth in the Plan. Modifications to the Plan shall be

submitted using the same format. No modification shall be effective unless reviewed and approved in accordance with section 311(d) of the JTPA and § 631.36 (d) and (e) of the JTPA regulations.

B. Single Substate Grantee "Plan"

Section 311(f) of the JTPA and § 631.50(h) of the JTPA regulations require that when the substate area is the State, the substate Plan and any Plan modification(s) shall be submitted by the Governor to the Secretary, in accordance with instructions issued by the Secretary.

Single substate grantee Plans are to be submitted using the OMB approved format contained in Attachment II. Modification to the Plan shall be submitted using the same format.

The department will review the Plan in accordance with the provisions of §§ 628.6 and 631.50(h) of the JTPA regulations for overall compliance with the provisions of the Act and JTPA regulations. States will be notified of the results of the review within the same timeframes specified for the review of the State Plan.

3. EDWAA Coordination

The State Plan must describe coordination activities among State and local organizations focusing on dislocated workers.

Pursuant to the new legislation, programs under EDWAA and TAA must be coordinated or integrated so as to avoid fragmented delivery of services to eligible dislocated workers.

The new EDWAA worker adjustment program and the TAA program will continue as separate and identifiable programs. However, as provided under the OTCA, States are encouraged to provide linkages and, where possible, to arrange joint responsibility for specific functions common to both programs. Such actions will assist dislocated workers to receive any and all benefits to which they are entitled, and any training or other services they need to become reemployed as quickly and as easily as possible. For example, linkages can take place in providing early intervention services, in exchange of information and coordination in the development and operation of training programs, in developing a common intake point and application process for the two programs, in providing technical assistance and training, and in establishing labor-management committees for dealing with dislocations. Above all, the delivery system must assure that the clientele of these programs, the dislocated workers to be served, are provided a clearly defined and easy-to-follow system of services.

4. Designation of State Disclocated Worker Unit

Section 311(b)(2) of the JTPA provides that States will designate or create an identifiable State dislocated worker unit (DWU) or office with the capability to respond rapidly onsite to permanent plant closures and substantial layoffs thorughout the State. Through this rapid response effort the DWU will be able to assess the need for appropriate basic readjustment services.

The DWU is a key feature of the States' implementation of the new programs under EDWAA and it is therefore key to the success of this initiative. The State, in designating an existing organization or creating a new organization to fulfill the responsibilities outlined in Title III of JTPA, shall assure that this organization has the capability to:

- Make appropriate retraining and basic adjustment services available to eligible dislocated workers through substate grantees, and in statewide, regional or industry-wide projects;
- Work with employers and labor organizations in promoting labor-management cooperation to achieve the goals of the program;
- Operate a monitoring, reporting, and management system to provide adequate information for effective program management, review, and evaluation;
- Provide technical assistance and advice to substate grantees;
- Exchange information and coordinate programs with the appropriate economic development agency, and State education, training, and social services programs;
- Coordinate with the unemployment insurance system and Federal-State Employment Service system, as well as TAA and JTPA Titles II–A and II–B programs in the State;
- Receive advance notice of plant closings and mass layoffs as provided at section 3(a)(2) of the Worker Adjustment and Retraining Notification (WARN) Act, Pub. L. 100–139, 102 Stat. 890;
- Notify the appropriate substate grantees as soon as possible (preferably within 48 hours) following receipt of employer notice of layoff or plant closing; and,
- Consult with labor organizations where substantial numbers of their members are to be served.

5. Rapid Response Capability

Pursuant to JTPA section 311(b)(2), the DWU has as one of its primary responsibilities the establishment of a rapid response capability, including securing appropriate staff, which will enable it to provide assistance, onsite, for dislocation events, such as permanent closures and substantial layoffs, throughout the State. This staff should include individuals who are knowledgeable about resources, including programs under EDWAA, TAA, JTPA, and other programs which are available through public and private sources to assist dislocated workers. These rapid response specialists are to have the ability to: (1) Organize a broad-based response to a disclocation event, including the ability to coordinate services provided under EDWAA with other State-administered programs; (2) provide limited amounts of immediate financial assistance for rapid response activities; (3) work effectively with employers and employees; and (4) work out provisions of retraining and readjustment services by substate grantees.

The rapid response specialists who are designated within the DWU may use EDWAA funds to establish on-site contact with employer and employee representatives (preferably within 48 hours after notification) of a current or impending permanent closure or substantial layoff in order to provide information on available resources and to provide emergency assistance. The specialists also will promote the formation of labor-management committees and provide on-going assistance to these committees.

6. Key Planning Dates

The Planning instructions in this notice are but one part of the information necessary for the implementation of the new EDWWA Program. Issuance targets for key products and other planning benchmarks are as follows: This schedule supplements and updates the prior schedule at 53 FR 34844, 34847 (September 8, 1988).

11–23–88 Comment period on interim final rules for Title III ends.

12–30–88 Employment and Training Administration issues final allotments for State formula allotments for Titles II–A, II–B and III of JTPA.

01–05–89 ETA issues final regulations and planning instructions.

By this time, Governors should have reconstituted their SJTCC, designated substate areas and grantees, and determined their formula for substate fund distribution.

2–01–89 Governors should give direction for substate planning. (statute requires 3/1)

02–17–89 ETA issues Title III reporting instructions.

02–17–89 ETA issues Title III performance standards instructions.

05–01–89 Governor's Plan submitted to the Secretary, who advises of problems within 30 days or approves within 45 days. Single substate grantee Plans due to the Secretary.

07–01–89 Program operations begin.

Attachment I
OMB Control No.
Expiration Date:

Planning Instructions

Format and Procedures for Submitting the State Plan for Employment and Training Assistance for Dislocated Workers

I. Identifying Information

A. Name and Address of the grantee.
B. Date of submission.
C. Time period covered.

II. State Responsibilities (overall)

A. *Coordination.* 1. Describe coordination activities among State and local organizations focusing on dislocated workers.

2. Describe how EDWAA programs will be coordinated with the unemployment compensation system within the State. (Section 314(f)).

3. Describe how EDWAA programs will be coordinated with the Federal-State Employment system.

4. Describe how EDWAA programs will be coordinated with dislocated worker programs under Title III of the Carl D. Perkins Vocational Education Act. (Section 311(b)(5) of JTPA and § 631.37(c) of the JTPA regulations).

5. Describe how EDWAA programs will be coordinated with JTPA Title II-A programs.

6. Describe how Title III services,including intake, referral, assessment, training and placement will be integrated or coordinated with services and payment made available under Chapter 2 of Title II of the Trade Act of 1974 and provided by any State or local agencies designated under section 239 of the Trade Act of 1974 so as to avoid fragmented delivery of services to eligible dislocated workers. (Section 311(b)(10) of JTPA and § 631.37(a) of the JTPA regulations). Attach a copy of the interagency agreement developed if Title III and the Trade Adjustment Assistance program are not opprated by the same agencies.

B. *Program Administration.* 1. Describe the composition, including required representation (e.g., private sector, general public, labor, etc.) and functions of the State Job Training Council (SJTCC) as they pertain to EDWAA. Include the written comments provided on the State's plan as well as a description of the staffing provided to the SJTCC. (Section 311(b)(9)).

2. Provide a list of the selected substate areas. (Section 312(a) of JTPA and § 631.35 of the JTPA regulations)

3. Provide a list of selected substate grantees. (Section 312(b) of JTPA and § 631.35 of the JTPA regulations).

4. Describe the State's substate allocation methodology, including the data elements and allocation formulas to be used, as well as the methodology, if any, for the reallocation of funds among and from the State to substate areas. (Section 302 and 303 of JTPA and § 632.32(b) of the JTPA regulations).

5. Describe the State's procedures to identify funds required to be reallotted pursuant to section 303(b) of the Act and how such procedures will ensure equitable recapture of such funds. (Section 303(b) of JTPA and § 631.33 of the JTPA regulations).

6. Describe the method to be used to assess the level of need and use of the ten percent of the State's allocation to substate grantees on the basis of need. (Section 302(c)(2) of JTPA and § 631.32(d) of the JTPA regulations).

7. If the Governor has determined that services will be provided to displaced homemakers, indicate the basis for this decision. (Section 311(b)(4)).

8. Describe the manner in which the State will conduct monitoring and oversight of all State and substate activities to ensure that expenditures and activities are in accordance with the State or substate plan or modification. (Section 631.31 of the JTPA regulations).

C. *Performance Standards.* 1. Describe the State's methodolgy for setting performance standards for each substate grantee and any other method for assessing performance including State developed standards, which are not inconsistent with the Secretary's standards. (Section 106(g)).

2. Describe the method for providing incentives for training of greater duration consistent with JTPA section 106(g) and identifying that portion of the Governor's reserve funds (Section 302(c)(1)) which will be utilized to make such incentive awards.

3. Describe the sanctions policy for substate areas failing to meet performance standards pursuant to section 106(h).

III. State Program Operational Plan

A. *Disclocated Worker Unit/Rapid Response.* 1. Describe the State dislocated worker unit (DWU) or office, including a description of the organization, functions and staffing of this unit; also describe the DWU's capacity to provide "rapid response" assistance to permanent closure and substantial layoffs throughout the State. (Section 311(b)(2) of JTPA and § 631.30 of the JTPA regulations).

2. Describe how the DMU will arrange for the provision of retraining and basic readjustment services to eligible disclocated workers through substate grantees and other appropriate organizations. (Section 311(b)(3)(A) of JTPA and § 631.30(a)(1) of JTPA regulations).

3. Describe how the DMU will work with employees and labor organizations to establish labor-management committees to achieve the goals of the program. (Section 311(b)(3)(B) of JTPA and § 631.30(a)(2) of the JTPA regulations).

4. Describe the DMU's monitoring, reporting, and management systems. (Section 311(b)(3)(C) of JTPA and § 631.30(a)(3) of the JTPA regulations).

5. Describe how the DMU will provide technical assistance and advice to substate grantees. (Section 311(3)(D) of JTPA and § 631.30(a)(4) of the JTPA regulations).

6. Describe how the DMU will exchange information and coordinate programs with the appropriate economic development agency and state education, training and social services programs. Include in this description a discussion of how this coordination will be assured. Indicate which staff in the DMU have special responsibilities for coordination. (Section 311(b)(5) of JTPA and § 631.30(a)(5) of the JTPA regulations).

7. Describe how the DWU will coordinate the delivery of services, and provide for exchange of information and coordinate with all other programs available to assist dislocated workers including the state unemployment insurance system, TAA and Federal-State employment service system. (Section 631.30(a)(6) of the JTPA regulations).

8. Describe the procedures for the receipt of advance notice of plant closings and mass layoffs as provided at section 3(a)(2) of the Worker Adjustment and Retraining Notification (WARN) Act, Pub. L. 100–379, 102 Stat. 898; and the procedures for notification of appropriate substate grantees. (Section 631.31(a)(7) and (8) of the JTPA regulations).

9. Described how the State DWU will disseminate information throughout the State on the availability of services and activities for dislocated workers. (Section 311(b)(6) of the Act § 631.30(a)(10)).

B. Describe other activities undertaken by the State with 40 percent funds authorized under section 314(d) of JTPA and § 631.41(a) of the JTPA regulations.

1. Retraining services, including (but not limited to) those in section 314(d) of the Act when undertaken in Statewide, industrywide and regional programs;

2. Coordination with the unemployment compensation system, in accordance with § 631.36(b) of the JTPA regulations;

3. Discretionary allocation for basic readjustment and retraining services to provide additional assistance to areas that experience substantial increases in the number of dislocated workers, to be expended in accordance with the substate plan or modification thereof;

4. Incentives to provide training of greater duration for those who require it; and

5. Needs-related payments in accordance with section 315(b) of the Act.

IV. Assurances

The following assurances must be included in the State plan:

A. The State will comply with the statutory and regulatory requirements of EDWAA;

B. That services will be provided to eligible dislocated workers. (Section 311(b)(1) (B) and (C) of the Act).

C. Services will not be denied on the basis of State of residence to eligible dislocated workers displaced by a permanent closure or substantial layoff within the State; and may be provided to other eligible dislocated workers regardless of the state of residence of such workers; (Section 311(b)(1)(C)).

D. That services to displaced workers will not adversely affect the delivery of services to eligible dislocated workers and that services are provided in conjunction with ongoing programs for all dislocated workers.

E. That any program, under this Title, serving a substantial number of members of a labor organization will be established only after full consultation with such labor organization. (Section 311(b)(7) of JTPA.

F. That the State will not prescribe any Title III performance standards which are inconsistent with the parameters set annually by the Secretary pursuant to section 106(e) and apply the standards in accordance with section 311(a) with regards to incentives.

V. General Administrative Information

A. *Signature.* The State plan must contain the Governor's signature or the signature, name and title or his/her designee.

The plan must also include a statement indicating that the SJTCC has reviewed the plan and concurs with it, whether or not the SJTCC has made written comments. If written comments have been provided, copy of these comments shall be attached to the Plan. (Section 311(b)(9).)

B. *Mailing Address.* States are to submit three copies of the State Plan, each with original signature of the Governor or his/her designee to:

Administrator, Office of Job Training Programs, U.S. Department of Labor, Employment and Training Administration (ETA), Room N–4459, 200 Constitution Avenue, NW, Washington, DC 20210.

Also, a copy of the State Plan must be sent to the ETA regional office.

C. *Modification to State Plan.* Any Plan submitted under section 311(a) of JTPA, as amended, may be modified to describe changes in or additions to the programs and activities set forth in the Plan, except that no such modification shall be effective unless reviewed and approved pursuant to § 631.56(c),(d),(e), and (f) of the JTPA regulations.

Attachment II

OMB Control No.

Expiration Date:

Planning Instructions

Format and Procedures for Submitting the Single Substate Grantee Plan Employment and Training Assistance for Dislocated Workers

The Single Substate Grantee Plan shall contain:

I. Identifying Information

A. Identification and address of the grant recipient.

B. Identification and address of the entity or entities that will administer the program, if different from the grant recipient.

C. Date of submission.

D. Area covered by substate grantee (i.e. entire State of).

E. Time period covered by plan.

II. Program Information

A. The State's plan shall contain a description of:

(1) The means for delivering services in section 314 to eligible dislocated workers;

(2) The means to be used to identify, select, and verify the eligibility of program participants;

(3) The means for implementing the requirements of section 314(f);

(4) The means for involving labor organizations in the development and implementation of services;

(5) The performance goals to be achieved consistent with the performance goals contained in the State plan pursuant to section 311(b)(8);

(6) Procedures, consistent with section 107, for selecting service providers which take into account past performance in job training or related activities, fiscal accountability, and ability to meet performance standards;

(7) A description of the methods by which the substate grantee will respond expeditiously to worker dislocation where the rapid response assistance required by section 314(b) is inappropriate, including worker dislocation in sparsely populated areas, which methods may include (but are not limited to)—

(a) Development and delivery of wide-spread outreach mechanisms;

(b) Provision of financial evaluation and counseling (where appropriate) to assist in determining eligibility for services and the type of services needed;

(c) Initial assessment and referral for further basic adjustment and training services; and

(d) Establishment or regional centers for the purpose of providing such outreach, assessment, and early readjustment assistance;

(8) A description of the methods by which the other parties to the agreement described in section 312(b) may be involved in activities of the substate grantee;

(9) A description of training services to be provided, including—

(a) Procedures to assess participants' current education skill levels and occupational abilities;

(b) Procedures to assess participants' needs including educational, training, employment, and social services;

(c) Methods for allocating resources to provide the services recommended by rapid response teams for eligible dislocated workers within the substate area; and

(d) A description of services and activities to be provided in the substate area;

(10) The means whereby coordination with other appropriate programs, services, and systems will be effected, particularly where such coordination is intended to provide access to the services of such other systems for program participants at no cost to the worker readjustment program; and

(11) A detailed budget showing the planned expenditure of funds for the one year transition period by cost category and activity.

B. Describe the manner in which the single substate grantee will coordinate with the State dislocated worker unit in the implementation of the single substate grantee program in particular the rapid response activity. (Section 311(b)(2)).

C. Include a statement that the State will comply with the cost limitations contained in section 315 of the Act, including those limitations which apply to needs-related payments (25 percent) and retraining services (50 percent). Indicate whether the State will request a waiver of the 50 percent limitation for retraining. (Section 315 of the Act and § 631.14(a)(5) of the JTPA regulations).

D. Include the current and/or written comments of the SJTCC. If written comments have been provided, a copy of these comments shall be attached to the plan. (Section 313(a)).

III. Signature

The plan shall contain the Governor's signature or the signature and title of his/her designee. The name of the signer should be typed below the signature.

IV. Mailing Address

States shall submit three copies of the Single substate grantee plan, each with original signature of the Governor or his/her designee to:

Administrator, Office of Job Training Programs, Department of Labor, Employment and Training Administration (ETA), Room N–4459, 200 Constitution Avenue NW., Washington, DC 20210.

Also, a copy of the plan must be sent to the ETA regional office.

V. Modification

Any plan submitted under section 313(a) of JTPA as amended may be modified to describe changes in or additions to the programs and activities set forth in the plan, except that no such modification shall be effective unless reviewed and approved pursuant to §§ 631.50(h) and 628.6 of the JTPA regulations.

Signed at Washington, DC, this 15th day of November 1988.

Roberts T. Jones,

Assistant Secretary of Labor.

[FR Doc. 88–26852 Filed 11–18–88; 8:45 am]

BILLING CODE 4510–30–M

COMMISSION ON MERCHANT MARINE AND DEFENSE

Meeting

Summary: The Commission on Merchant Marine and Defense was established by Pub. L. 98–525 (as amended), and the Commission was constituted in December 1986. The Commission's mandate is to study and report on problems relating to transportation of cargo and personnel for national defense purposes in time of war or national emergency, the capability of the Merchant Marine to meet the need for such transportation, and the adequacy of the shipbuilding mobilization base to support naval and merchant ship construction. In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the Commission announces the following meeting:

Date and Time: Monday, December 5, 1988; Beginning 10:00 a.m.

Place: Room 1120, The Federal Building, 500 Camp Street, New Orleans, Louisiana 70130.

Type of Meeting: Open.

Contact Person: Allan W. Cameron, Executive Director, Commission on Merchant Marine and Defense, Suite 520, 4401 Ford Avenue, Alexandria, Virginia 22302–0268, Telephone (202) 756–0411.

Purpose of Meeting: The Honorable Jeremiah Denton, the Chairman of the Commission, will receive and consider statements of individuals and groups in Louisiana and neighboring states about the problems and prospects of the nation's maritime industries, particularly the merchant marine and shipbuilding industries. In particular, Senator Denton desires reactions to the Commission's first two reports and its recommendations, views about the contributions of the maritime industries to the national security, and suggestions for actions that would help to address current and projected shortages of merchant marine and shipyard capability to meet defense requirements. Individuals or organizations desiring to present oral testimony must notify the Executive Director in writing or by telephone by December 1, 1988, and are requested to provide two copies of their written statements to the Commission and to have copies available for the press. Witnesses will be allowed a maximum of 15 minutes to summarize their written testimony, may be included on panels, and may be asked to respond to questions. Questions about the nature and content of testimony, scheduling, and related matters should be directed to Captain Wayne I. Humphreys, USN, the Commission's Chief of Staff.

Supplementary Information: Other interested persons are invited to submit written statements about the merchant marine and the shipping required to implement United States defense policy. Written statements should be delivered to the Commissioners at the public hearing or received at the Commission's office by the close of business on December 5, 1988. All written submissions will be made available for inspection by interested parties, and may be published as part of the Commission's proceedings. Submissions should be addressed to the Executive Director at the Commission's office in Alexandria, Virginia.

Allan W. Cameron,

Executive Director, Commission on Merchant Marine and Defense.

[FR Doc. 88–26888 Filed 11–18–88; 8:45 am]

BILLING CODE 3820–01–M

Notice of Meeting

SUMMARY: The Commission on Merchant Marine and Defense was established by Pub. L. 98–525 (as amended), and the Commission was constituted in December 1986. The Commission's mandate is to study and report on problems relating to transportation of cargo and personnel for national defense purposes in time of war or national emergency, the capability of the Merchant Marine to meet the need for such transportation, and the adequacy of the shipbulding mobilization base to support naval and merchant ship construction. In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the Commission announces the following meeting:

Date and Time: Firday, December 9, 1988; Beginning 10:00 a.m.

Place: Board Room, Port of Long Beach, 925 Harbor Plaza, Long Beach, California 90802.

Type of Meeting: Open.

Contact Person: Allan W. Cameron, Executive Director, Commission on Merchant Marine and Defense, Suite 520, 4401 Ford Avenue, Alexandria, Virginia 22302–0268, Telephone (202) 756–0411.

Purpose of Meeting: Commissioner Shannon J. Wall will receive and consider statements of individuals and groups in California about the problems and prospects of the nation's maritime industries, particularly the merchant marine and shipbuilding industries. In particular, Mr. Wall desires reactions to the Commission's first two reports and its recommendations, views about the contributions of the maritime industries to the national security, and suggestions for actions that would help to address current and projected shortages of merchant marine and shipyard capability to meet defense requirements. Individuals or organizations desiring to present oral testimony must notify the Executive Director in writing or by telephone by December 5, 1988, and are requested to provide two copies of their written statements to the Commission and to have copies available for the press. Witnesses will be allowed a maximum of 15 minutes to summarize their written testimony, may be included on panels, and may be asked to respond to questions. Questions about the nature and content of testimony, scheduling, and related matters should be directed to Captain Wayne I. Humphreys, USN, the Commission's Chief of Staff.

Supplementary Information: Other interested persons are invited to submit written statements about the merchant marine and the shipping required to implement United States defense policy. Written statements should be delivered to the Commissioners at the public hearing or received at the Commission's office by the close of business on December 9, 1988. All written submissions will be made available for inspection by interested parties, and may be published as part of the Commission's proceedings. Submissions should be addressed to the Executive Director at the Commission's office in Alexandria, Virginia.

Allan W. Cameron,

Executive Director, Commission on Merchant Marine and Defense.

[FR Doc. 88–26889 Filed 11–18–88; 8:45 am]

BILLING CODE 3820–01–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (88–95)]

Agency Report Forms Under OMB Review

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of agency report forms under OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed information collection requests to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made the submission.

Copies of the proposed forms, the requests for clearance (S.F. 83's), supporting statements, instructions, transmittal letters and other documents submitted to OMB for review, may be obtained from the Agency Clearance Officer. Comments on the items listed should be submitted to the Agency Clearance Officer and the OMB Paperwork Reduction Project.

DATE: Comments are requested by December 21, 1988. If you anticipate commenting on a form but find that time to prepare will prevent you from submitting comments promptly, you should advise the OMB Paperwork Reduction Project and the Agency Clearance Officer of your intent as early as possible.

ADDRESS: Philip D. Waller, NASA Agency Clearance Officer, Code NPN, NASA Headquarters, Washington, DC 20546; Office of Management and Budget, Paperwork Reduction Project (2700–0042), Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Shirley C. Peigare, NASA Reports Officer, (202) 453–1090.

Reports

Title: Information Collection from the Public in Support of the NASA Acquisition Process.
OMB Number: 2700–0042.
Type of Request: Extension.
Frequency of Report: As required.
Type of Respondent: Individuals or households, state or local governments, businesses or other for-profit, non-profit institutions, small businesses or organizations.
Numbers of Respondents: 175,000.
Responses per Respondent: 2.
Annual Responses: 350,000.
Hours per Response: 32.
Annual Burden Hours: 11,214,000.
Abstract-Need/Uses: Information collection is required to evaluate bids and proposals from offerors in order to award contracts for required goods and services in support of NASA's mission. It also includes reporting requirements under NASA contracts.

November 14, 1988.

Philip D. Waller,

Director, General Management Division.

[FR Doc. 88–26768 Filed 11–18–88; 8:45 am]

BILLING CODE 7510–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting; Media Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Media Arts Advisory Panel (Narrative Film Development Section) to the National Council on the Arts will be held on December 13, 1988, from 9:00 a.m.–5:30 p.m. in Room 716 of the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

This meeting is 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 discussion of information given in confidence to the Agency by grant applicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682–5433.

November 15, 1988.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 88–26825 Filed 11–18–88; 8:45 am]

BILLING CODE 7537–01–M

Meeting; National Council on the Arts

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Office of Public Partnership Advisory Panel (Local Programs Section) to the National Council on the Arts will be held on December 8, 1988, from 8:30 a.m.–5:30 p.m. and December 9, 1988, from 8:30 a.m.–4:00 p.m. in Room MO9 at the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

A portion of this meeting will be open to the public on December 9, 1988, from 2:00–4:00 p.m. The topic for discussion will be policy.

The remaining session of this meeting on December 9 from 8:30 a.m.–2:00 p.m. is 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 published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office for Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington DC 20506, 202/682–5532, 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 M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5433.

November 15, 1988.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 88–26824 Filed 11–18–88; 8:45 am]

BILLING CODE 7537–012–M

Meeting; Theater Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Theater Advisory Panel (Fellowships for Playwrights Section) to the National Council on the Arts will be held on December 7, 1988, from 9:30 a.m.–5:30 p.m. in Room MO7 at the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

A portion of this meeting will be open to the public on December 7, 1988, from 9:30–10:15 a.m. The topic for discussion will be policy.

The remaining session of this meeting on December 7 from 10:15 a.m.–5:30 p.m. is 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 appplicants. In accordance with the determination of the Chairman published in the **Federal Register** of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office for Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington DC 20506, 202/682–5532, 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 M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5433.

November 15, 1988.

Yvonne M. Sabine,

Director, Council and Panel Operations National Endowment for the Arts.

[FR Doc. 88–26826 Filed 11–18–88; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–423]

Northeast Nuclear Energy Co.; Milestone Nuclear Power Station, Unit No. 3; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is

considering issuance of an exemption from the requirements of Appendix J to 10 CFR Part 50 and an associated license amendment to Northeast Nuclear Energy Company, et al. (the licensee) for the Millstone Nuclear Station, Unit No. 3, located at the licensee's site in New London County, Connecticut.

Environmental Assessment

Identification of Proposed Action

The licensee is requesting an exemption from Paragraph III.A.3 of 10 CFR Part 50 Appendix J, "Primary Reactor Containment Testing for Water-Cooled Power Reactors" to permit the use of the mass-point method of primary containment leakage testing. In 1973, Appendix J was issued to established requirements for primary containment leakage testing and incorporated by reference ANSI N45.4–1972, "Leakage Rate Testing of Containment Structures for Nuclear Reactors." The standard requires that containment leakage calculations be performed by using either the point-to-point method or the total time method.

At this time, a licensee who wishes to use mass-point must submit an application for exemption from the Appendix J requirement that containment integrated leak rate tests will conform to ANSI N45.4. The exemption proposed by the licensee would be granted until a proposed revision to Appendix J, which will permit use of the mass-point method, becomes effective. In the mass-point method, the mass of air in containment is calculated and plotted as a function of time and leakage is calculated from the slope of the linear least squares.

With the present developments in technology, the mass-point method has gained increasing recognition.

The superiority of the mass-point method becomes apparent when it is compared with the two other methods. In the total time method, a series of leakage rates is calculated on the basis of air mass differences between an initial data point and each individual data point thereafter. If for any reason (such as instrument error, lack of temperature equilbrium, ingassing or outgassing) the initial data point is not accurate, the results of the test will be affected. In the point-to-point method, the leak rates are based on the mass difference between each pair of consecutive points which are then averaged to yield a single leakage rate estimate. Mathematically, this can be shown to be the difference between the air mass at the beginning of the test and the air mass at the end of the test expressed as a percentage of the containment air mass. It follows from the above that the point-to-point method ignores any mass readings during the test and thus the leakage rate is calculated on the basis of the difference in mass between two measurements taken at the beginning and at the end of the test, which are 24 hours apart.

The licensee's request and bases for exemption are contained in a letter dated August 11, 1988.

The licensee has also requested changes to the Technical Specifications that are related to the containment leakage rate test. By application for license amendment dated August 11, 1988, the licensee requested changes to Millstone Unit 3 Technical Specification (TS) 4.6.1.3, "Containment Leakage," to allow for use of ANSI/ANS Standard 56.8–1981 for "mass-point" determination of containment leakage rate.

A "Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing" regarding the proposed changes to TS 4.6.1.2 was published in the **Federal Register** on September 21, 1988 (53 FR 36672).

The Need for The Proposed Action

The exemption and associated license amendment are needed to allow use of the mass-point analysis method at Millstone Unit No. 3.

Environmental Impacts of the Proposed Action

The erraticism of the total time method creates a higher probability of unnecessarily failing a containment integrated leakage rate test (note that the calculated procedure is independent of containment tightness) possibly resulting in increased test frequency, critical path outage time, and exposure to test personnel.

Radiological releases will not be greater than previously determined, nor does the proposed exemption otherwise affect radiological plant effluents, or have any other environmental impact. Therefore, the Commission concludes that there are no measurable radiological or non-radiological environmental impacts associated with the proposed exemption and associated license amendment.

Alternatives to the Proposed Action

It has been concluded that there is no measurable impact associated with the proposed exemption and associated license amendment; any alternatives to the exemption and associated license amendment would have either essentially the same or greater environmental impact.

Alternative Use of Resources

This action does not involve the use of any resources different from or beyond the scope of resources used during normal plant operation, which were assessed in the Final Environmental Statement relating to plant operation, NUREG–1064, dated December 1984.

Agencies and Persons Consulted

The Commission's staff reviewed the licensee's request that supports the propsed exemption. The staff did not consult other agencies or persons.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed exemption and associated license amendment.

For further details with respect to this action, see the request for exemption and application for license amendment dated August 11, 1988. A copy of the above 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 room located at the Waterford Public Library, 49 Rope Ferry Road, Route 156, Waterford, Connecticut 06385.

Dated at Rockville, Maryland, this 14th day of November, 1988.

For the Nuclear Regulatory Commission.

John F. Stolz,

Director, Project Directorate I–4, Division of Reactor Projects–I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88–26840–Filed 11–18–88; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards Subcommittee on Thermal Hydraulic Phenomena; Meeting

The ACRS Subcommittee on Thermal Hydraulic Phenomena will hold a meeting on December 7, 1988, Room P–114, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, December 7, 1988—8:30 a.m. Until the Conclusion of Business

The Subcommittee will review: (1) The final report of the NRC–RES Technical Program Group on the Code Scaling, Applicability and Uncertainty (CSAU) Evaluation Methodology and (2) the report of the joint NRC/B&W Technical Advisory Group on the need for follow-on research pertaining to thermal hydraulic phenomena of the B&W once through steam generator (OTSG).

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting open to the public, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, their consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Paul Boehnert (telephone 301/492–8558) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any change in schedule, etc., which may have occurred.

Date: November 15, 1988.

Morton W. Libarkin,

Assistant, Executive Director for Project Review.

[FR Doc. 88–26841 Filed 11–18–88; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–255]

Consumers Power Co.; Issuance of Amendment to Provisional Operating License

The United States Nuclear Regulatory Commission (the Commission) has issued Amendment No. 117 to Provisional Operating License No. DPR–20, issued to Consumers Power Company (the licensee), which revised the Technical Specifications (TSs) for operation of the Palisades Plant, located in Van Buren County, Michigan. The amendment is effective as of the date of issuance.

The amendment revises the provisions in the Technical Specifications relating to low temperature, overpressure protection and the heatup and cooldown limits for meeting the requirements of 10 CFR Part 50, Appendix G, and operability requirements for the high pressure safety injection pumps.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings, as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Provisional Operating License and Opportunity for Hearing in connection with this action was published in the **Federal Register** on May 19, 1988 (53 FR 17994). No request for hearing or petition to intervene was filed following this notice.

Also in connection with this action, the Commission prepared an Environmental Assessment and Finding of No Significant Impact which was published in the **Federal Register** on November 10, 1988, at 53 FR 45632.

For further details with respect to this action, see (1) the application for amendment dated December 22, 1987 as revised April 12, 1988, (2) Amendment No. 117 to License No. DPR–20 and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the Van Zoeren Library, Hope College, Holland, Michigan 49423. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V, and Special Projects.

Dated at Rockville, Maryland, this 14th day of November 1988.

For the Nuclear Regulatory Commission.

Thomas V. Wambach,

Project Manager, Project Directorate III–1, Division of Reactor Projects—III, IV, V & Special Projects.

[FR Doc. 88–26838 Filed 11–18–88; 8:45 am]

BILLING CODE 7590–01–M

[Dockets Nos. 50–315 and 50–316]

Indiana Michigan Power Co.; Issuance of Amendments to Facility Operating Licenses

The United States Nuclear Regulatory Commission (the Commission) has issued Amendments Nos. 118 and 104 to Facility Operating Licenses Nos. DPR–58 and DPR–74, issued to the Indiana Michigan Power Company (the licensee), which revised the licenses and Technical Specifications (TSs) for operation of the Donald C. Cook Nuclear Plant, Units Nos. 1 and 2, located in Berrien County, Michigan. The amendments are effective as of the date of issuance.

These amendments change the TSs and License Conditions 2.C.(5) for Unit 1 and 2.C.(3)(s) for Unit 2 by increasing the maximum enrichment of the fuel assemblies from the present values to 4.23 weight percent U–235. The changes are necessary because the Unit 2 Cycle 7 reload includes fuel assemblies which have enrichment in excess of the 3.84 weight percent presently allowed by the TSs. In addition, the amendment for Unit 2 makes an editorial change to TS 5.6.1.2.

The application for the amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings, as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendments.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Opportunity for Hearing in connection with this action was published in the **Federal Register** on October 11, 1988 (53 FR 39679). No request for hearing or petition to intervene was filed following this notice.

Also in connection with this action, the Commission prepared an Environmental Assessment and Finding of No Significant Impact which was published in the **Federal Register** on November 14, 1988, at 53 FR 45830.

For further details with respect to this action, see (1) the application for

amendments dated August 19, 1988, (2) amendments Nos. 118 and 104 to Licenses Nos. DPR–58 and DPR–74, and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the Maude Preston Palenski Memorial Library, 500 Market Street, St. Joseph, Michigan 49085. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V, and Special Projects.

Dated at Rockville, Maryland, this 14th day of November, 1988.

For the Nuclear Regulatory Commission.

Wayne Scott,

Project Manager, Project Directorate III–I, Division of Reactor Projects—III, IV, V & Special Projects.

[FR Doc. 88–26839 Filed 11–18–88; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meeting

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on—

Wednesday, November 23, 1988
Wednesday, November 30, 1988
Wednesday, December 7, 1988
Wednesday, December 14, 1988

These meetings will start at 10 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chairman, representatives from five labor unions holding exclusive bargaining rights for Federal blue-collar employees, and representatives from five Federal agencies. Entitlement to membership of the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

These scheduled meetings will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chairman to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a concensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of the meeting.

Annually, the Committee publishes for the Office of Personnel Management, the President, and Congress a comprehensive report of pay issues discussed, concluded recommendations, and related activities. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chairman on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 1340, 1900 E Street, NW., Washington, DC 20415 (202) 632–9710.

Thomas E. Anfinson,

Chairman, Federal Prevailing Rate Advisory Committee.

November 10, 1988.

[FR Doc. 88–26837 Filed 11–18–88; 8:45 am]

BILLING CODE 6325–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–26276; File No. SR–CSE–88–4]

Self-Regulatory Organizations; Proposed Rule Change by the Cincinnati Stock Exchange Relating to the Limitation of Liability for Use of Exchange Facilities

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 August 16, 1988, the Cincinnati Stock Exchange (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the Proposed Rule Change from interested persons.

I. The Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Cincinnati Stock Exchange proposed to add new Rule 11.9(t) in order to limit the Exchange's liability for losses resulting from the use of its facilities.

II. Self-Regulatory Organization's Statement Regarding the Proposed Rule Change

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 limit the liability of the Exchange and its facilities manager for claims by CSE members and member employees arising out of their use of the Exchange's National Securities Trading System and Automated Extension Processing System. CSE Rule 14.5 limits the Exchange's liability to its members for losses resulting from their use of the Intermarket Trading System.[1] Although Exchange policy also limits the Exchange's liability to members for losses arising out of their use of CSE's data processing systems, currently there is no specific Rule to this effect.

Proposed Rule 11.9(t) is consistent with sections 6(b)(5) and 11A of the Act, which encourage the use of new data processing and communication techniques to facilitate economically efficient executions of securities transactions.

B. Self-Regulatory Organization's Statement on Burden on Competition.

The Exchange believes that the proposed Rule change will not impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

[1] On November 3, 1988, the Commission received a letter from the CSE, which deleted proposed CSE Rule 11.9(t)'s extension of the liability limitation to CSE customers. See letter from David Colker, General Counsel, CSE to George Scargle, Staff Attorney, SEC, Division of Market Regulation, dated October 31, 1988.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others.

The Exchange neither solicited nor received comments on the proposed rule change from members, participants, or others.

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 Section, 450 5th Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 12, 1988.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

November 14, 1988.

[FR Doc. 88-26830 Filed 11-18-88; 8:45 am]

BILLING CODE 3010-01-M

(Release No. 34-26277; File No. SR-NYSE-88-32)

Self-Regulatory Organizations; Proposed Rule Change by New York Stock Exchange, Inc. Relating to Stock Allocations

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 October 20, 1988, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 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 (1) new Rule 103B which authorizes the Exchange to adopt policies governing stock allocations, (2) Allocation Policies and Procedures, and (3) the form of application to be used by specialists in applying for stock allocations. The operation of the Allocation Policies and Procedures is described in Item. A. below.

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 self-regulatory organization 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 and is set forth in Sections A, B and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis, for, the Proposed Rule Change

(a) *Purpose*—The proposed rule change will update the Exchange's procedures and policies regarding the allocation of Exchange-listed equity securities to specialist units.[1] The proposal covers allocations resulting from: (i) Initial listings of common stock on the Exchange; (ii) the withdrawal of allocations from a specialist unit resulting from proceedings under Exchange Rules 103A, 475 and 476; and (iii) a specialist unit's voluntarily surrendering a security as a result of possible disciplinary or performance improvement action. The Policy will replace the current allocation system which is described in filing SR-NYSE-83-10.[2]

The proposed rule change is a result of a comprehensive review of the stock allocation system that the Quality of Markets Committee ("QOMC") initiated in 1987. The QOMC appointed an Allocation System Review Committee ("ARC"), which included four Exchange Directors and five former Allocation Committee ("Committee") Chairmen, to develop recommendations to enhance the allocation system. The ARC was guided by the following objectives:

—Preserve the integrity of the existing allocation process, and build upon its strengths to improve its objectivity, consistency and continuity;
—Consistent with the foregoing, strengthen the system's responsiveness to the needs of listing companies with respect to the allocation process; and
—Preserve the independence and autonomy of the Allocation Committee in applying allocation policy.

In following these objectives, the ARC recommended, and the Exchange adopted, revised allocation procedures and policies that are intended: (i) To ensure that securities are allocated in a fair and equitable manner; (ii) to ensure that all specialist units have a fair opportunity for allocations based on established criteria and procedures; (iii) to provide incentives for ongoing enhancement of performance by specialist units; (iv) to provide the best possible match between specialist units and securities; and (v) to contribute to the strength of the specialist system. The procedures and allocation criteria adopted by the Exchange, and how those procedures and criteria differ from current procedures and criteria, are described below.

Composition of the Committee

The Allocation Committee will continue to have nine members. However, the make-up of the Committee has been altered slightly. There will be one, rather than two, specialists on the committee, and six, rather than five floor brokers. There will continue to be two allied members. Either one of the

[1] The Exchange will be reviewing the allocation of options to specialist units and will file revised options allocation procedures with the Commission when that review is complete.

[2] Securities Exchange Act Release No. 19626 (March 23, 1986), 48 FR 14103.

floor brokers or the specialist now will also be a Floor Governor. While specialists offer technical expertise, the Exchange believes that the proposed mix of representation best addresses the needs of the allocation system; floor brokers and allied members are in the best position to judge the relative strengths and weaknesses of specialist units and to provide a perspective on the trading characteristics of new issues.

Committee members will be chosen from a 54 member allocation panel reflecting the make-up of the Committee. The panel will include brokers and specialists with five years experience on the Flor, allied members involved in listed equity trading and all 16 Floor Governors. Appointment of the allocation panel will be the responsibility of the QOMC pursuant to the following procedures: the Floor Directors will appoint a selection committee to develop a representative panel that maximizes the professional expertise and broad experience of the floor. The selection committee then will recommend panel appointments to the Floor Directors, who will finalize recommendations to the QOMC.

Panel members will serve a one-year term. During this term, panel members (except for Floor Governors) will be eligible for random appointment to a six-month term on the Committee.[3] Floor Governors will serve two-month terms on the Committee. Every two months, three Committee members will rotate off the Committee, thereby fostering continuity and objectivity in the decision-making process. After a panel member rotates off the Committee, he will be ineligible for reappointment for two months; after that two months, if he is still on the panel, he will be eligible for random selection for a second term. At the conclusion of a second Committee term, a panel member other than a Floor Governor will be ineligible for selection to the panel for one year. This differs from current policy which allows for up to six consecutive one-year terms on the panel. Under the Policy, the Exchange will post the names of the nine-member Committee at the time of each bi-monthly rotation.

Committee members will elect as Chairman one floor broker member of the Committee whose firm does a public business. The Committee members will elect the chairman two months before his term begins in order to foster consistency and to provide an opportunity for further education of the chairman-elect. Floor Governors and brokers whose firms are affiliated with a specialist unit will be ineligible to serve as chairman. A member elected chairman will serve as chairman for the remainder of his six-month Committee term. The chairman will preside at meetings of the committee and will be expected to take the leadership and initiative to conduct the meeting in accordance with Exchange policy.

Committee Procedures

Allocation decisions will be made by a majority vote of the Committee members present at a meeting and eligible to vote on the matter. The Exchange will make every effort to have nine members present for each allocation decision and will use substitutes from the panel where necessary; if no specialist panel member is available, a former specialist panel member may substitute or, if none is available, a former Allocation Committee chairman may substitute. In the event it is impossible to arrange a meeting of a full nine-member committee, the Exchange has established a quorum requirement of seven members (as opposed to five members under current policy), including five floor brokers, one allied member and one specialist (or a former Allocation Chairman as a substitute).

Under the Policy, Committee members may not participate in the allocation deliberations with respect to any stocks for which either they or a specialist with whom their firm is affiliated have applied. Members also must disqualify themselves if there is any other conflict.

The decision of the Committee, along with a summary of the reasons for the decision, will be made known to the members of the Exchange. The Exchange also will provide that information to the issuer of the security allocated.

Allocation Criteria

Committee members will base their decisions on their professional judgment rather than a specific mathematical calculation. Each Committee member will apply the specific criteria based on his expertise and experience in the Exchange community.

Specialist performance will continue to be the key allocation criterion and performance will be judged in large part by the standards included in the recently-approved amendments to Exchange rule 1031.[4] First, an important measurement of specialist performance will continue to be the subjective measurements provided by the Specialist Performance Evaluation Questionnaire ("SPEQ"). In evaluating SPEQ results, while the Committee will evaluate current ratings and the ranking of a specialist unit relative to other applicants, the Committee also will evaluate: improvements in ratings; ratings over the last year to account for possible aberrations in ratings; the strengths of the particular individual designated to trade the stock;[5] written comments as to the performance of the entire unit; and any particular ratings or comments that may be relevant to particular characteristics of the new stock.

The Committee now will also evaluate specific objective performance standards pursuant to Rule 103A, such as timeliness of openings; promptness in seeking floor official approval of non-regulatory delayed openings; timeliness of reports under the Opening Automatic Reporting System ("OARS"); timeliness of turnaround in the Designated Order Turnaround ("DOT") System; and responses to administrative messages.[6] The Committee also will evaluate other objective criteria provided by the Exchange, such as data on specialist participation and stabilization.

In addition to performance criteria, the Committees also will consider a number of additional criteria. First, recognizing that listing on the Exchange is a significant development for a company, the Committee will consider a letter from the listing company that either requests specific units or specifies particular expertise in one or more aspects of the specialist's roles.

The Committee also will consider other allocations received by a unit in each of the preceding two years and the current year. While a recent allocation does not preclude a new allocation, the committee considers such factors in

[3] Although appointment is random as to individuals, the Exchange will make a effort (i) to provide a geographical balance to the Allocation Committee so that the Committee adequately represents all areas of the Floor, and (ii) to include on the Committee no more than one broker or allied member whose firm is affiliated with a specialist unit.

[4] Securities Exchange Act Release No. 25681 (May 9, 1988) 53 FR 17287 (the "Rule 103A Approval Release"). The Exchange believes that reaffirmation specialist performance standards, including the rule 103A standards, as the key allocation criteria is responsive to the Commission's stated policy in this area. *See* Rule 103A Approval Release at note 32.

[5] While stocks are allocated to specialist units, allocation applications must note the individual who will serve as the primary specialist handling the stock. The individual who will act as specialist is a factor that may be considered by the Committee.

[6] These 103A objective measures will be reported to the Committee on a "pass" or "fail" basis for each criterion. The Committee also will be informed if an applicant has been subject to a performance improvement action under Rule 103A in the most recent four quarters.

comparing qualified applicants. In this regard, the Committee also will consider information regarding stocks lost through mergers, delistings and other events over which the specialist has no control.

The Committee also will review the capital adequacy of the specialist unit, based both on a current check of estimated capital and on its capital history, and the disciplinary history of the unit. Specific disciplinary matters the Committee will consider include: cautionary letters regarding market-maintenance for the prior 12 months; other cautionary letters and summary fines for the past six months, disciplinary actions for the past six months; and significant pending enforcement matters. The Committee will consider significant pending enforcement matters once charges are issued or a stipulation is signed. Regardless of the length of time before an enforcement matter is resolved, the enforcement matter will be in a specialist's allocation file until the action is dismissed, or, if formal disciplinary action is taken, until six months after the stipulation is signed or a Hearing Panel decision on the matter is final.[7]

The final criterion the Committee will consider involves foreign listings. Due to the unique characteristics of the trading of foreign issues, such as international arbitrage and the trading of the stock in the home market, the Committee also will consider an applicant's commitment to the particular efforts necessitated by these listings.

Special Policies and Education

The Policy also includes a number of special policy notes. First, the Policy states that spin-offs of listed companies, the listing of related companies, and relistings of companies are treated as new listings and are subject to the Policy. In these cases, however, relevant information concerning the relationship to a listed company or prior listing, and the specialist involved, will be included on the stock data sheet and will be provided to the Committee. Committee members will use their judgment to determine what consideration, if any, should be given to that information.

Second, the Exchange has adopted special criteria for applicants that are not current specialists. Each individual that the applicant proposes as a specialist must pass the Exchange's specialist examination. The proposed unit must demonstrate that it understands the specialist business, as well as demonstrate an ability and willingness to meet the specialist's trading obligations. The Committee also will evaluate the entity's: capital commitment; specialist and clerical support; disciplinary history; and any available record of the entity or its participants as a specialist or market maker on another exchange.

The Exchange also will continue its policy of blanket applications pursuant to which an applicant agrees to accept the allocation of any security. Because a specialist may be allocated a security pursuant to a blanket application when the Committee determines that the regular applicants are not suitable for a particular stock, the allocation of a security pursuant to a blanket application will not prejudice a unit's eligibility for future allocations.

Finally, the proposal emphasizes the importance of the education of all participants to ensure continued quality and consistency in the allocation process. Educational efforts include: orientation of new panel members; a two-month "phase-in" of new Committee chairmen; providing all members the names of committee and the reasons for allocations; and general educational efforts for both specialists and the general membership.

(b) *Statutory Basis.*—The proposal will provide a fair procedure by which securities are allocated to specialist units, and for selecting among applicants on a basis that encourages superior performance and enhances the specialist system on the Exchange Floor. Accordingly, the proposal furthers the objectives of Section 6(b)(5) of the Act which requires that the rules of the Exchange be "designed * * * to promote just and equitable principles of trade * * * to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and * * * not be designed to permit unfair discrimination between customers, issuers, brokers or dealers * * *."

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

B. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Although the Exchange has neither solicited nor received written comments on the proposed rule change, as discused in Item II.A. above, the proposal is a result of a special Allocation Review Committee of Exchange directors and members.

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 (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 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 persons, 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 Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-88-32 and should be submitted by December 12, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: November 14, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-26831 Filed 11-18-88; 8:45 am]

BILLING CODE 8010-01-M

[7] Concurrent with the filing of this proposal, the Exchange also is proposing a separate policy that will limit the ability of a specialist unit to receive an allocation (i) if it has lost a registration in a security pursuant to a reallocation proceeding under Rule 103A or a disciplinary proceeding, or (ii) if it voluntarily surrendered a security in anticipation of such a proceeding. See File No. SR-NYSE-88-33.

[Release No. 34-26278; File No. SR-NYSE-88-33]

Self-Regulatory Organizations; Proposed Rule Change by New York Stock Exchange, Inc., Relating to Stock Allocations

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 October 20, 1988, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 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 an "Allocation Restrictions Policy and Specialist Unit's Demonstration of Corrective Efforts." The operation of the Proposed rule change is described in Item II.A. below.

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 self-regulatory organization 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 and is set forth in Sections A, B and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) *Purpose.*—The purpose of this proposed rule change is to impose certain restrictions on a specialist unit that either (i) loses its registration in a specialty stock due to Exchange disciplinary or performance improvement action; or (ii) voluntarily withdraws its registration in a specialty stock as a result of possible disciplinary or performance improvement action.

In either case, the specialist unit would be ineligible to apply for future allocations for the six month period immediately following the reassignment of the security. After this six month allocation restriction period, the unit will be able to apply for allocations during the following six months only if the unit demonstrates that it has undertaken relevant efforts to resolve the circumstances that gave rise to the loss of the security; however, even if the Exchange allows a specialist unit to apply for a new allocation during this second six month period, the circumstances that gave rise to the loss of the security will be included in the information provided to the Allocation Committee. The Exchange staff, in consultation with the Floor Directors, will determine whether a unit may apply for new listings.

This proposed rule change will work in tandem with two newly-adopted Exchange rules. First, the proposal will work in tandem with the Allocation Policy contained in File No. SR-NYSE-88-32. That policy contains specific criteria that the Allocation Committee will use in making allocation decisions. While the proposed criteria include a review of a specialist unit's disciplinary history, nothing in the rule specifically prevents a new allocation to an applicant that recently lost or withdrew its registration in a security due to actual or anticipated regulatory or performance improvement action. This proposed rule would specifically prevent such a new allocation for six months and impose additional restrictions on the allocation of new securities to the unit for the following six months.

Second, this proposed rule will work in tandem with recently-revised Rule 103A. That rule codifies the procedures and standards by which the Exchange reviews specialist unit performance. In the event that a unit's performance falls below specified standards, Rule 103A provides for the possible initiation of a reallocation proceeding. The Exchange does not believe it would be appropriate for a unit to receive a new allocation during a period of time proximate to its losing its registration in a stock pursuant to a reallocation proceeding. Thus, the restrictions of this proposed rule change will apply following a reallocation under Rule 103A, as well as after the loss of a registration in a stock following other Exchange disciplinary actions.

The Exchange further believes that there should not be a distinction between: (i) A specialist unit's losing its registration in a security as a result of a reallocation or disciplinary proceeding; and (ii) a unit's voluntarily withdrawing its registration in a specialty stock as a result of the possibility of such action. Thus, this proposed rule change provides for the consistent application of the penalty in these two instances and will prevent a unit from avoiding the allocation restriction by negotiating a settlement of pending action.

Following the market break in October 1987 and an intense regulatory review of a specialist performance during that period, seven specialist units voluntarily withdrew their registrations in a number of speciality stocks. The Exchange believes that it would be inappropriate for specialists to receive new stock allocations for some period following the voluntary withdrawal of registrations in these circumstances.

The Exchange further believes that this proposed rule change is consistent with the Commission Staff's report on the market break.[1] In the Rerport, the staff reviewed Exchange specialist performance during the market break and encouraged Exchange action to improve specialist review procedures and the reallocation process in general. Specifically, the Report states that the staff "will review carefully the willingness of the Exchange to use its reallocation and other enforcement authority to address poor specialist performance during the market break and thereafter." [2] The Exchange believes that this proposed rule change is responsive to the staff's concerns.

(b) *Statutory Basis.*—The proposal will enhance the ability of the Exchange to ensure the fair allocation of securities to specialist units and to prevent the allocation of securities to specialist units whose performance is below acceptable standards. Accordingly, the proposal furthers the objectives of section 6(b)(5) of the Act which requires that the rules of the Exchange be "designed * * * to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest; and * * * not be] designed to permit unfair discrimination between customers, issuers, brokers or dealers * * *."

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments regarding the proposed rule change.

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[1] The October 1987 Market Break, A Report by the Division of Market Regulation, U.S. Securities and Exchange Commission, February, 1988 ("Report").

[2] Report at 4-28.

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 changes, or

(B) Institute proceedings to determine whether the proposed rule changes 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 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 persons, 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 Comission's Public Reference Section, 450 Fifth Street, N.W., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-88-33 and should be submitted by December 12, 1988.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: November 14, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-26834 Filed 11-18-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 33-6807; 34-26284; IC-16636; IA-1143; S7-25-88]

Regulation of International Securities Markets

AGENCY: Securities and Exchange Commission.

ACTION: Policy Statement; request for comments.

SUMMARY: The Securities and Exchange Commission is releasing a Policy Statement on Regulation of International Securities Markets. The Policy Statement identifies areas of regulatory concern presented by the continued internationalization of the securities markets. The Policy Statement sets forth principles and goals which the Commission considers to be central to achieving a truly global market system. The Commission emphasizes the need for cooperation between securities regulators throughout the world in seeking coordinated international solutions to world market problems. The Commission notes that in seeking solutions to common problems securities regulators should be sensitive to cultural differences and national sovereignty concerns. Regulators should be mindful and respectful of existing national regulatory frameworks. The Commission emphasizes concepts of accommodation and comparability in dealing with differences existing between these regulatory frameworks. Welcoming comments on its views, the Commission suggests that an effective regulatory structure for an international securities market system would include the following features:

1. *Efficient structures* for quotation, price, and volume information dissemination, order routing, order execution, clearance, settlement, and payment, as well as strong capital adequacy standards;

2. *Sound disclosure systems,* including accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards that provide investor protection yet balance costs and benefits for market participants; and

3. *Fair and honest markets,* achieved through regulation of abusive sales practices, prohibitions against fraudulent conduct, and high levels of enforcement cooperation.

DATES: This policy statement is dated November 14, 1988. Comments are due on or before January 23, 1989.

ADDRESS: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Comment letters should refer to File No. S7-25-88. All comment letters will be available for public inspection and copying in the Commission's Public Reference Room.

FOR FURTHER INFORMATION CONTACT: (1) On market structure issues, Richard G. Ketchum, Director of the Division of Market Regulation, (202) 272-3000;

(2) On disclosure issues, Linda C. Quinn, Director of the Division of Corporation Finance, (202) 272-2800;

(3) On accounting and auditing issues, Edmund Coulson, Chief Accountant, (202) 272-2050;

(4) On investment company and investment adviser issues, Kathryn B. McGrath, Director of the Division of Investment Management, (202) 272-2750; and

(5) On enforcement issues, Gary G. Lynch, Director of the Division of Enforcement, (202) 272-2900.

SUPPLEMENTARY INFORMATION:

I. Introduction

International markets for securities have grown tremendously in recent years. The world's markets for equity and debt securities have become increasingly automated and linked. Driven by new technology, investors' desires to enter foreign markets, and issuers' efforts to obtain low cost capital, the trend toward internationalization of the securities markets undoubtedly will continue.

The challenge facing regulators of these global securities markets is to ensure efficiency and honesty. An effective regulatory structure for an international securities market system would include the following features:

(1) *Efficient structures* for quotation, price, and volume information dissemination, order routing, order execution, clearance, settlement, and payment, as well as strong capital adequacy standards;

(2) *Sound disclosure systems,* including accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards that provide investor protection yet balance costs and benefits for market participants; and

(3) *Fair and honest markets,* achieved through regulation of abusive sales practices, prohibitions against fraudulent conduct, and high levels of enforcement cooperation.

To achieve these objectives, securities regulators in each nation should work closely with their foreign counterparts and seek coordinated international solutions to world market problems. Securities regulators should continue to utilize both bilateral and multilateral relationships in various areas. Cooperative efforts through multilateral organizations, such as the International Organization of Securities Commissions ("IOSCO"), should be continued and strengthened.

In seeking solutions to common problems, securities regulators should

be sensitive to cultural differences and national sovereignty concerns. As regulators seek to minimize differences between systems, the goal of investor protection should be balanced with the need to be responsive to the realities of each marketplace.

Solutions to the problems posed by internationalization should also be developed with due consideration to the differing approaches to regulation of the varying products in the securities markets, such as stock index futures and options. In that regard, both derivative and underlying markets should be fair and honest so that wrongdoers cannot do indirectly in one market what they are unable to do directly in a related market.

Major world markets and their regulators should also assist developing securities markets. By helping those markets to become efficient and honest, the developed markets will benefit as participants in the resulting enhanced global securities market system.

The United States Securities and Exchange Commission believes it has a responsibility to assume a leadership role in international securities regulation. It considers the principles and goals contained in this Policy Statement to be central to achieving a truly global market system.

II. A Structurally Efficient Securities Market System

A. Information and Trading Systems

The international securities market system should feature efficient structures for quotation, price, and volume information dissemination concerning securities and derivative products traded worldwide. The dissemination of market data on a real-time basis promotes the efficient operation of capital markets. Presently, quotation, price, and volume information in various national securities markets often may not be timely, because such information may be available only at the end of a trading day or at fixed times during the day. Such data would be inadequate to support the 24-hour trading activity that would occur in a global securities market system. World markets and their regulators should work with the private sector to improve market information systems so that these systems keep pace with growth in the volume of international trading. The systems should be fully automated to achieve the goal of worldwide, real-time information dissemination concerning globally traded securities and derivative products. Traders then would be able to determine the last sale price, current quotes, and current volume in a security or derivative product on a worldwide basis. Such automated, real-time information systems can be particularly crucial in times of market volatility when current information may be necessary to avert panic.

Accordingly, the first step in achieving a worldwide securities market information system should be to establish automated market information systems in each national market in order to increase efficiency and stability. A second step would be the creation and maintenance of international linkages between the automated information systems of the various national securities markets. A number of such linkages already exist between major national securities markets. Ultimately, the development of international consolidated information systems in globally traded securities and derivative products should be explored.

The international securities market system should also feature efficient structures for order routing and execution of trades. The key to achieving this goal will be to create and maintain automated national securities market routing systems and to improve the various execution systems, whether they be open outcry, auction, negotiated, automated, or a combination of those systems. The next step would be to establish international linkages between routing and execution systems, such as those already existing between several major national securities markets.

B. Clearance, Settlement, and Payment Systems

If a truly global securities market is to be achieved, one of the most important international goals should be to establish efficient and comparable automated national and international clearance, settlement, and payment systems. There are wide-ranging differences in dealer and institutional comparison periods, settlement periods, and degrees of automation among various equity and debt markets. Ultimately, all countries should establish fully automated clearance and settlement systems that permit paperless book entry movement of all broker-dealer and institutional equity and debt positions. The current lack of coordination among clearance, settlement, and payment sytems in major world securities markets increases the costs and risks of global securities trading.

Although comparable systems are not currently in place, it is nevertheless important to develop clearing linkages among the major national securities markets. Linkages provide a current viable means of establishing international clearance and settlement because they do not depend upon the existence of identical, or even comparable, systems in each country. Sound linkages facilitate cross-border settlements without compromising the essential soundness and integrity of each national clearance and settlement system. For the linkages to be sound, adequate safeguards should exist to reduce the risk of default and to contain potential losses. In the near term, securities regulators should encourage the development of a network of sound linkages between individual market clearance and settlement systems to facilitate cross-border settlements. Regulators also should strive to agree upon appropriate minimum standards for these linkages.

Notwithstanding the use of clearance and settlement linkages, reduction of differences between the various national clearance and settlement systems is necessary for creation of a truly global securities market. Accordingly, world markets and their regulators should continue to work towards achieving efficient and compatible systems. A top priority of all markets should be to establish and maintain centralized depository and clearing systems. Concurrently, securities regulators should work together to develop compatible worldwide standards for clearing entities.

C. Financial Responsibilities of Securities Firms

The multinational character of many large brokerage firms and financial institutions has raised regulatory concerns regarding the financial integrity of these entities. Securities regulators worldwide share the goal of preventing defaults of overseas affiliates from jeopardizing the financial integrity of firms in their own countries.

1. Financial Information Sharing

In the near term, national securities markets and their regulators should continue to develop bilateral and, if possible, multilateral agreements for the sharing of financial information with respect to securities affiliates. This approach recognizes the need for home country regulators to be better informed about worldwide securities activities of their regulated securities firms. Regulators thus would be in a better position to respond to international events—either on a firm or market-wide basis—that could have an adverse effect on the financial and operational condition of the regulated firm in the home country.

2. Capital Adequacy Standards

Varying degrees of regulation exist in different nations regarding broker-dealer capital. Securities regulators should continue to explore the desirability of more consistent international capital adequacy standards designed to ensure stability and liquidity in national and international markets. Acheiving full harmonization of capital requirements between banks and non-bank securities firms with regard to their worldwide securities activities is a difficult task. Efforts nevertheless should continue to harmonize securities firm financial responsibility rules in coordination with bank regulatory officials in order to ensure that mutually agreeable standards for risk-based capital are established. At a minimum, securities regulators should seek a common conceptual framework against which non-bank capital adequacy standards can be measured.

III. A Sound Disclosure System

Investors participating in the international securities markets should be protected through a sound disclosure system based on mutually agreeable accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards. The goal in addressing international disclosure and registration problems should be to minimize regulatory impediments without compromising investor protection.

Differences in disclosure requirements, accounting principles, auditing standards, and auditor independence standards between countries are impediments to multijurisdictional offerings. Securities regulators should continue to seek ways to accommodate and, to the extent possible, minimize these differences in order to facilitate transnational capital formation, while ensuring adequate disclosure for the protection of investors.

As a means of facilitating transnational capital formation and increasing available investment opportunities, securities regulators should consider multijurisdictional registration mechanisms whereby issuers can use their own jurisdiction's disclosure documents for offerings in other countries. The ultimate goal should be the development of an integrated international disclosure system.

Efforts should be made to ease restrictions on cross-border sales of investment company shares. Easing restrictions on access by foreign investment companies to domestic markets can result in increased investment opportunities for domestic investors. If cross-border sales of investment company shares are to be facilitated, however, cooperative efforts by securities regulators are a necessity. The most promising approach currently seems to be one based on mutually acceptable standards which are adequate for protection of investors. accordingly, securities regulators should strive to develop and implement bilateral and, if feasible, multilateral agreements for the sale of investment company shares based upon such standards.

With regard to the applicability of securities registration requirements to overseas offerings, a "territorial approach" has merit. Under this approach, offers or sales of securities occurring outside a country's borders generally would not be subject to that country's registration requirements.

Accounting principles, auditing standards, and auditor independence standards are key factors in determining the feasibility of achieving mutually acceptable disclosure. A primary impediment to multinational offerings of securities is that different countries have different accounting standards. Mutually acceptable international accounting standards are a critical goal because they will reduce the unnecessary regulatory burdens resulting from current disparities between the various national accounting standards. Accordingly, securities regulators and members of the accounting profession throughout the world should continue efforts to revise and adjust international accounting standards with the aim of increasing comparability and reducing costs.

Differences in auditing standards and auditor independence standards also present obstacles to achieving a mutually acceptable worldwide disclosure regime. Auditors around the world are subject to different independence standards, perform different procedures, gather varying amounts of evidence to support their conclusions, and report the results of their work differently. Accordingly, an important long-term goal should be to establish mutually agreeable auditing and auditor independence standards.

IV. Fair and Honest Markets

Regulators should strive to make the world securities market system fair and honest, through regulation of abusive sales practices, prohibitions against fraudulent and manipulative conduct, and high levels of enforcement cooperation. Laws and regulations should promote efficiency and fairness in the securities markets by prohibiting such acts as insider trading, market manipulation, and misrepresentations to the marketplace. Additionally, securities firms and their personnel should be held to high standards of commercial honor and integrity. Securities regulators, including self-regulatory organizations, should require securities firms to establish and implement effective supervisory arrangements to guard against dishonet or abusive sales practices.

Investors will seek out markets they perceive as fair and honest. Countries that do not have prohibitions against insider trading, market manipulation, and misrepresentations to the marketplace risk becoming havens for illegal activities. Market abuses result in less efficient markets, higher insurance and other costs and, most important, the absence from those markets of individuals and institutional investors who consider integrity to be an essential market characteristic.

As access to international securities markets by brokers, issuers, investment companies, investment advisers, and securiites traders from all countries has increased, the need for access by enforcement authorities to information about foreign trading activity and the capital raising operations of foreign companies has expanded. Pertinent information and evidence regarding such activities frequently is located outside of a particular regulator's jurisdiction. Accordingly, securities regulators should continue to forge a network of bilateral and multilateral surveillance and information sharing arrangements that are effective from an enforcement standpoint and sensitive to national sovereignty concerns. The major international securities markets should be encouraged to share surveillance information with a view toward ultimate implementation of a worldwide network of surveillance sharing agreements.

Additionally, securities regulators should strive to eliminate the ability of wrongdoers to shield themselves and their ill-gotten gains from the laws of the countries in which their wrongdoing occurred or where their conduct had an impact. Countries should work together to establish formal mechanisms for the enforcement of judgments abroad, as well as for imposition of preliminary judgments freezing a wrongdoer's assets.

V. Need for International Coordination

The ability of securities regulators to address the issues raised by internationalization of the securities markets will depend greatly upon cooperation among regulators. There can be no doubt that all securities regulators should work together diligently to create sound international regulatory frameworks that will enhance the vitality of capital markets.

Securities regulators around the world have already made strides in developing coordinated responses to important issues. International forums such as IOSCO provide securities regulators with the opportunity to meet with their international counterparts in order to work toward achieving greater cooperation, comparability, and uniformity in areas of particular concern.

Although some progress toward the goal of reaching common understandings has been made, the tasks ahead are complex. Major differences remain among world securities market regulatory structures, even among the most mature markets. While seeking common solutions to international issues, regulators should also be mindful and respectful of existing national regulatory frameworks.

If these national frameworks are to be respected, resolution of international securites regulation issues requires special effort by all concerned. The United States Securities and Exchange Commission is committed to working with securities regulators around the world to achieve the goal of an international securities market system that is efficient and honest.

The views expressed by the United States Securities and Exchange Commission in this Policy Statement are intended to stimulate thought in a rapidly developing regulatory area and should be regarded as subject to revision. The Commission welcomes comments on these views from all interested persons.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-26878 Filed 11-18-88; 8:45 am]

BILLING CODE 8010-01-M

Applications and Opportunity for Hearing; Brock Exploration 1977-1, Ltd., et al.

November 15, 1988.

Notice is hereby given that the following issuers have filed applications pursuant to section 12(h) of the Securities Exchange Act of 1934, as amended, (the "1934 Act") for orders exempting the Applicants from certain registration and reporting requirements under sections 12, 13 and 15(d) of the 1934 Act.

Issuer	File No.
Brock Exploration 1977-1, Ltd.	81-754
Brock Exploration 1978-1, Ltd.	81-755
Brock Exploration 1979-1, Ltd.	81-756
Brock Exploration 1980-1, Ltd.	82-757
Brock Exploration 1981-1, Ltd.	81-758
Brock Exploration 1982-1, Ltd.	81-759
Brock Exploration 1983-1, Ltd.	81-760
Sierra-Pacific Pension Investors '84	81-774
Sierra-Pacific Pacific Development Fund	81-773
Sierra-Pacific International Properties V	81-765
Sierra-Pacific Development Fund II	81-776
Sierra-Pacific Development Fund III	81-777
Rancon Realty Fund III	81-766
Rancon Realty Fund IV	81-767
Rancon Realty Fund I	81-769
Green Gold Consolidated	81-770
Rancon Realty Fund II	81-778
Rancon Realty Fund V	81-781
Rancon Development Fund VI	81-782
Rancon Pacific Realty L.P.	81-783
Rancon Income Fund I	81-784
Income Growth Partners Ltd. IX	81-775
Angeles Income Properties, Ltd.	81-785

For a detailed statement of the information presented, all persons are referred to the applications which are on file at the offices of the Commission in the Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

Notice is further given that any interested person not later than December 12, 1988, may submit to the Commission in writing his views or any substantial facts bearing on any of these applications or the desirability of a hearing thereon. Any such communication or request should be addressed: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, and should state briefly the nature of the interest of the person submitting such information or requesting the hearing, the reason for such request, and the issues of fact and law raised by the applications which he desires to controvert.

Persons who request a hearing or advice as to whether a hearing is ordered in any of these matters will recieve any notices and orders issued, including the date of the hearing (if ordered) and any postponement thereof. At any time after that date, an order granting the applications may be issued upon request or upon the Commission's own motion.

For the Commission by the Division of Corporation Finance, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-26833 Filed 11-18-88; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16635; (811-2449)]

Application; Bullock Monthly Income Shares, Inc.

November 15, 1988.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for De-Registration under the Investment Company Act of 1940 ("1940 Act").

Applicant: Bullock Monthly Income Shares, Inc.

Relevant 1940 Act Section: Application filed pursuant to section 8(f) and Rule 8f-1.

Summary of Application: Applicant requests an order declaring that it has ceased to be an investment company under the 1940 Act.

Filing Date: The application was filed on October 18, 1988.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on December 9, 1988. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit or, in the case of an attorney-at-law, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549; Applicant, 1345 Avenue of the Americas, New York, NY 10105.

FOR FURTHER INFORMATION CONTACT: Thomas C. Mira, Staff Attorney (202) 272-3047, or Brion R. Thompson, Branch Chief (202) 272-3016 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person, or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Applicant was organized as a Maryland corporation and on January 10, 1974, filed a registration statement pursuant to Section 8(b) of the 1940 Act to register as an open-end, diversified management investment company. Applicant also filed a registration

statement pursuant to the Securities Act of 1933 ("1933 Act") on January 10, 1974, with respect to a public offering of Applicant's common stock. Applicant's 1933 Act registration statement became effective on April 12 1974, and its initial public offering commenced shortly thereafter.

2. On November 17, 1986, Applicant's Board of Directors approved (i) the sale of substantially all the assets of Applicant to the Monthly Income portfolio of Alliance Bond Fund (File No. 811-2383) in exchange for shares of beneficial interest of the Monthly Income portfolio of Alliance Bond Fund to be distributed to Applicant's shareholders on the basis of their relative net asset values per share, and (ii) the subsequent dissolution of Applicant. The Agreement and Plan of Reorganization and Liquidation and the terms of the reorganization are set forth in the preliminary proxy statement filed with the SEC on November 28, 1986. On December 26, 1986, a Prospectus/Proxy Statement was mailed to Applicant's shareholders or record. On February 27, 1987, at a meeting duly called and held, the shareholders of Applicant approved the reorganization and subsequent dissolution of Applicant. Pursuant to the Agreement and Plan of Reorganization and Liquidation, on March 2, 1987, Applicant transferred all its assets to the Monthly Income portfolio of Alliance Bond Fund in exchange for shares of beneficial interest of the Monthly Income portfolio of Alliance Bond Fund. The shares of the Monthly Income portfolio of Alliance Bond Fund received by Applicant were thereafter distributed to Applicant's shareholders in liquidation.

3. Applicant states that it does not currently have any shareholders; it does not have any assets or liabilities; it is not a party to any litigation or administrative proceeding, and it does not propose to engage in any business activities other than those necessary for the winding-up of its affairs. On August 28, 1987, Applicant filed Articles of Dissolution with the State of Maryland terminating its existence as a Maryland corporation. The Articles of Dissolution became effective upon filing.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-26832 Filed 11-18-88; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

Office of The Secretary

[Public Notice 1084]

[Delegation of Authority No. 170]

Delegation of Authority Providing for Implementation of the Victims of Terrorism Compensation Act

I hereby delegate to the Director General of the Foreign Service authority to carry out the functions vested in me by Executive Order 12598 of June 17, 1987 to implement the Victims of Terrorism Compensation Act (5 U.S.C. 5569 and 5570), including, but not limited to, declarations of instances in which individuals are in missing status or have suffered death or disability because of hostile action as a result of the individual's relationship with the United States Government, determinations of eligibility of individuals for compensation as a result of such instances, and issuance of regulations to administer these provisions.

The Director General may redelegate the functions delegated herein to a person acting as Director General in his or her absence.

Date: November 3, 1988.

George P. Shultz,

Secretary of State.

[FR Doc. 88-26779 Filed 11-18-88; 8:45 am]

BILLING CODE 4710-M

DEPARTMENT OF TRANSPORTATION

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended November 10, 1988

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 application, or motion 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.

Docket No.: 45921

Dated Filed: November 7, 1988.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 5, 1988.

Description: Application of Trump Shuttle, Inc. pursuant to section 401(d) of the Act and Subpart Q of the Regulations, requests authority to engage in interstate and overseas scheduled air transportation of persons, property and mail: Between any point in any State in the United States or the District of Columbia, or any territory or possession of the United States, and any other point in any State of the United States or the District of Columbia, or any territory or possession of the United States.

Docket No.: 45922.

Date Filed: November 8, 1988.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: December 6, 1988.

Description: Application of Aviacion Del Noroeste, S.A. de C.V., pursuant to section 402 of the Act and Subpart Q of the Regulations requests a foreign air carrier permit authorizing it to engage in scheduled foreign air transportation, carrying persons, property and mail and also authorizing it to engage in charter trips in foreign air transportation subject to the terms, conditions, and limitations of the Department's regulations governing charters, between points in Mexico and points in the United States.

Docket No.: 45926.

Date Filed: November 10, 1988.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: December 8, 1988.

Description: Application of America West Airlines, Inc., pursuant to section 401 of the Act and Subpart Q of the Regulations applies for a new or amended certificate of public convenience and necessity authorizing it to provide scheduled foreign air transportation of persons, property and mail over the following route: Between the coterminal points Phoenix, Arizona, Las Vegas, Nevada, Los Angeles, California, San Francisco/Oakland, California, San Diego, California, and Honolulu, Hawaii, and the terminal point Sydney, Australia.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 88-26844 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-62-M

Federal Aviation Administration

[Summary Notice No. PE 88-43

Petition For Exemption; Summary of Petitions Received, Disposition of Petitions Issued; Correction

AGENCY: Federal Aviation Administration DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions; Correction, Dates.

SUMMARY: FAA is correcting errors in Dates Section. In FR Doc. 88–25739 published Tuesday November 8, 1988 on page 45181 please change the comment closing date from November 11, 1988, to read November 28, 1988.

FOR FURTHER INFORMATION CONTACT: Rules Docket (AGC 10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue SW., Washington DC 20591; telephone (202) 267–3132.

Michael D. Triplett,

Docket Section, Program Management Staff, AGC 10.

[FR Doc. 88–26801 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–13–M

[Summary Notice No. PE–88–45]

Petition For Exemption; Summary of Petitions Received; Disposition of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before December 12, 1988.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–10), Petition Docket No. ____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on November 15, 1988.

Deborah E. Swank,

Manager, Program Management Staff.

Petitions For Exemption

Docket No.: 22441.
Petitioner: United Airlines.
Regulations Affected: 14 CFR 121.433(c)(1)(iii), 121.441(a)(1) and (b)(1), and Appendix F of Part 121.
Description of Relief Sought: To extend and amend Exemption No. 3451C that allows petitioner to continue an FAA-monitored program under which the petitioner's pilots in command, seconds in command, and flight engineers meet annual ground and flight recurrent training and proficiency check requirements. The proposed amendment would add, delete, and extend certain provisions of the exemption, based on petitioner's experience to date. Exemption No. 3451C will terminate on January 31, 1989.

Docket No.: 25656.
Petitioner: Michael S. Musticchio.
Sections of the FAR Affected: 14 CFR 65.71(a)(3).
Description of Relief Sought: To extend by 90 days the period during which all prescribed tests must be passed for a mechanic certificate.

Docket No.: 25682.
Petitioner: Thomas Glaeser and Richard Starks.
Sections of the FAR Affected: 14 CFR 91.24 (b) and (c).
Description of Relief Sought: To allow petitioners to operate their Nieuport (N124DS and N124TG) airplanes without the Mode C requirement because the current electrical system in the airplanes is there only to maintain engine operations and to trickle charge the battery.

Docket No.: 25686.
Petitioner: Airline Management Services, Inc.
Sections of the FAR Affected: 14 CFR 121.547.
Description of Relief Sought: To allow certain personnel of the petitioner and Airline Software Inc. to be admitted to the flight deck without a seat available in the cabin.

Docket No.: 25692.
Petitioner: JayHawk Air, Inc.
Sections of the FAR Affected: 14 CFR 43.3 (g).
Description of Relief Sought: To allow pilots employed by petitioner to perform the preventive maintenance function of removing and/or replacing the passenger seats of aircraft used in Part 135 operations.

Docket No.: 25710.
Petitioner: H&S Aviation, Ltd.
Sections of the FAR Affected: 14 CFR 145.73(a).
Description of Relief Sought: To allow petitioner to repair and overhaul PT6 engines for Pratt & Whitney Canada installed in aircraft operating wholly within the United States, and would enable petitioner to repair and overhaul PW100 engines for Pratt & Whitney Canada installed in aircraft operating wholly within the United States, contingent upon FAA certification of petitioner as a foreign repair station for PW100 engines.

Docket No.: 25716.
Petitioner: Flamenco Airways, Inc.
Sections of the FAR Affected: 14 CFR 43.3(g).
Description of Relief Sought: To allow petitioner's pilots to remove one to four seats on their Britten Norman BN2A aircraft and install a supplemental type certificate stretcher in the seat tracks vacated by the seats.

Docket No.: 25719
Petitioner: World Airways, Inc.
Sections of the FAR Affected: 14 CFR 121.371(a) 121.378.
Description of Relief Sought: To allow petitioner to use Caledonian Airmotive, Ltd., to perform services including inspection, repair, maintenance, overhaul, and return to service of CF6–6 and CF6–50 engines, appliances, parts, and components.

Docket No.: 25725.
Petitioner: Short Brothers PLC.
Sections of the FAR Affected: 14 CFR 145.73(a) and 43.3(a).
Description of Relief Sought: To allow petitioner to become certificated as a foreign repair station and to work on and approve for return to service aircraft, parts, and equipment on U.S.-registered aircraft regardless of their base or area of operation.

Docket No.: 25725.
Petitioner: Valley Airlines.
Sections of the FAR Affected: 14 CFR 21.197(c)(2).
Description of Relief Sought: To allow operation of petitioner's four Cessna 402 series aircraft under special flight permit with continuing authorization.

Docket No.: 25731.

Petitioner: Experimental Aircraft Association and Confererate Air Force.

Sections of the FAR Affected: 14 CFR Part 45.

Description of Relief Sought: To allow aircraft owned and operated by petitioners to operate with 2-inch markings located on the sides of the fuselage under the horizontal stabilizer or on the sides of the vertical tail surfaces, instead of as is presently provided under §§ 45.25 and 45.29.

Docket No.: 25670.

Petitioner: Airways Training Institute, Inc.

Sections of the FAR Affected: 14 CFR 141.35 (c)(5)(i) and (d)(4)(i).

Description of Relief Sought/ Disposition: To allow Mr. Joe Sposito to be designated as petitioner's chief flight instructor without meeting certain experience requirements for such designation. *Denied, November 7, 1988, exemption No. 4993.*

[FR Doc. 88-26808 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-13-M

Federal Highway Administration

Environmental Impact Statement; Watauga County, NC

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in Watauga County, North Carolina.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth L. Bellamy, Division Administration, Federal Highway Administration, 4505 Falls of the Neuse Road, Suite 470, Raleigh, North Carolina 27609, Telephone (919) 701-2950.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the North Carolina Department of Transportation (NCDOT), will prepare an environmental impact statement (EIS) for the proposed improvement of US 421 from east of the South Fork of the New River to SR 1361 in Watuaga County. The proposed action consists of the construction of a multilane, divided, partially controlled access facility on new location for a distance of approximately 11 miles. The proposed project is needed to serve traffic demand in the area and to relieve the congestion, delay, and inconvenience currently being experienced along this highway.

Alternatives under consideration include (1) the "no-build", (2) improving existing US 421, and (3) construction on new location.

Letters describing the proposed action and soliciting comments are being sent to appropriate Federal, State, and local agencies. Public meetings and meetings with local officials will be held in the project area. A public hearing will also be held. Information on the time and location of the public meeting and public hearing will be provided in the local news media. The draft EIS will be available for public and agency review and comment prior to the public hearing. No formal scoping meeting is planned at this time.

To insure that the full range of issues relating to the proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments and questions concerning the proposed action should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities apply to this program.)

Issued on November 14, 1988.

J. Max Tate,

District Engineer, FHWA, Raleigh, North Carolina.

[FR Doc. 88-26784 Filed 11-18-88; 8:45 am]

BILLING CODE 4910-27-M

Federal Railroad Administration

Petition for Exemptions or Waivers of Compliance; Soo Line Railroad Co.

In accordance with 49 CFR 211.9 and 211.41 and 45 U.S.C. sections 1-16 and 1013, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for waivers of compliance with certain requirements of the Federal railroad safety laws and regulations. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, and the nature of the relief being requested.

Soo Line Railroad Company Waiver Petition Docket Numbers PB-88-2 and SA-88-4

The Soo Line Railroad Company (Soo Line) requests waivers of compliance with certain provisions of the railroad power brakes regulation (49 CFR Part 232), under Docket No. PB-88-2, and the safety appliance regulation (49 CFR Part 231), under Docket No. SA-88-4.

Soo Line seeks these waivers of compliance to permit the operation of railroad/highway vehicles which are designated as "RoadRailer" units. The Soo Line and the Norfolk Southern Corporation are entering into an agreement for the Soo Line to use RoadRailer equipment between Chicago, Illinois, and Minneapolis/St. Paul, Minnesota, a distance of about 450 miles.

Operating subsidiaries of the Norfolk Southern Corporation (Norfolk Southern) are presently operating 500 RoadRailer vehicles under a conditional waiver issued by FRA on July 28, 1987. (See notice of waiver petitions, 52 FRA 16326, May 4, 1987, for more detailed discussion.) These vehicles are almost identical to the standard semi-trailer presently used to haul cargo over the highway, the only difference being that they are equipped with a special drawbar, railroad running wheels and a special railroad brake system. The railroad wheels are mounted on a single axle, either to the rear of the normal tandem highway wheels or between the tandem highway wheels of the semi-trailer.

The RoadRailer vehicles, by design, cannot be subjected to traditional switching procedures conducted in railroad classification yards. The coupler assmebly will only couple to another RoadRailer vehicle or to a specially designed adapter car between the locomotive and a RoadRailer train, and the drawbar height is nonstandard. The waiver granted to the Norfolk Southern permits noncompliance with all the provisions of the Safety Appliance Standards (49 CFR Part 231). These standards include provisions that state the number, location and dimensional specifications for the handholds, ladders and sill steps that are required for each railroad car. In addition, the train air brake system on a RoadRailer train is not compatible with the more traditional system found on freight trains and would not be in compliance with the power brake regulation (49 CFR Part 232). It was for these reasons that the Norfolk Southern was granted relief from Parts 231 and 232.

It is for the same reasons that the Soo Line is seeking permanent waivers similar to those which were granted to the Norfolk Southern. The Soo Line would also agree to the same terms and conditions that presently exist for the operation of service of the RoadRailer equipment by the Norfolk Southern. The Soo Line states that a grant of conditional waivers for RoadRailer operations between Chicago and Minneapolis would result in an extension of the use of RoadRailer

equipment to the Twin Cities area over the track of the Soo Line with no additional costs to the private sector, to consumers, or to the Federal state or local governments. It says that the service will provide benefits to consumers and the private sector through anticipated lower costs for transportation and the addition of new traffic to the Soo Line.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment, they should notify FRA, in writing, before the end of the period and specify the basis for their request.

All communications concerning these proceeding should identify the appropriate docket number (e.g., Waiver Petition Docket Number PB–88–2) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. Communications received before January 5, 1989 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m. to 5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

Issued in Washington, DC, on November 14, 1988.

J. W. Walsh,

Associate Administrator for Safety.

[FR Doc. 88–26894 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–06–M

National Highway Traffic Safety Administration

Action on Motor Vehicle Defect Petition; Center for Auto Safety

This notice sets forth the reasons for the decision not to grant a petition submitted to the National Highway Traffic Safety Administration (NHTSA) under section 124 of the National Traffic and Motor Safety Act of 1966, as amended (15 U.S.C. 1381 *et seq.*)

On May 10, 1988, the Center for Auto Safety (CFAS), petitioned NHTSA to investigate and recall 1983 through 1987 ambulances, built by various manufacturers using the Ford E–350 chassis, regarding an alleged defect involving coolant hose failures.

The agency investigated the reported fires and found that the problem was related to the installation of the rear compartment heater by the second-stage ambulance manufacturers. During this installation, the second-stage manufacturers cut both the Ford installed heater hoses, running to and from the underdash original equipment heater, and install "T" connectors, usually made of plastic. These "T" connectors allow the second-stage manufacturer to connect additional heater hoses to supply coolant to the heaters they install in the rear compartments, which they fit to the Ford Chassis. Failures appeared to be caused by the poor quality of the original equipment hoses and the internal hose damage caused by the presence of sharp flashings on the plastic "T" most of the second-stage manufacturers were using.

Additional information showed that the problem not only involved Ford and the second-stage manufacturers, but also the operators of the ambulances. In a survey of 75 ambulances in Missouri, it was found that most Ford original equipment radiator caps had been replaced with aftermarket caps, which did not maintain pressure as high as required by Ford to inhibit the coolant boiling. It was also determined that most operators were operating with coolant which contained higher concentrations of antifreeze than the 50/50 mixture of water and antifreeze recommended by Ford and which was therefore more liketly to ignite.

NHTSA urged Ford to take recall action, and Ford agreed to conduct a safety recall. A recall was announced by Ford on August 4, 1988. Ford has agreed to conduct this recall even though some responsibility for the problem may lie with the second stage ambulance manufacturers and the ambulance operators. The recall will include replacing several heater hoses with hoses made of silicone and nomex, which will safely operate at higher temperatures. The "T"s installed by second stage manufacturers will be replaced with a metal "Y" which will have no sharp edges. Ford will also replace the radiator caps and the coolant with a properly balanced mixture of 50 percent coolant, 50 percent water.

Based on Ford's recall action, NHTSA has decided not to grant the CFAS petition.

Authority: Sec. 124, Pub. L. 93–492; 88 Stat. 1470 (15 U.S.C. 1410a); delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 15, 1988.

George L. Parker,

Associate Administrator for Enforcement.

[FR Doc. 88–26875 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. T84–01; Notice 18]

Final Passenger Motor Vehicle Theft Data for 1987

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Publication of final theft data for 1987.

SUMMARY: The Motor Vehicle Information and Cost Savings Act provides that NHTSA shall publish passenger motor vehicle theft data for review and comment "immediately upon enactment of this title, *and periodically thereafter.*" (Emphasis added). The periodic publication of these theft data does not have any effect on the obligations of regulated parties under the Cost Savings Act. These theft data for years after 1984 serve only to inform the public of the extent of the motor vehicle theft problem. NHTSA has previously published 1987 theft data for public review and comment. After evaluating those public comments, the agency has made some minor changes to the previously published 1987 data. This notice informs the public of those minor changes and of this agency's final calculations of 1987 theft data.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Kurtz, Office of Market Incentives, NHTSA, 400 Seventh Street SW., Washington, DC 20590 (202 366–4808).

SUPPLEMENTARY INFORMATION: NHTSA has promulgated a Federal motor vehicle theft prevention standard at 49 CFR Part 541. This standard applies to cars that are in lines designated as "high theft lines." Whether or not a car line is a high theft line depends on the relationship of the line's actual or likely theft rate to the median theft rate for car lines in 1983 and 1984. Section 603(b)(3) of the Cost Savings Act (15 U.S.C. 2023(b)(3) sets forth the steps NHTSA had to follow in making its determination of the median theft rate for 1983 and 1984. The agency followed those steps, published final theft data for the 1983 and 1984 car lines, and made a determination of the median theft rate for those years. *See* 50 FR 4666; November 12, 1985.

Section 603(b)(3) of the Cost Savings Act also provides that NHTSA shall "periodically" publish later calendar years' theft data for public review and

comment. These publications of theft data for subsequent model years have no effect on the determination of whether a car line is or should be subject to the requirements of the theft prevention standard. The agency believes that the reason Congress directed it to periodically publish data for later years to inform the public, particularly law enforcement groups, automobile manufacturers, and the Congress, of the extent of the vehicle theft problem and the impact, if any, on the vehicle thefts of the Federal motor vehicle theft prevention standard.

To accomplish this purpose, NHTSA published for public review and comment the theft rates for 1987 on July 22, 1988 (53 FR 27792). NHTSA received two comments on the 1987 theft data, both of which were submitted by vehicle manufacturers, Volkswagen of America, Inc. (Volkswagen) and Saab-Scania of America, Inc. (Saab)

Volkswagen provided the agency with updated production figures for the Volkswagen Golf/GTI and the Volkswagen Jetta. The agency has incorporated these figures into the theft data and recalculated the theft rankings as appropriate. The Volkswagen Golf/GTI and Jetta theft rate ranking remain the same at numbers 90 and 71, respectively.

Saab brought to NHTSA's attention an error in the production figure for the Saab 9000 carline. This figure has been corrected and the theft rate recalculated. Formerly ranked at 154, the final Saab 9000 theft ranking is number 151.

The following list represents NHTSA's final calculation of theft rates for all 1987 car lines. As noted above, this list is only intended to inform the public of 1987 vehicle theft experience, and does not have any effect on the obligations of regulated parties under the Cost Savings Act.

Authority: 15 U.S.C. 2023; delegation of authority at 49 CFR 1.50. Issued on November 16, 1988.

Diane K. Steed,

Administrator.

MODEL YEAR 1987 THEFT RATES FOR CARLINES PRODUCED IN CALENDAR YEAR 1987

	Manufacturer	Make/Model (Line)	Thefts 1987	Production (Mfgr's) 1987	Theft Rate (Thefts/Product) (1987) (1,000's)
1	General Motors	Pontiac Firebird	2,424	80,414	30.1440
2	General Motors	Chevrolet Camaro	3,333	128,056	26.0277
3	General Motors	Chevrolet Monte Carlo	1,516	74,739	20.2839
4	Toyota	MR2	381	19,782	19.2599
5	General Motors	Buick Regal	910	61,659	14.7586
6	Mitsubishi	Starion	100	6,845	14.6092
7	Ferrari	Mondial	2	147	13.6054
8	Mitsubishi	Mirage	357	27,879	12.8053
9	General Motors	Pontiac Fiero	563	44,376	12.6870
10	General Motors	Oldsmobile Cutlass Supreme	1,338	114,013	11.7355
11	General Motors	Chevrolet Beretta/Corsica	186	16,109	11.5463
12	Porsche	911	104	9,047	11.4955
13	Chrysler Corp	Chrysler New Yorker	747	68,106	10.9682
14	Chrysler Corp	Chrysler Conquest	160	15,014	10.6567
15	General Motors	Pontiac Grand Prix	176	16,543	10.6389
16	Toyota	Corolla/Corolla Sport	1,851	175,011	10.5765
17	General Motors	Chevrolet Corvette	278	29,021	9.5793
18	Volkswagen	Cabriolet	165	17,268	9.5552
19	General Motors	Cadillac Seville	168	18,175	9.2435
20	Toyota	Cressida	275	31,828	8.6402
21	Lotus	Espirt	3	350	8.5714
22	General Motors	Cadillac Fleetwood Brougham (RWD)	522	61,733	8.4558
23	Mitsubishi	Cordia	39	4,801	8.1233
24	Chrysler Corp	Chrysler Lebaron/Town & Country	489	60,243	8.1171
25	General Motors	Chevrolet Nova	1,187	147,105	8.0691
26	General Motors	Chevrolet Spectrum	734	91,730	8.0017
27	Volkswagen	Scirocco	69	8,815	7.8276
28	Mitsubishi	Tredia	57	7,290	7.8189
29	Mazda	626	648	85,385	7.5892
30	Chrysler Corp	Dodge Lancer	193	26,521	7.2773
31	Ford Motor Co	Lincoln Town Car	537	74,171	7.2400
32	Honda	Prelude	397	55,856	7.1076
33	Mitsubishi	Galant	93	13,126	7.0852
34	Hyundai	Excel	1,592	231,551	6.8754
35	Isuzu	I-Mark	187	28,804	6.4922
36	General Motors	Buick Riviera	93	14,586	6.3760
37	General Motors	Oldsmobile Toronado	90	14,272	6.3061
38	Ford Motor Co	Ford Mustang	884	140,661	6.2846
39	Isuzu	Impulse	12	1,937	6.1951
40	Mazda	323	490	79,134	6.1920
41	General Motors	Pontiac Sunbird	540	87,251	6.1890
42	General Motors	Cadillac Deville (FWD)	970	157,374	6.1637
43	Chrysler Corp	Plymouth Caravelle	259	42,447	6.1017
44	Nissan	300ZX	203	33,981	5.9739
45	Chrysler Corp	Lebaron GTS	227	38,790	5.8520
46	Mazda	RX-7	297	50,924	5.8322
47	Chrysler Corp	Dodge Colt/Colt Vista	328	57,799	5.6748
48	Toyota	Supra	217	38,936	5.5732
49	Nissan	200 SX	201	36,116	5.5654
50	Ford Motor Co	Ford Thunderbird	680	122,339	5.5583
51	Yugo	GY/GVX	193	35,000	5.5143
52	Chrysler Corp	Plymouth Colt/Colt Vista	289	52,836	5.4698

MODEL YEAR 1987 THEFT RATES FOR CARLINES PRODUCED IN CALENDAR YEAR 1987—Continued

	Manufacturer	Make/Model (Line)	Thefts 1987	Production (Mfgr's) 1987	Theft Rate (Thefts/ Product) (1987) (1,000's)
53	Ford Motor Co	Mercury Topaz	395	72,911	5.4176
54	Porsche	928	12	2,223	5.3981
55	General Motors	Pontiac 6000	747	138,516	5.3929
56	Chrysler Corp	Dodge 600	212	40,368	5.2517
57	General Motors	Oldsmobile 98 Regency	410	78,335	5.2339
58	AMC/Renault	Alliance/Encore	160	30,697	5.2122
59	Chrysler Corp	Dodge Aries	497	99,043	5.0180
60	General Motors	Chevrolet Impala/Caprice	916	184,570	4.9629
61	General Motors	Buick Electra	413	83,613	4.9394
62	Chrysler Corp	Laser/Daytona	161	32,640	4.9326
63	Toyota	Celica	451	93,127	4.8428
64	Ford Motor Co	Mercury Lynx	192	40,036	4.7957
65	Nissan	Maxima	872	183,910	4.7414
66	Chrysler Corp	Dodge Shadow	381	81,012	4.7030
67	Ford Motor Co	Mercury Cougar	471	100,584	4.6827
68	General Motors	Cadillac Cimarron	68	14,560	4.6703
69	Ford Motor Co	Ford Tempo	1,103	240,096	4.5940
70	Suzuki	Forsa	21	4,587	4.5782
71	Volkswagen	Jetta	351	77,102	4.5524
72	General Motors	Oldsmobile Custom Cruiser Wagon	77	16,954	4.5417
73	General Motors	Chevrolet Cavalier	1,437	316,476	4.5406
74	Alfa Romeo	Spider Veloce 2000	14	3,090	4.5307
75	Chrysler Corp	Plymouth Reliant	467	103,795	4.4993
76	General Motors	Buick LeSabre/Electra Estate Wagon	53	11,808	4.4885
77	TVR	280I	1	225	4.4444
78	Ford Motor Co	Lincoln Mark VII	65	14,768	4.4014
79	General Motors	Oldsmobile Cutlass Ciera/Cruiser (FWD)	1,198	274,332	4.3670
80	General Motors	Buick Skylark/Somerset	331	76,125	4.3481
81	Porsche	944	60	13,872	4.3253
82	Chrysler Corp	Chrysler Fifth Avenue/Newport	414	96,685	4.2819
83	Ford Motor Co	Ford Escort	1,630	383,244	4.2532
84	General Motors	Chevrolet Chevette	150	35,448	4.2316
85	Nissan	Sentra	1,568	378,046	4.1476
86	Chrysler Corp	Plymouth Horizon	469	113,526	4.1312
87	BMW	6	14	3,412	4.1032
88	General Motors	Chevrolet Celebrity	1,375	342,738	4.0118
89	Mercedes-Benz	560SL	54	13,575	3.9779
90	Volkswagen	Golf/GTI	218	55,681	3.9152
91	General Motors	Cadillac Eldorado	68	17,452	3.8964
92	General Motors	Pontiac Bonneville	423	111,396	3.7973
93	General Motors	Oldsmobile Calais	399	107,029	3.7280
94	General Motors	Pontiac Parisienne/Safari S/W	45	12,111	3.7156
95	General Motors	Oldsmobile Delta 88 Royale	576	155,098	3.7138
96	Peugeot	505	30	8,128	3.6909
97	Mercedes-Benz	560SEL	28	7,801	3.5893
98	Mercedes-Benz	190D/E	79	22,018	3.5880
99	General Motors	Buick Century	618	172,911	3.5741
100	General Motors	Pontiac T1000	20	5,628	3.5537
101	BMW	7	9	2,541	3.5419
102	Nissan	Pulsar	229	65,374	3.5029
103	Bertone	X-1/9	7	2,000	3.5000
104	Nissan	Stanza	393	113,596	3.4596
105	General Motors	Buick LeSabre	486	141,529	3.4339
106	General Motors	Pontiac Grand AM	775	226,453	3.4223
107	BMW	5	51	15,035	3.3921
108	General Motors	Buick Skyhawk	140	41,511	3.3726
109	Ferrari	328	2	595	3.3613
110	Ford Motor Co	Mercury Grand Marquis	412	122,945	3.3511
111	General Motors	Chevrolet Sprint	207	61,925	3.3428
112	Chrysler Corp	Plymouth Turismo	126	38,215	3.2971
113	Alfa Romeo	Milano	19	5,840	3.2534
114	BMW	3	218	72,180	3.0202
115	Honda/Acura	Integra	181	60,454	2.9940
116	Ford Motor Co	Ford Taurus	1,015	348,502	2.9125
117	Toyota	Camry	498	175,373	2.8397
118	Mercedes-Benz	420SEL	50	17,948	2.7858
119	Honda/Acura	Legend	128	45,982	2.7837
120	Subaru	Subaru	157	60,000	2.6167
121	Audi	4000/Coupe/Quattro	41	15,789	2.5967
122	Chrysler Corp	Plymouth Sundance	202	81,725	2.4717
123	Ford Motor Co	Lincoln Continental	40	16,832	2.3764
124	Volvo	740/760	143	60,890	2.3485
125	Honda	Civic	631	268,692	2.3484
126	Chrysler Corp	Dodge Diplomat	72	30,804	2.3374
127	Ford Motor Co	Ford Crown Victoria	225	97,349	2.3113
128	Honda	Accord	770	333,436	2.3093

MODEL YEAR 1987 THEFT RATES FOR CARLINES PRODUCED IN CALENDAR YEAR 1987—Continued

	Manufacturer	Make/Model (Line)	Thefts 1987	Production (Mfgr's) 1987	Theft Rate (Thefts/ Product) (1987) (1,000's)
129	Ford Motor Co	Merkur XR4TI	16	7,352	2.1763
130	Mercedes-Benz	300E	43	19,957	2.1546
131	General Motors	Oldsmobile Firenza	45	21,042	2.1386
132	Chrysler Corp	Plymouth Gran Fury	34	16,235	2.0942
133	Jaguar	XJ	27	12,919	2.0899
134	Mercedes-Benz	260E	14	6,723	2.0824
135	Jaguar	XJ-S	6	2,925	2.0513
136	Volkswagen	Quantum	16	7,990	2.0025
137	Audi	5000S/Quattro	56	28,245	1.9827
138	Ford Motor Co	Mercury Sable	213	110,114	1.9344
139	Saab	900	65	37,171	1.7487
140	Subaru	Justy	17	10,000	1.7000
141	Porsche	924	24	15,097	1.5897
142	Chrysler Corp	Dodge Omni	146	94,681	1.5420
143	General Motors	Cadillac Allante	5	3,247	1.5399
144	Volvo	DL/GL	74	51,006	1.4508
145	Volkswagen	Fox	35	24,343	1.4378
146	Mercedes-Benz	560SEC	3	2,089	1.4361
147	Subaru	XT	64	45,000	1.4222
148	Volvo	780	1	704	1.4205
149	Austin Rover	Sterling	22	16,453	1.3371
150	Mercedes-Benz	300SDL	11	8,291	1.3267
151	Saab	9000	18	14,765	1.2191
152	Chrysler Corp	Dodge Charger	41	42,369	0.9677
153	Toyota	Tercel	34	108,189	0.3143
154	Mercedes-Benz	300DT	3	12,552	0.2390
155	Ferrari	Testarossa	0	301	0.0000
156	Rolls-Royce/Bentley	Silver Spirit/Silver Spur/Mulsanne	0	410	0.0000
157	Aston Martin	Saloon/Vantage/Volante	0	31	0.0000
158	Maserati	Quattroporte	0	73	0.0000
159	Excalibur	Phaeton/Roadster	0	70	0.0000
160	Aston Martin	Lagonda	0	15	0.0000
161	Rolls-Royce/Bentley	Corniche/Continental	0	140	0.0000
162	Zimmer	Classic/Elegante/Cabriolet	0	170	0.0000
163	Rolls-Royce/Bentley	Camargue	0	40	0.0000
164	Maserati	Biturbo	0	973	0.0000
165	Bitter GMBH	Bitter SC	0	82	0.0000

[FR Doc. 88-26874 Filed 11-18-88; 8:45 am]
BILLING CODE 4910-59-M

Research and Special Programs Administration

[Notice No. 88-8]

Request for Comments to the International Atomic Energy Agency Regulations

AGENCY: Research and Special Programs Administration (RSPA), Department of Transportation (DOT).

ACTION: Request for comments.

SUMMARY: The International Atomic Energy Agency (IAEA) has initiated its second cycle of changes to its Safety Series No. 6, "Regulations for the Safe Transport of Radioactive Materials." The public is being asked to submit prospective changes to Safety Series No. 6, and its companion documents Safety Series Nos. 7, 37, and 80. Any future changes to IAEA Safety Series No. 6 may affect the Hazardous Materials Regulations (HMR; 49 CFR Parts 171 through 179).

DATE: Comments should be received by December 23, 1988.

ADDRESS: Proposed changes to the IAEA regulations should be submitted to the Dockets Unit, Office of Hazardous Materials Transportation, U.S. Department of Transportation. The Dockets Unit is located in Room 8421 of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. Office hours are 8:30–5:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael E. Wangler, Chief, Radioactive Materials Branch, Technical Division, Office of Hazardous Materials Transportation, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-4545.

SUPPLEMENTARY INFORMATION: Many countries and international transport organizations throughout the world have adopted the standards of the IAEA "Regulations for the Safe Transport of Radioactive Materials" (IAEA Regulations). These regulations are currently found in IAEA publication Safety Series No. 6, 1985 Edition (SS6-85). Section 171.12(e) of the HMR permits the import and export of radioactive materials, under certain conditions, if packages are prepared for shipment in accordance with the IAEA Regulations. Currently, § 171.12(e) references Safety Series No. 6, 1973 Revised Edition (As Amended). In addition, the HMR are revised periodically so that they are in harmony with the most recent edition of SS6. Such revisions affect international as well as the domestic transportation of radioactive materials. Thus, it is anticipated that RSPA will propose to amend the HMR to bring it into harmony with SS6-85 and its revisions prior to

January 1, 1990. Any future revisions to SS6–85 may affect the HMR.

In 1985 the IAEA instituted a new process for the continuing review and revision of its regulations. Through this process, supplements to the IAEA Regulations and its supportive documents would be issued every 2 years, thereby allowing the IAEA Regulations to remain current with technology and needs.

The IAEA initiated this review process in August 1986 by requesting that member states review SS6–85 and its supporting documents, Safety Series Nos. 7, 37, and 80, and submit suggestions for changes to those documents. As part of this process, the IAEA convened a Technical Committee meeting June 22–26, 1987, to consider proposals for amendments and identified problems submitted by IAEA Member States and international organizations in connection with the IAEA Regulations. Additionally, the Technical Committee considered advice and reports developed by consultant groups examining specific aspects of the regulatory standards for transport. The Technical Committee was charged with the tasks of examining the justification for the prospsed amendment and of recommending changes suitable for early adoption in the IAEA Regulations.

Subsequent to this meeting, the Director General of the IAEA transmitted the changes to the U.S. and other Member States and invoked the 90 day notice procedure, which gives Member States not less than 90-days to comment on the changes. On March 9, 1987, RSPA published in the **Federal Register** a Notice of Availability (52 FR 7254; Notice No. 87–2) requesting comments on these proposed changes to SS6–85 and its supporting documents. These changes were accepted by the Member States and are expected to be published by the IAEA in the near future. The second revision cycle is now being initiated.

Since amendments to SS6 may have an effect on the HMR, the public is invited to submit suggestions for proposed changes to SS6 and its supporting documents. In order to receive appropriate handling, RSPA is requesting that comments contain the following information: (1) An identification of the problem; (2) an explanation of the need for the proposed revision; (3) the paragraphs affected in SS6, SS7, SS37, and/or SS80; (4) a summary of the proposed revision; and (5) a justification for the proposed revision. To facilitate this process, a copy of SS6 and its supporting documents have been placed in RSPA's Dockets Unit. Individual copies may be purchased from Bernan-Unipub., 4611–F Assembly Drive, Lanham, MD 20706–4391. All proposals for changes received by DOT will be considered and included, as appropriate, in its response to the IAEA.

Issued in Washington, DC on November 15, 1988 under authority delegated in 49 CFR Part 106, Appendix A.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[FR Doc. 88–26885 Filed 11–18–88; 8:45 am]

BILLING CODE 4910–60–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authoirty vested in me by the Act of October 19, 1985, (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (J50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit "From Queen to Empress" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the Metropolitan Museum of Art (The Costume Institute) in New York, New York, beginning on or about December 15, 1988, to on or about April 16, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

Date: November 16, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88–26985 Filed 11–18–88; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Ms. Lorie J. Nierenberg of the Office of the General Counsel of USIA. The telephone number is 202–485–8827, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 53, No. 224
Monday, November 21, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 5:20 p.m. on Tuesday, November 15, 1988; the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to: (1) The Corporation's supervisory activities; (2) the possible closing of certain insured banks; and (3) an assistance agreement pursuant to section 13(c) of the Federal Deposit Insurance Act.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Director Robert L. Clarke (Comptroller of the Currency), concurred in by Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in Room 6221 of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: November 16, 1988.

Federal Deposit Insurance Corporation.

M. Jane Williamson,

Assistant Executive Secretary.

[FR Doc. 88-26917 Filed 11-17-88; 11:51 am]

BILLING CODE 6714-01-M

NATIONAL COUNCIL ON THE HANDICAPPED

Quarterly Meeting

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Council on the Handicapped. This notice also describes the functions of the Council. Notice of this meeting is required under section 522 (b) (10) of the "Government in Sunshine Act" (Pub. L. 94-409).

DATES:

Nov. 28, 1988, 9:00 a.m. to 5:00 p.m.
Nov. 29, 1988, 9:00 a.m. to 5:30 p.m.
Nov. 30, 1988, 8:30 a.m. to 1:00 p.m.

LOCATION: Grand Hyatt Hotel, Washington, DC.

FOR FURTHER INFORMATION CONTACT: National Council on the Handicapped, 800 Independence Avenue, SW, Suite 814, Washington, DC 20591, (202) 267-3846, TDD: (202) 267-3232.

The National Council on the Handicapped is an independent Federal agency comprised of 15 members appointed by the President of the United States and confirmed by the Senate. Established by the 95th Congress in Title IV of the Rehabilitation Act of 1973 (as amended by Public Law No. 95-602 in 1978), the Council was initially an advisory board within the Department of Education. In 1984, however, the Council was transformed into an independent agency by the Rehabilitation Act Amendments of 1984 (Public Law No. 98-221).

The Council is charged with reviewing all laws, programs, and policies of the Federal Government affecting disabled individuals and making such recommendations as it deems necessary to the President, the Congress, the Secretary of the Department of Education, the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research (NIDRR).

The meeting of the Council shall be open to the Public. The proposed agenda includes:

Report from the Chairperson and Executive Committee
Forum: Implementing Public Policy In *Toward Independence*, cosponsored by the District of Columbia Mayor's Committee on Persons with Disabilities.
Committee Meetings
Press Conference in the "Disability Prevention Initiative"
Discussion of Unfinished and New Business

Records shall be kept of all Council proceedings and shall be available after the meeting for public inspection at the National Council on the Handicapped.

Signed at Washington, DC, on November 10, 1988.

Paul G. Hearne,

Executive Director.

[FR Doc. 88-26978 Filed 11-17-88; 3:39]

BILLING CODE 6820-BS-M

NATIONAL SCIENCE BOARD

DATE AND TIME:

December 1, 1988 8:00 a.m. Closed Session
December 2, 1988 8:30 a.m. Closed Session
December 2, 1988 9:00 a.m. Closed Session

PLACE: National Science Foundation, 1800 G Street, NW, Room 540, Washington, DC 20550.

STATUS: Most of this meeting will be open to the public. Part of this meeting will be closed to the public.

MATTERS TO BE CONSIDERED ON DECEMBER 1:

Committee on Programs and Plans

Closed Session (8:00 a.m. to 1:00 p.m.)

Grants and Contracts. During discussion of certain proposed awards the Committee may be joined by enough other Board members to constitute a quorum.

MATTERS TO BE CONSIDERED ON DECEMBER 2:

National Science Board

Closed Session (8:30 a.m. to 9:00 a.m.)

1. Minutes—October 1988 Meeting
2. NSB and NSF Staff Nominees
3. Grants and Contracts

Open Session (9:00 a.m.—12:00 noon)

4. Grants, Contracts, and Programs
5. Chairman's Report
6. Minutes—October 1988 Meeting
7. Director's Report
8. Draft Report of the NSB Committee on Openness of Scientific Communication
9. Inspector General Provisions
10. Presentation by Dr. Carl Lineberger: "The Laser Revolution in Chemical Physics"
11. Other Business

Thomas Ubois,

Executive Officer.

[FR Doc. 88-26901 Filed 11-17-88 1:50 p.m.]

BILLING CODE 7555-01-M

Corrections

Federal Register
Vol. 53, No. 224
Monday, November 21, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP87-428-001 et al.]

CNG Transmission Corp. et al.; Natural Gas Certificate Filings

Correction

In notice document 88-26311 beginning on page 45960 in the issue of Tuesday, November 15, 1988, make the following correction:

On page 45962, in the first column, after **8. Amoco Production Company**, the "Docket No." should read "CI88-94-002".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL-3449-9]

National Emission Standards for Hazardous Air Pollutants Subparts and Test Methods; Technical Corrections

Correction

In rule document 88-21393 beginning on page 36972 in the issue of Friday, September 23, 1988, make the following corrections:

§ 61.70 [Corrected]

1. On page 36972, in the second column, in amendatory instruction 6, in the fifth line, "M" should read "P_{Gi}".

Appendix B— [Corrected]

2. On page 36973, in the first column, in the equation following amendatory instruction 21, between "/" and "10^3", insert "(".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPP-180791; FRL-3467-5]

Maryland Department of Agriculture, Receipt of Applications for Emergency Exemptions To Use (±)-2-[4,5-Dihydro-4-methyl-4-(1-methylethyl)-5-oxo-1H-imidazol-2-yl]-5-ethyl-3-pyridinecarboxylic acid; Solicitation of Public Comment

Correction

In notice document 88-24590 beginning on page 43269 in the issue of Wednesday, October 26, 1988, make the following corrections:

1. On page 43269, in the second column, under **SUBJECT**, in the fifth line, the formula should read "(±) -2-[4,5-dihydro-".

2. On the same page, in the third column, under **SUPPLEMENTARY INFORMATION**, in the second paragraph, in the fourth line, the formula should read "(±)-2-[4,5-".

BILLING CODE 1505-01-D

FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R-0648]

Availability of Funds and Collection of Checks

Correction

In proposed rule document 88-25039 beginning on page 44335 in the issue of Wednesday, November 2, 1988, make the following correction:

§ 229.36 [Corrected]

On page 44341, in the third column, in § 229.36(f), the sixth line should read "(b)(5)(i) through (iii) of this section".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

[Docket No. 84N-0036]

Proposed Removal of Regulation Regarding Sulfonamide-Containing Drugs for Use in Food-Producing Animals

Correction

In proposed rule document 88-21057 beginning on page 35833 in the issue of Thursday, September 15, 1988, make the following correction:

On page 35833, in the first column, the CFR Part heading should read as it appears above.

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-020-09-4212-12; A 20346-0]

Realty Action, Exchange of Public Lands, Navajo and Apache Counties, AZ

Correction

In notice document 88-24302 appearing on page 41247 in the issue of Thursday, October 20, 1988, make the following correction:

In the third column, the 33rd line should read "Sec. 4, lot 1, SE¼NE¼, E½SE¼.".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 780, 784, 815, 816, and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Reclamation and Operation Plan; Performance Standards; Roads

Correction

In rule document 88-25688 beginning

on page 45190 in the issue of Tuesday, November 8, 1988, make the following corrections:

1. On page 45195, in the second column, in the second complete paragraph, in the second line, "technology" should read "terminology".

2. On page 45197, in the second column, in the second complete paragraph, in the ninth line, after "performance" insert "standards".

3. On page 45201, in the second column, in the second complete paragraph, in the 17th line, "has" should read "had".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 158

[CGD 88-002]
RIN 2115-AC89

Regulations Implementing the Pollution Prevention Requirements of Annex V of MARPOL 73/78

Correction

In proposed rule document 88-24616 beginning on page 43622 in the issue of Thursday, October 27, 1988, make the following corrections:

§ 158.120 [Corrected]

On page 43645, in the second column, in paragraph (4), in § 158.120, the definition for "Recreational boating facility" should read:

"Recreational boating facility" means a port that can provide wharfage or other services to 10 or more recreational vessels. It includes but is not limited to marinas, boatyards, and yacht clubs. It does not include a place or facility containing only an unattended launching ramp.

BILLING CODE 1505-01

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 390

[Docket No. R-120]

Capital Construction Fund

Correction

In proposed rule document 88-25110 beginning on page 43907 in the issue of Monday, October 31, 1988, make the following correction:

On page 43908, in the first column, in the third complete paragraph, the third line should read "not be deductible as an expense from the".

BILLING CODE 1505-01-D

federal register

Monday
November 21, 1988

Part II

Department of Transportation

Office of the Secretary

49 CFR Part 40

Procedures for Transportation Workplace Drug Testing Programs; Interim Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket No. 45928 Notice No. 88-17]

RIN 2105-AB42

Procedures for Transportation Workplace Drug Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Interim final rule.

SUMMARY: The Department of Transportation is adopting a modification of the Department of Health and Human Services' "Mandatory Guidelines for Federal Workplace Programs." The purpose of the modification is to adapt the procedures and safeguards developed by the Department of Health and Human Services more closely to the circumstances of drug testing programs in industries regulated by the Department of Transportation. Antidrug program rules published by the Department's operating administrations will require employers to conduct drug testing according to these Procedures.

DATES: This rule is effective December 21, 1988. Comments should be received by January 23, 1989. Late-filed comments will be considered to the extent practicable.

ADDRESS: Comments should be sent to Docket Clerk, Docket 45928, Department of Transportation (C-55), 400 7th Street SW., Room 4107, Washington, DC., 20590. In order to expedite handling of comments, commenters are requested to refer to the docket number for this rule and to provide an original and four copies of their comments. Commenters wishing to have their comments acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will time and date stamp the card and mail it back to the commenter.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington DC, 20590. Mr. Ashby's phone number is 202-366-9306.

SUPPLEMENTARY INFORMATION: The Department of Transportation (DOT) believes that a drug-free transportation workplace is essential to transportation safety. For this reason, the Department's operating administrations (the Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, United States Coast Guard, Urban Mass Transportation Administration, and Research and Special Programs Administration) are issuing regulations requiring antidrug programs in the aviation, motor carrier, railroad, maritime, mass transit, and pipeline industries, respectively.

The proposed regulations for these operating administration rules proposed that employers conduct drug testing according to the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" of the Department of Health and Human Services (DHHS). The "HHS Guidelines," as this document is known, were published in the **Federal Register** on April 11, 1988 (53 FR 11970). They were based on a notice of proposed rulemaking (NPRM) published August 14, 1987 by DHHS, and on comments to that NPRM.

The HHS Guidelines include procedures for collecting urine samples for drug testing, procedures for transmitting the samples to testing laboratories, testing procedures, procedures for evaluating test results, quality control measures applicable to the laboratories, recordkeeping and reporting requirements, and standards and procedures for HHS certification of drug testing laboratories. The intent of the Guidelines is to safeguard the accurancy of test results and the privacy of individuals who are tested.

The Department believes that the basic requirements of the Guidelines must remain a vital component of DOT drug drug testing regulations. However, the Department is aware that the Guidelines, as written by HHS to apply to testing by Federal agencies, do not fit perfectly the circumstances of employers regulated by DOT. There are many references to legal authorities and other matters which are peculiar to Federal agencies (e.g., references to the Privacy Act and to Executive Order 12564). Terminology referring to Federal "agencies" rather than to "employers" may be confusing in the DOT regulated industry context. One purpose of this rule is to make necessary editorial changes to adapt the content of the HHS Guidelines to the context of industries regulated by DOT.

In addition, DHSS drafted the Guidelines to apply to the physical and organizational circumstances of Federal agencies. Obviously, the circumstances of industries regulated by DOT are very different from those of Federal agencies. For this reason, the Department is modifying some provisions of the HHS Guidelines to work better in the implementation of drug testing programs by DOT regulated industries. These revisions are intended to leave intact the safeguards for accuracy and privacy in drug testing established by the HHS Guidelines while ensuring that parties regulated by DOT can practically implement the requirements.

We would call particularly to the attention of commenters the following revisions. This is not an exhaustive list of all modifications to the HHS Guidelines published in this document. The Department seeks comments on all aspects of this interim final rule.

In § 40.2, definitions of "employer" and "employee" have been added. The former definition includes consortia, but points out that individual members of a consortium are not relieved of their responsibilities under the rule by virtue of participation in the consortium. As provided in the operating administration drug rules, the testing rate of 50 percent can relate to the entire employee population covered by a consortium; the definition does not mean that 50 percent of the work force of each consortium member must be tested in a year.

Under the HHS Guidelines, a Federal agency may test a urine sample *only* for certain specified drugs. The Department's Procedures echo this requirement. Under § 40.21(c), an employer may test the sample obtained under a DOT drug rule only for the drugs required or specifically authorized to be tested under the DOT drug rule. That is, an employer must test the sample for the five major drugs listed in each DOT drug regulation. If the DOT agency involved authorizes testing for Drug X under § 40.21(b), the employer may also test the sample for that drug. If the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of the DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request.

As alluded to above, an employer may submit to the DOT agency involved a protocol for testing another controlled substance (see § 40.21(b)). DOT agencies have discretion whether or not to entertain such requests; if a DOT agency approves such a request, then the employer can test for the drug as part of its DOT-mandated program.

The HHS Guidelines require Federal agencies to keep a permanent log book at the collection site. This is a requirement that is likely to be difficult for many employers to meet, particularly where there are scattered or remote locations at which testing must take place. Consequently, the DOT

Procedures will not require a permanent log book. Instead, employers would use a custody and control form (described at § 40.21–1(b)(4)), a copy of which would be retained for permanent record purposes. For the sake of flexibility, an employer could use a different but equivalent form, or a permanent log book, with the approval of the DOT agency involved.

The DOT procedures also seek to add flexibility to the choice and use of collection sites, in view of the variety of circumstances in which employers have to conduct tests (especially post-accident and reasonable cause tests). Collection sites are defined to include any suitable facility (e.g., a medical facility or mobile unit could qualify); a facility without all the security safeguards contemplated for collection sites could be used if samples are under the direct control of collection site personnel; and other water sources are permissible in the facility if the other sources are secured or monitored to ensure that they could not be used to dilute a specimen (see §§ 40.22(a); 40.22(b)(3); 40.22(f)(1)).

Based on the experience DOT has gained with its drug testing program for its own employees, the DOT procedures spell out the grounds on which an employee would be directed to give a sample while being observed (§ 40.22(e)(2)). These circumstances, which are the exclusive circumstances under which observation could be ordered, include a discrepancy in the temperature of the sample; a record of the employee having previously given a sample which had a too-low specific gravity or concentration of creatinine; or observation by the collection site person of conduct clearly and unequivocally indicating an attempt to tamper with a sample. In the latter case, the collection site person would have to get authorization from a higher-level supervisor before ordering the providing of a sample under observation (§ 40.22(f)(23)). The Department seeks comment on whether there are circumstances in which obtaining this authorization would be too difficult or would occasion too great a delay, such that this requirement should be modified or eliminated in such circumstances.

An additional circumstance in which a test can be observed is when that test is part of a rehabilitation program or post-positive testing program. The rationale for this provision is that, given recidivism rates among users of some drugs, and the concern that employees would have to avoid a second positive test, employees may have a greater incentive to "cheat" than in other circumstances. The Department seeks comment on this provision and its rationale. Should there be limitations on the authority of employers to conduct observed tests in these situations? For example, should the MRO or other appropriate official have to make a determination that a particular employee is likely to warrant observation during a particular test or series of tests? Should there be a temporal limitation on the period during which tests could be observed (e.g., the first two or three tests, the first or second year of post-positive testing)?

One of the purposes of the Procedures is to ensure that a proper chain of custody is maintained. A number of provisions of the Procedures, particularly in § 40.22, deal with this subject. One such provision (§ 40.22(j)(2)) concerns transfer of the specimen from the collection site person to the laboratory.

It is likely, in some circumstances, that the collection site person will transport or mail the sample directly to the laboratory. For example, the collection site person may put the sample in a mailer and turn it over to a mail room employee, who then sends it to the laboratory. However, the chain of custody form will be sealed in the mailer by the collection site person. This could leave a gap in the chain of custody. The Department seeks comment on whether this would be a significant problem and, if so, how to correct it.

Section 40.24(g)(5) requires a laboratory manager or other employee to sign urine custody and control forms. The Department seeks comment on whether this requirement is needed and whether there are other approaches that would be less burdensome.

The HHS Guidelines do not permit laboratories to subcontract any of their drug testing work. In the interest of flexibility of contracting arrangements for employers, the DOT procedures would permit subcontracting under carefully controlled conditions. These conditions include complete processing of and responsibility for a sample by the subcontract laboratory, which must also be HHS-certified (§ 40.24(j)).

The HHS Guidelines require Federal agencies to inspect laboratories before a testing contract is awarded. Believing that such a requirement would be too burdensome for employers, particularly small employers, the DOT procedures eliminate this requirement. However, DOT, DHSS, or any employer may inspect a laboratory at any time (§ 40.24(1)).

Similarly, the HHS Guidelines require Federal agencies contracting with a particular laboratory to periodically send "blind samples" to the laboratory to test the laboratory's accuracy. Doing so is reasonable for Federal agencies, but it could be very burdensome and costly for small employers. Consequently, the DOT Procedures provide that only large employers (i.e., those with 2,000 or more employees subject to drug testing under the applicable operating administration drug rule) need to follow this practice (§ 40.2(d)(2)(ii)). This relief for small entities is based, in part, on the assumption that most, if not all, HHS-certified laboratories will have contracts with one or more Federal agencies or other large entities, and will therefore be subject to some blind sample testing.

The Department seeks comment on whether this assumption is likely to be correct. If not, what should the Department's response be? The language of the rule would require employers to submit blind samples if the laboratory they work with does not have contracts with entities who would do blind sample testing. Is this reasonable, or would another approach be better? Also, is the 2,000 covered employee cutoff a reasonable one? Should a lower cutoff (e.g., 1,000 covered employees) be used, in order to make it less likely that laboratories would be subject to blind testing from at least some DOT regulated employers? This would also afford employees of more employers the assurance of properly-run drug testing programs which blind sampling provides. Alternatively, should a higher cutoff be used? Another approach that could be taken would be to base the cutoff on the number of specimens submitted by the employer in a year (e.g., 1,000 specimens rather than 2,000 employees, which might include some employers with high numbers of reasonable cause and post-accident tests who might otherwise not have to conduct blind testing.) The Department seeks comment on this approach as well.

Regulatory Process Matters

This is not a major rule under Executive Order 12291. It is a significant rule under the Department's Regulatory Policies and Procedures, since it affects several operating administrations and their regulated industries. A regulatory evaluation has not been prepared, since the costs of conducting drug testing conforming with these Procedures have been analyzed in the regulatory evaluations or regulatory impact analyses for the operating administration drug-free transportation workplace program rules.

This rule will affect small entities in all the industries covered by DOT operating administration drug rules. The basic small entity impacts of each rule have been considered as part of the operating administrations' rulemakings. The Department has taken steps, as described in "Supplementary Information," to reduce small entity impacts in such areas as inspections, submission of blind samples, and permanent log books. Consequently, the Department certifies that 49 CFR Part 40 will not have a significant economic impact on a substantial number of small entities.

The Department has considered the Federalism implications of this rule under Executive Order 12612. The Department has determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. Federalism implications of individual operating administrations' drug rules are discussed in those rulemaking documents.

The reporting and recordkeeping requirements referenced in this regulation have been submitted for Paperwork Reduction Act approval to the Office of Management and Budget by the respective DOT operating administrations in connection with their own drug rules. This is because it is the operating administration rules, rather than this rule, that actually imposes the requirements on regulated parties. However, the Office of the Secretary is seeking OMB approval under the Paperwork Reduction Act for the form described in § 40.21–1(a). A **Federal Register** notice will be published when Paperwork Act approval is obtained.

This rule has been published without prior opportunity for notice and public comment. The Department finds that it would be impracticable, unnecessary, and contrary to the public interest to seek prior public comment for this rule. This finding is made on the basis of the overriding public interest in ensuring a drug-free transportation workplace, in order to ensure transportation safety and as a step toward controlling the nationwide problem of drug abuse. (There have been previous opportunities for public notice and comment on this subject, obtained by DHSS on the HHS Guidelines, which served as the basis for this rule, and on the operating administration drug rules, which proposed use of the HHS Guidelines.) It is necessary to publish final rules on this subject at this time, so that all parties affected by the operating administration drug rules will know what is expected of them with respect to testing procedures as they develop their drug-free workplace programs.

The Department will review comments received on this rule and publish a notice responding to the comments. The Department will also make any appropriate changes to the rule at that time. The operating administrations have received some comments on the HHS Guidelines in the course of their drug rulemakings. These comments will be made a part of the docket for this rulemaking and the Department will respond to them along with the other comments we receive. (Many of the changes in the HHS Guidelines made in this rule appear to be responsive to these comments.)

List of Subjects in 49 CFR Part 40

Controlled substances, Transportation.

Issued this 14th day of November 1988, at Washington, DC.

Jim Burnley,

Secretary of Transportation.

49 CFR Subtitle A is amended by adding Part 40 to read as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG TESTING PROGRAMS

Subpart A—General

Sec.

Subpart B—Scientific and Technical Requirements

Subpart C—Certification of Laboratories Engaged in Urine Drug Testing

Authority: 49 U.S.C. 102, 301.

Subpart A—General

§ 40.1 Applicability.

This part applies to transportation employers (including self-employed individuals) conducting drug urine testing programs pursuant to regulations issued by agencies of the Department of Transportation and to such transportation employers' officers, employees, agents and contractors, to the extent and in the manner provided in DOT agency regulations.

§ 40.2 Definitions.

For purposes of this part the following definitions apply:

Aliquot. A portion of a specimen used for testing.

Chain of custody. Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an approved chain of custody form 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 for the sample or sample aliquots within the laboratory. Chain of custody forms shall, at a minimum, include an entry documenting date and purpose each time a specimen or aliquot is handled or transferred and identifying every individual in the chain of custody. Two forms of chain of custody documents are utilized under this part. An external chain of custody form or "urine custody and control form" (described in § 40.23) is used to document chain of custody to the laboratory. An internal chain of custody form is utilized to document handling and transfer of the original sample container and aliquots within the laboratory.

Collection site. A place designated by the 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 an initial examination of the urine specimen provided by those individuals. A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician who is provided instructions for collection under this part and certifies completion as required herein. In any case where: (a) A collection is observed or (b) collection is monitored by non-medical personnel, the collection site person must be a person of the same gender as the donor.

Confirmatory test. A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (At this time gas

chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

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 requiring compliance with this part, including the United States Coast Guard, the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Urban Mass Transportation Administration, and the Research and Special Programs Administration.

Employee. An individual designated in a DOT agency regulation as subject to drug urine testing and the donor of a specimen under this part. As used in this part "employee" includes a final 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" is inclusive of a industry consortium or joint enterprise comprised of two or more employing entities, but no single employing entity is relieved of its responsibility for compliance with this part by virtue of participation in such a consortium or joint enterprise.

Initial test (also known as screening test). An immunoassay screen to eliminate "negative" urine specimens from further consideration.

Medical Review Officer. A licensed physician 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 positive test result together with his or her medical history and any other relevant biomedical information.

Permanent Record Book. A permanently bound book in which identifying data on each specimen collected at a collection site are permanently recorded in the sequence of collection. May be used in conjunction with a modified urine custody and control form to document collection.

Reason to believe. Reason to believe that a particular individual may alter or substitute the urine specimen.

Secretary. The Secretary of Transportation or the Secretary's designee may be a contractor or other recognized organization which acts on behalf of the Secretary in implementing this part.

Subpart B—Scientific and Technical Requirements

§ 40.21 The drugs.

(a) DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines and phencyclidine.

(b) An employer may include in its testing protocols other controlled substances or alcohol only pursuant to a DOT agency approval, if testing for those substances is authorized under agency regulations and if the Department of Health and Human Services has established an approved testing protocol and positive threshold for each such substance.

(c) Urine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations.

(d) This section does not prohibit procedures reasonably incident to analysis of the specimen for controlled substances (e.g., determination of pH or tests for specific gravity, creatinine concentration, or presence of adulterants).

§ 40.23 Preparation for testing

The employer and certified laboratory shall develop and maintain a clear and well-documented procedure for collection, shipment, and accessioning of urine specimens under this part. Such a procedure shall include, at a minimum, the following:

(a) Utilization of a standard urine custody and control form (carbonless manifold). The form shall be a multiple-part, carbonless record form with an original (part 1) that shall accompany the specimen to the laboratory. Copies shall be provided for the Medical Review Officer (part 2, to go directly to the MRO), the employee (part 3), the collection site (part 4) (if distinct from the employer), and the employer representative (part 5). The form should be a permanent record on which identifying data on the employee and on the specimen collection and transfer process is retained. The form shall be constructed to display, at a minimum, the following elements, which shall appear on its respective parts as indicated:

(1) The following information shall appear on all parts of the form:

(i) A preprinted specimen identification number, which shall be unique to the particular collection.

(ii) The employee's Social Security or employee identification number, which shall be entered by the employee.

(iii) Specification of the type of test conducted (pre-employment, random, etc.), which shall be entered by the employer representative or collector (acting for the employer).

(iv) A block providing that "Collector must note temperature of specimen has been read and record here if not within the range of 32.5—37.7C/90.5—99.8F:" with an area for the required notation.

(v) A chain-of-custody block providing areas to enter the following information for each transfer of possession: purpose of change; released by (signature/print name); received by (signature/print name); date. The words "Provide specimen for testing" and "DONOR" shall be preprinted in the initial spaces.

(vi) Information to be completed by the collection site person, identifying that person and providing the date of collection, the collection site and the telephone number (if any) of the collection site; a space for remarks at which unusual circumstances may be described; and a certification statement as set forth below and a signature block with date which shall be completed by the collection site person:

> I certify that the specimen identified on this form is the specimen presented to me by the employee providing the certification below, that I have verified that it bears the same identification number as that set forth above, and that it has been collected, labelled and sealed as required by the instructions provided.

(vii) A block to be completed by the laboratory after analysis of the specimen, providing a space for entry of the laboratory accession number and a certification to read as follows, together with spaces to enter the printed name and signature of the certifying laboratory official and date:

> I certify that the specimen identified by this accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements, and that the results attached are for that specimen.

(2) Information to be provided by the employee, which shall appear on parts 2 through 5 of the form only: Employee name (printed); duty location; job title; date of birth; and a certification statement as set forth below, together with a signature block with date which shall be completed by the employee:

I certify that the urine specimen identified on this form is my own; that it is fresh and has not been adulterated in any manner; and that the identification information provided on this form and on the collection bottle is correct. I consent to the submission of this specimen to the certified laboratory designated by my employer, to the analysis of the specimen for controlled substances as provided by Federal requirements, and to the release of test results from that analysis to the Medical Review Officer designated by my employer.

(3) A block to be completed by the employee, which shall appear only on parts 2 and 3 of the form, containing a statement as follows: "If you wish to have prescription or over-the-counter medications you may have taken or been administered within the past 30 days considered as your test results are reviewed, you may list them here:" followed by an adequate writing area to list such substances.

A form meeting the requirements of this paragraph is displayed at Appendix B to this part. The urine custody and control form may include such additional information as may be required for billing or other legitimate purposes necessary to the collection, provided that personal identifying information (other than the employee identification number) may not be provided to the laboratory and employee medical information may appear only on the copies provided to the employee and to the Medical Review Officer. In lieu of a form meeting the above-described criteria, an employer may choose to use a multiple-sample chain of custody form together with a permanent record book maintained at the site of collection to document collection and transfer of specimens under this part, so long as the data elements set forth above are documented, personal identifying information is not disclosed to the laboratory, and the record system is designed in such a manner as to maintain the confidentiality of medical information.

(b) Use of a tamperproof sealing system designed in a manner such that the specimen bottle top can be sealed against undetected opening, the bottle can be identified with a unique identifying number identical to that appearing on the urine custody and control form, and space has been provided to initial the bottle affirming its identity. For purposes of clarity, this part assumes use of a system made up of one or more pre-printed labels and seals (or a unitary label/seal), but use of other, equally effective technologies is authorized.

(c) Use of a shipping container in which one or more specimens and associated paperwork may be transferred and which can be sealed and initialled to prevent undetected tampering.

(d) Written procedures, instructions and training shall be provided as follows:

(1) Employer collection procedures and training shall clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the employee, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise offensive or inappropriate.

(2) A non-medical collection site person shall receive training in compliance with this part and shall demonstrate proficiency in the application of this part prior to serving as a collection site person. A medical professional, technologist or technician licensed or otherwise approved to practice in the jurisdiction in which collection occurs may serve as a collection site person if that person is provided instructions described in this part and performs collections in accordance with those instructions.

(3) Collection site persons shall be provided with detailed, clearly illustrated written instructions on the collection of specimens in compliance with this part. Employer representatives and employees subject to testing shall also be provided standard written instructions setting forth their responsibilities.

§ 40.25 Specimen collection procedures.

(a) *Designation of collection site.* (1) Each employer drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory. An independent medical facility may also be utilized as a collection site provided the other applicable requirements of this part are met.

(2) A designated collection site may be any suitable location where a specimen can be collected under conditions set forth in this part, including a properly equipped mobile facility. A designated collection site shall be a location having an enclosure within which private urination can occur, a toilet for completion of urination (unless a single-use collector is used with sufficient capacity to contain the void), and a suitable clean surface for writing. The site must also have a source of water for washing hands, which, if practicable, should be external to the enclosure where urination occurs.

(b) *Security.* The purpose of this paragraph is to prevent unauthorized access which could compromise the integrity of the collection process or the specimen.

(1) Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(2) A facility normally used for other purposes, such as a public rest room or hospital examining room, may be secured by visual inspection to ensure other persons are not present and undetected access (e.g., through a rear door not in the view of the collection site person) is not possible. Security during collection may be maintained by effective restriction of access to collection materials and specimens. In the case of a public rest room, the facility must be posted against access during the entire collection procedure to avoid embarrassment to the employee or distraction of the collection site person.

(3) If it is impractical to maintain continuous physical security of a collection site from the time the specimen is presented until the sealed mailer is transferred for shipment, the following minimum procedures shall apply: The specimen shall remain under the direct control of the collection site person from delivery to its being sealed in the mailer. The mailer shall be immediately mailed, maintained in secure storage, or remain until mailed under the personal control of the collection site person.

(c) *Chain of custody.* The chain of custody block of the urine custody and control form shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) *Access to authorized personnel only.* No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored. Only the collection site person may handle specimens prior to their securement in the mailing container or monitor or observe specimen collection (under the

conditions specified in this part). In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of specimens, a collection site person shall conduct only one collection procedure at any given time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialled, the urine custody and control form has been executed, and the employee has departed the site.

(e) *Privacy.* (1) Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided, as further described in this paragraph.

(2) For purposes of this part, the following circumstances are the exclusive grounds constituting a reason to believe that the individual may alter or substitute the specimen:

(i) The employee has presented a urine specimen that falls outside the normal temperature range, and the employee declines to provide a measurement of oral body temperature by sterile thermometer, as provided in paragraph (f)(23) of this part, or the oral temperature does not equal or exceed that of the specimen.

(ii) The last urine specimen provided by the employee (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below .2 g/L.

(iii) The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc.).

(iv) The employee has previously been determined to have used a controlled substance without medical authorization and the particular test is being conducted as a part of a rehabilitation program, on return to service after any required rehabilitation, or under a DOT agency regulation providing for follow-up testing after return to service.

(f) *Integrity and identity of specimen.* Employers shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and on the urine custody and control form can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. Where practicable, there shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs. If there is another source of water in the enclosure, it shall be effectively secured or monitored to ensure it is not used (undetected) as a source for diluting the specimen.

(2) When an individual arrives at the collection site, the collection site person shall ensure that the individual is positively identified as the employee selected for testing (e.g., through presentation of photo identification or identification by the employer's representative). If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned areas that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance on the urine custody and control form.

(9) In the exceptional event that an employer-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliliters. (The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(12) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of urine, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measure is critical and in no case shall exceed 4 minutes.

(13) If the temperature of a specimen is outside the range of 32.5°–37.7° C/90.5°–99.8° F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted on the urine custody and control form.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual has altered or substituted the specimen as described in paragraph (e)(2)(i) and (iii) of this section, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. As provided below, the specimen shall be sealed (by placement of a tamperproof seal over the bottle cap and down the sides of the bottle) and labeled in the presence of the employee. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (f)(19)–(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the employer. If separate form the label, the tamperproof seal shall also be applied.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter on the urine custody and control form all information identifying the specimen. The collection site person shall sign the urine custody and control form certifying that the collection was accomplished according to the instructions provided.

(22) (i) The individual shall be asked to read and sign a statement on the urine custody and control form certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(ii) The individual shall be provided an opportunity to set forth on the urine custody and control form information concerning medications taken or administered in the past 30 days.

(iii) When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others.

(23) A higher level supervisor of the collection site person, or a designated employer representative, shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based upon the circumstances described paragraph (e)(2) of this section.

(24) The collection site person shall complete the chain of custody portion of the urine custody and control form to indicate receipt from the employee and shall certify proper completion of the collection.

(25) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26)(i) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the specimen and urine custody and control form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(ii) The collection site person shall not leave the collection site in the interval between presentation of the specimen by the employee and securement of the sample with an identifying label bearing the employee's specimen identification number (shown on the urine custody and control form) and seal initialled by the employee. If it becomes necessary for the collection site person to leave the site during this interval, the collection shall be nullified and (at the election of the employer) a new collection begun.

(g) *Collection control.* To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled. The urine custody and control form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on an approval chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) *Transportation to laboratory.* Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment (e.g., specimen boxes and/or padded mailers); and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site person shall sign and enter the date specimens were sealed in the containers for shipment. The collection site person shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

(i) *Failure to cooperate.* If the employee refuses to cooperate with the collection process (e.g., refusal to provide a complete specimen, complete paperwork, initial specimen) the collection site person shall inform the employer representative and shall document the non-cooperation on the urine custody and control form.

§ 40.27 Laboratory personnel.

(a) *Day-to-day management.* (1) The laboratory shall have a qualified individual to assume professional, organizational, educational, and administrative responsibility for the laboratory's urine drug testing facility.

(2) This individual shall have documented scientific qualifications in analytical forensic toxicology. Minimum qualifications are:

(i) Certification as a laboratory director by the State in forensic or clinical laboratory toxicology; or

(ii) A Ph.D. in one of the natural sciences with an adequate undergraduate and graduate education

in biology, chemistry, and pharmacology or toxicology, or

(iii) Training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree with additional training and laboratory/research experience in biology, chemistry, and pharmacology or toxicology; and

(iv) In addition to the requirements in paragraph (a)(2) (i), (ii), and (iii) of this section, minimum qualifications also require:

(A) Appropriate experience in analytical forensic toxicology including experience with the analysis of biological material for drugs of abuse, and

(B) Appropriate training and/or experience in forensic applications of analytical toxicology, e.g., publications, court testimony, research concerning analytical toxicology of drugs of abuse, or other factors which qualify the individual as an expert witness in forensic toxicology.

(3) This individual shall be engaged in and responsible for the day-to-day management of the drug testing laboratory even where another individual has overall responsibility for an entire multispecialty laboratory.

(4) This individual shall be responsible for ensuring that there are enough personnel with adequate training and experience to supervise and conduct the work of the drug testing laboratory. He or she shall assure the continued competency of laboratory personnel by documenting their inservice training, reviewing their work performance, and verifying their skills.

(5) This individual shall be responsible for the laboratory's having a procedure manual which is complete, up-to-date, available for personnel performing tests, and followed by those personnel. The procedure manual shall be reviewed, signed, and dated by this responsible individual whenever procedures are first placed into use or changed or when a new individual assumes responsibility for management of the drug testing laboratory. Copies of all procedures and dates on which they are in effect shall be maintained. (Specific contents of the procedure manual are described in § 40.29(n)(1).)

(6) This individual shall be responsible for maintaining a quality assurance program to assure the proper performance and reporting of all test results; for maintaining acceptable analytical performance for all controls and standards; for maintaining quality control testing; and for assuring and documenting the validity, reliability, accuracy, precision, and performance characteristics of each test and test system.

(7) This individual shall be responsible for taking all remedial actions necessary to maintain satisfactory operation and performance of the laboratory in response to quality control systems not being within performance specifications, errors in result reporting or in analysis of performance testing results. This individual shall ensure that sample results are not reported until all corrective actions have been taken and he or she can assure that the tests results provided are accurate and reliable.

(b) *Test validation.* The laboratory's urine drug testing facility shall have a qualified individual(s) who reviews all pertinent data and quality control results in order to attest to the validity of the laboratory's test reports. A laboratory may designate more than one person to perform this function. This individual(s) may be any employee who is qualified to be responsible for day-to-day management or operation of the drug testing laboratory.

(c) *Day-to-day operations and supervision of analysts.* The laboratory's urine drug testing facility shall have an individual to be responsible for day-to-day operations and to supervise the technical analysts. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the laboratory, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; maintenance of chain of custody; and proper remedial actions to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

(d) *Other personnel.* Other technicians or nontechnical staff shall have the necessary training and skills for the tasks assigned.

(e) *Training.* The laboratory's urine drug testing program shall make available continuing education programs to meet the needs of laboratory personnel.

(f) *Files.* Laboratory personnel files shall include: resume of training and experience; certification or license, if any; references; job descriptions; records of performance evaluation and advancement; incident reports; and results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate.

§ 40.29 Laboratory analysis procedures.

(a) *Security and chain of custody.* (1) Drug testing laboratories shall be secure at all times. They shall have in place sufficient security measures to control access to the premises and to ensure that no unauthorized personnel handle specimens or gain access to the laboratory processes or to areas where records are stored. Access to these secured areas shall be limited to specifically authorized individuals whose authorization is documented. With the exception of personnel authorized to conduct inspections on behalf of Federal agencies for which the laboratory is engaged in urine testing or on behalf of DHHS, all authorized visitors and maintenance and service personnel shall be escorted at all times. Documentation of individuals accessing these areas, dates, and time of entry and purpose of entry must be maintained.

(2) Laboratories shall use chain of custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results, during storage, and continuing until final disposition of specimens. The date and purpose shall be documented on an appropriate chain of custody form each time a specimen is handled or transferred, and every individual in the chain shall be identified. Accordingly, authorized technicians shall be responsible for each urine specimen or aliquot in their possession and shall sign and complete chain of custody forms for those specimens or aliquots as they are received.

(b) *Receiving.* (1) When a shipment of specimens is received, laboratory personnel shall inspect each package for evidence of possible tampering and compare information on specimen bottles within each package to the information on the accompanying chain of custody forms. Any direct evidence of tampering or discrepancies in the information on specimen bottles and the employer's chain of custody forms attached to the shipment shall be immediately reported to the employer and shall be noted on the laboratory's chain of custody form which shall accompany the specimens while they are in the laboratory's possession.

(2) Specimen bottles will normally be retained within the laboratory's accession area until all analyses have been completed. Aliquots and the laboratory's chain of custody forms shall be used by laboratory personnel for conducting initial and confirmatory tests.

(c) *Short-term refrigerated storage.* Specimens that do not receive an initial

test within 7 days of arrival at the laboratory shall be placed in secure refrigeration units. Temperatures shall not exceed 6°C. Emergency power equipment shall be available in case of prolonged power failure.

(d) *Specimen processing.* Laboratory facilities for urine drug testing will normally process specimens by grouping them into batches. The number of specimens in each batch may vary significantly depending on the size of the laboratory and its workload. When conducting either initial or confirmatory tests, every batch shall contain an appropriate number of standards for calibrating the instrumentation and a minimum of 10 percent controls. Both quality control and blind performance test samples shall appear as ordinary samples to laboratory analysts.

(e) *Initial test.* (1) The initial test shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The following initial cutoff levels shall be used when screening specimens to determine whether they are negative for these five drugs or classes of drugs:

	Initial test Level (ng/ml)
Marijuana metabolites	100
Cocaine metabolites	300
Opiate metabolites	* 300
Phencyclidine	25
Amphetamines	1,000

* 25ng/ml if immunoassay specific for free morphine.

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. Initial test methods and testing levels for other drugs shall be submitted in writing by the employer for the written approval of the DOT Agency under that agency's regulations.

(f) *Confirmatory test.* (1) All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cutoff values listed in this paragraph for each drug. All confirmations shall be by quantitative analysis. Concentrations which exceed the linear region of the standard curve shall be documented in the laboratory record as "greater than highest standard curve value."

	Confirmatory test level (ng/ml)
Marijuana metabolite [1]	15
Cocaine metabolite [2]	150
Opiates:	
Morphine	300
Codeine	300
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2] Benzoylecgonine.

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. Confirmatory test methods and testing levels for other drugs shall be submitted in writing by the employer for the written approval of the DOT agency as provided in that agency's regulations.

(g) *Reporting results.* (1) The laboratory shall report test results to the employer's Medical Review Officer within an average of 5 working days after receipt of the specimen by the laboratory. Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by the responsible individual. The report shall identify the drugs/metabolites tested for, whether positive or negative, and the cutoff for each, the specimen number assigned by the employer, and the drug testing laboratory specimen identification number (accession number). The results (positive and negative) for all specimens submitted at the same time to the laboratory shall be reported back to the Medical Review Officer at the same time.

(2) The laboratory *shall report as negative* all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive shall be reported positive for a specific drug.

(3) The Medical Review Officer may request from the laboratory and the laboratory shall provide quantitation of test results. The Medical Review Officer may not disclose quantitation of test results to the employer but shall report only whether the test was positive or negative.

(4) The laboratory may transmit results to the Medical Review Officer by various electronic means (for example, teleprinters, facsimile, or computer) in a manner designed to ensure confidentiality of the information. Results may not be provided verbally by telephone. The laboratory and employer must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.

(5) The laboratory shall send only to the Medical Review Officer the original or a certified true copy of the urine custody and control form (part 1), which shall be signed (after the required certification block) by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports, and attached to which shall be a copy of the test report.

(6) The laboratory shall provide to the employer official responsible for coordination of the drug-free workplace program a monthly statistical summary of urinalysis testing of the employer's employees and shall not include in the summary any personal identifying information. Initial and confirmation data shall be included from test results reported within that month. Normally this summary shall be forwarded by registered or certified mail not more than 14 calendar days after the end of the month covered by the summary. The summary shall contain the following information:

(i) *Initial testing:*

(A) Number of specimens received;

(B) Number of specimens reported out; and

(C) Number of specimens screened positive for:

Marijuana metabolites
Cocaine metabolites
Opiate metabolites
Phencyclidine
Amphetamines

(ii) *Confirmatory testing:*

(A) Number of specimens received for confirmation;

(B) Number of specimens confirmed positive for:

Marijuana metabolite
Cocaine metabolite
Morphine, codeine
Phencyclidine
Amphetamine
Methamphetamine

(7) The laboratory shall make available copies of all analytical results for employer drug testing programs when requested by DOT or any DOT agency with regulatory authority over the employer.

(8) Unless otherwise instructed by the employer in writing, all records pertaining to a given urine specimen shall be retained by the drug testing laboratory for a minimum of 2 years.

(h) *Long-term storage.* Long-term frozen storage (−20° C or less) ensures that positive urine specimens will be available for any necessary retest during administrative or disciplinary proceedings. Drug testing laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive. Within this 1-year period an employer (or other person designated in a DOT agency regulation) may request the laboratory to retain the specimen for an additional period of time, but if no such request is received the laboratory may discard the specimen after the end of 1 year, except that the laboratory shall be required to maintain any specimens under legal challenge for an indefinite period.

(i) *Retesting specimens.* Because some analytes deteriorate or are lost during freezing and/or storage, quantitation for a retest is not subject to a specific cutoff requirement but must provide data sufficient to confirm the presence of the drug or metabolite.

(j) *Subcontracting.* Drug testing laboratories shall not subcontract and shall perform all work with their own personnel and equipment. The laboratory must be capable of performing testing for the five classes of drugs (marijuana, cocaine, opiates, phencyclidine, and amphetamines) using the initial immunoassay and confirmatory GC/MS methods specified in this part procedures. This paragraph does not prohibit subcontracting of laboratory analysis if specimens are sent directly from the collection site to the subcontractor, the subcontractor is a laboratory certified by DHHS as required in this part, the subcontractor performs all analysis and provides storage required under this part, the subcontractor is responsible to the employer for compliance with this part and applicable DOT agency regulations as if it were the prime contractor, and other relevant provisions of this part are observed.

(k) *Laboratory facilities.* (1) Laboratory facilities shall comply with applicable provisions of any State licensure requirements.

(2) Laboratories certified in accordance with DHHS Mandatory Guidelines for Federal Workplace Drug Testing Programs must have the capability, at the same laboratory premises, of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

(l) *Inspections.* The Secretary, a DOT agency, any employer utilizing the laboratory, DHHS or any organization performing laboratory certification on behalf of DHHS reserve the right to inspect the laboratory at any time. Employer contracts with laboratories for drug testing, as well as contracts for collection site services, shall permit the employer and the DOT agency of jurisdiction (directly or through an agency) to conduct unannounced inspections.

(m) *Documentation.* The drug testing laboratories shall maintain and make available for at least 2 years documentation of all aspects of the testing process. This 2-year period may be extended upon written notification by a DOT agency or by any employer for which laboratory services are being provided. The required documentation shall include personnel files on all individuals authorized to have access to specimens; chain of custody documents; quality assurance/quality control records; procedure manuals; all test data (including calibration curves and any calculations used in determining test results); reports; performance records on performance testing; performance on certification inspections; and hard copies of computer-generated data. The laboratory shall be required to maintain documents for any specimen under legal challenge for an indefinite period.

(n) *Additional requirements for certified laboratories.*—(1) *Procedure manual.* Each laboratory shall have a procedure manual which includes the principles of each test, preparation of reagents, standards and controls, calibration procedures, derivation of results, linearity of methods, sensitivity of the methods, cutoff values, mechanisms for reporting results, controls, criteria for unacceptable specimens and results, remedial actions to be taken when the test systems are outside of acceptable limits, reagents and expiration dates, and references. Copies of all procedures and dates on which they are in effect shall be maintained as part of the manual.

(2) *Standards and controls.* Laboratory standards shall be prepared with pure drug standards which are properly labeled as to content and concentration. The standards shall be labeled with the following dates: when received; when prepared or opened; when placed in service; and expiration date.

(3) *Instruments and equipment.* (i) Volumetric pipettes and measuring devices shall be certified for accuracy or be checked by gravimetric, colorimetric, or other verification procedure. Automatic pipettes and dilutors shall be checked for accuracy and reproducibility before being placed in service and checked periodically thereafter.

(ii) There shall be written procedures for instrument set-up and normal operation, a schedule for checking critical operating characteristics for all instruments, tolerance limits for acceptable function checks and instructions for major trouble shooting and repair. Records shall be available on preventive maintenance.

(4) *Remedial actions.* There shall be written procedures for the actions to be taken when systems are out of acceptable limits or errors are detected. There shall be documentation that these procedures are followed and that all necessary corrective actions are taken. There shall also be in place systems to verify all stages of testing and reporting and documentation that these procedures are followed.

(5) *Personnel available to testify at proceedings.* A laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against an employee when that proceeding is based on positive urinalysis results reported by the laboratory.

§ 40.31 Quality assurance and quality control.

(a) *General.* Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, and validation of analytical procedures. Quality assurance procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs.

(b) Laboratory quality control requirements for initial tests. Each analytical run of specimens to be screened shall include:

(1) Urine specimens certified to contain no drug;

(2) Urine specimens fortified with known standards; and

(3) Positive controls with the drug or metabolite at or near the threshold (cutoff).

In addition, with each batch of samples a sufficient number of standards shall be included to ensure and document the linearity of the assay method over time in the concentration area of the cutoff. After acceptable values are obtained for the known standards, those values will be used to calculate sample data. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall be documented. A minimum of 10 percent of all test samples shall be quality control specimens. Laboratory

quality control samples, prepared from spiked urine samples of determined concentration shall be included in the run and should appear as normal samples to laboratory analysts. One percent of each run, with a minimum of at least one sample, shall be the laboratory's own quality control samples.

(c) Laboratory quality control requirements for confirmation tests. Each analytical run of specimens to be confirmed shall include:

(1) Urine specimens certified to contain no drug;

(2) Urine specimens fortified with known standards; and

(3) Positive controls with the drug or metabolite at or near the threshold (cutoff).

The linearity and precision of the method shall be periodically documented. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall also be documented.

(d) Employer blind performance test procedures. (1) Employers shall purchase drug testing services only from laboratories certified by DHHS or a DHHS-recognized certification program in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs. Laboratory participation is encouraged in other performance testing surveys by which the laboratory's performance is compared with peers and reference laboratories.

(2) (i) During the initial 90-day period of any new drug testing program, each employer shall submit blind performance test specimens to each laboratory it contracts with in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 10 percent of all samples (to a maximum of 250) submitted per quarter.

(ii) These blind performance testing requirements shall not apply to an employer that submits fewer than 1,000 employee specimens per year for analysis under one or more DOT agency regulations requiring compliance with this part, if such employer utilizes a laboratory that is currently subject to blind performance testing under this part or the DHHS Mandatory Guidelines for Federal Workplace Drug Testing Programs by a Federal agency or by another transportation employer required by this section to perform such blind performance testing for the substances for which the specimen is to be tested

(3) Approximately 80 percent of the blind performance test samples shall be blank (i.e., certified to contain no drug) and the remaining samples shall be positive for one or more drugs per sample in a distribution such that all the drugs to be tested are included in approximately equal frequencies of challenge. The positive samples shall be spiked only with those drugs for which the employer is testing. This paragraph shall not be construed to prohibited spiking of other (potentially interfering) compounds, as technically appropriate, in order to verify the specificity of a particular assay.

(4) The DOT agency concerned shall investigate, or shall refer to DHHS for investigation, any unsatisfactory performance testing result and, based on this investigation, the laboratory shall take action to correct the cause of the unsatisfactory performance test result. A record shall be made of the investigative findings and the corrective action taken by the laboratory, and that record shall be dated and signed by the individuals responsible for the day-to-day management and operation of the drug testing laboratory. Then the DOT agency shall send the document to the employer as a report of the unsatisfactory performance testing incident. The DOT agency shall ensure notification of the finding to DHHS.

(5) Should a false positive error occur on a blind performance test specimen and the error is determined to be an administrative error (clerical, sample mixup, etc.), the employer shall promptly notify the DOT agency concerned. The DOT agency and the employer shall require the laboratory to take corrective action to minimize the occurrence of the particular error in the future; and, if there is reason to believe the error could have been systematic, the DOT agency may also require review and reanalysis of previously run specimens.

(6) Should a false positive error occur on a blind performance test specimen and the error is determined to be a technical or methodological error, the employer shall instruct the laboratory to submit all quality control data from the batch of specimens which included the false positive specimen to the DOT agency concerned. In addition, the laboratory shall retest all specimens analyzed positive for that drug or metabolite from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for day-to-day management of the laboratory's urine drug testing. The DOT agency concerned may require an on-site review of the laboratory which may be conducted unannounced during any hours of operation of the laboratory. Based on information provided by the DOT agency, DHHS has the option of revoking or suspending the laboratory's certification or recommending that no further action be taken if the case is one of less serious error in which corrective action has already been taken, thus reasonably assuring that the error will not occur again.

§ 40.33 Reporting and review of results.

(a) *Medical Review Officer shall review results.* An essential part of the drug testing program is the final review of results. A positive test result does not automatically identify an employee/applicant as having used drugs in violation of a DOT agency regulation. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer prior to the transmission of results to employer administrative officials.

(b) *Medical Review Officer—qualifications and responsibilities.* The Medical Review Officer shall be a licensed physician with knowledge of substance abuse disorders and may be an employee of the transportation employer or a private physician retained for this purpose. The role of the Medical Review Officer is to review and interpret positive test results obtained through the employer's testing program. In carrying out this responsibility, the Medical Review Officer shall examine alternate medical explanations for any positive test result. This action could include conducting a medical interview with the individual, review of the individual's medical history, or review of any other relevant biomedical factors. The Medical Review Officer shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication. The Medical Review Officer shall not, however, consider the results of urine samples that are not obtained or processed in accordance with this part.

(c) *Positive test result.* Prior to making a final decision to verify a positive test result, the Medical Review Officer shall give the individual an opportunity to discuss the test result with him or her. Following verification of a positive test result, the Medical Review Officer shall, as provided in the employer's policy, refer the case to the employer employee assistance or rehabilitation program, if

applicable, to the management official empowered to recommend or take administrative action (or the official's designated agent), or both.

(d) *Verification for opiates; review for prescription medication.* Before the Medical Review Officer verifies a confirmed positive result for opiates, he or she shall determine that there is clinical evidence—in addition to the urine test—of unauthorized use of any opium, opiate, or opium derivative (e.g., morphine/codeine). (This requirement does not apply if the employer's GC/MS confirmation testing for opiates confirms the presence of 6-monoacetylmorphine.)

(e) *Reanalysis authorized.* Should any question arise as to the accuracy or validity of a positive test result, only the Medical Review Officer is authorized to order a reanalysis of the original sample and such retests are authorized only at laboratories certified by DHHS. The Medical Review Officer shall authorize a reanalysis of the original sample on timely request of the employee, as provided in applicable DOT agency regulations.

(f) *Result consistent with legal drug use.* If the Medical Review Officer determines there is a legitimate medical explanation for the positive test result, the Medical Review Officer shall report the test result to the employer as negative.

(g) *Result scientifically insufficient.* Additionally, the Medical Review Officer, based on review of inspection reports, quality control data, multiple samples, and other pertinent results, may determine that the result is scientifically insufficient for further action and declare the test specimen negative. In this situation the Medical Review Officer may request reanalysis of the original sample before making this decision. (The Medical Review Officer may request that reanalysis be performed by the same laboratory or, as provided in § 40.33(e), that an aliquot of the original specimen be sent for reanalysis to an alternate laboratory which is certified in accordance with the DHHS Guidelines.) The laboratory shall assist in this review process as requested by the Medical Review Officer by making available the individual responsible for day-to-day management of the urine drug testing laboratory or other employee who is a forensic toxicologist or who has equivalent forensic experience in urine drug testing, to provide specific consultation as required by the employer. The employer shall include in its annual report to the DOT agency a summary of any negative findings based on scientific insufficiency but shall not include any personal identifying information in such reports.

§ 40.35 Protection of employee records.

Employer contracts with laboratories shall require that the laboratory maintain employee test records in confidence, as provided in DOT agency regulations.

§ 40.37 Individual access to test and laboratory certification results.

Any employee who is the subject of a drug test conducted under this part shall, upon written request, have access to any records relating to his or her drug test and any records relatings to the results of any relevant certification, review, or revocation-of-certification proceedings.

Subpart C—Certification of Laboratories Engaged in Urine Drug Testing

§ 40.41 Use of DHHS-certified laboratories.

Employers subject to this part shall use only laboratories certified under the DHHS Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 FR 11970, April 11, 1988, and subsequent amendments thereto. DHHS certification standards are set forth in Appendix A to this part for information and reference. Information concerning the current certification status of laboratories is available from: the Office of Workplace Initiatives, National Institute on Drug Abuse, 5600 Fishers Lane, Rockville, Maryland 20857.

Appendix A to Part 40—DHHS Laboratory Certification Standards

Note: Reproduced below is subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs issued by DHHS. Cross-references are to sections of those DHHS Guidelines. Equivalent provisions in this part may be determined by reference to the following table:

	Part 40
DHHS Guidelines:	
Section 1.1	§ 40.1
Section 1.2	§ 40.2
Section 2.1	§ 40.21
Section 2.2	§ 40.25
Section 2.3	§ 40.27
Section 2.4	§ 40.29
Section 2.5	§ 40.31
Section 2.6	
Section 2.7	§ 40.33
Section 2.8	§ 40.35
Section 2.9	§ 40.37

Subpart C—Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies

Section 3.1 Introduction.

Urine drug testing is a critical component of efforts to combat drug abuse in our society. Many laboratories are familiar with good laboratory practices but may be unfamiliar with the special procedures required when drug test results are used in the employment context. Accordingly, the following are minimum standards to certify laboratories engaged in urine drug testing for Federal agencies. Certification, even at the highest level, does not guarantee accuracy of each result reported by a laboratory conducting urine drug testing for Federal agencies. Therefore, results from laboratories certified under these Guidelines must be interpreted with a complete understanding of the total collection, analysis, and reporting process before a final conclusion is made.

Section 3.2 Goals and Objectives of Certification.

(a) *Uses of Urine Drug Testing.* Urine drug testing is an important tool to identify drug users in a variety of settings. In the proper context, urine drug testing can be used to deter drug abuse in general. To be a useful tool, the testing procedure must be capable of detecting drugs or their metabolites at concentrations indicated is section 2.4 (e) and (f).

(b) *Need to Set Standards; Inspections.* Reliable discrimination between the presence, or absence, of specific drugs or their metabolites is critical, not only to achieve the goals of the testing program but to protect the rights of the Federal employees being tested. Thus, standards have been set which laboratories engaged in Federal employee urine drug testing must meet in order to achieve maximum accuracy of test results. These laboratories will be evaluated by the Secretary or the Secretary's designee as defined in section 1.2 in accordance with these Guidelines. The qualifying evaluation will involve three rounds of performance testing plus on-site inspection. Maintenace of certification requires participation in an every-other-month performance testing program plus periodic, on-site inspections. One inspection following successful completion of a performance testing regimen is required for initial certification. This must be followed by a second inspection within 3 months, after which biannual inspections will be required to maintain certification.

(c) *Urine Drug Testing Applies Analytical Forensic Toxicology.* The possible impact of a positive test result on an individual's livelihood or rights, together with the possibility of a legal challenge of the result, sets this type of test apart from must clinical laboratory testing. In fact, urine drug testing should be considered a special application of analytical forensic toxicology. That is, in addition to the application of appropriate analytical methodology, the specimen most be treated as evidence, and all aspects of the testing procedure must be documented and available for possible court testimony. Laboratories engaged in urine drug testing for Federal agencies will require the services and

advice of a qualified forensic toxicologist, or individual with equivalent qualifications (both training and experience) to address the specific needs of the Federal drug testing program, including the demands of chain of custody of specimens, security, proper documentation of all records, storage of positive specimens for later or independent testing, presentation of evidence in court, and expert witness testimony.

Section 3.3 General Certification Requirements.

A laboratory must meet all the pertinent provisions of these Guidelines in order to qualify for certification under these standards.

Section 3.4 Capability to Test for Five Classes of Drugs.

To be certified, a laboratory must be capable of testing for at least the following five classes of drugs: marijuana, cocaine, opiates, amphetamines, and phencyclidine, using the initial immunoassay and quantitative confirmatory GC/MS methods specified in these Guidelines. The certification program will be limited to the five classes of drugs (section 2.1(a) (1) and (2)) and the methods (section 2.4 (e) and (f)) specified in these Guidelines. The laboratory will be surveyed and performance tested only for these methods and drugs. Certification of a laboratory indicates that any test result reported by the laboratory for the Federal Government meets the standards in these Guidelines for the five classes of using the methods specified. Certified laboratories must clearly inform non-Federal clients when procedures followed for those clients conform to the standards specified in these Guidelines.

Section 3.5 Initial and Confirmatory Capability at Same Site.

Certified laboratories shall have the capability, at the same laboratory site, of performing both initial immunoassays and confirmatory GC/MS tests (section 2.4(e) and (f)) for marijuana, cocaine, opiates, amphetamines, and phencyclidine and for any other drug or metabolite for which agency drug testing is authorized (section 2.1(a)(1) and (2)). All positive initial test results shall be confirmed prior to reporting them.

Section 3.6 Personnel.

Laboratory personnel shall meet the requirements specified in section 2.3 of these Guidelines. These Guidelines establish the exclusive standards for qualifying or certifying those laboratory personnel involved in urinalysis testing whose functions are prescribed by these Guidelines. A certification of a laboratory under these Guidelines shall be a determination that these qualification requirements have been met.

Section 3.7 Quality Assurance and Quality Control.

Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process, including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, and validation of analytical procedures. Quality control procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs as specified in section 2.5 of these Guidelines.

Section 3.8 Security and Chain of Custody.

Laboratories shall meet the security and chain of custody requirements provided in section 2.4(a).

Section 3.9 One-Year Storage for Confirmed Positives.

All confirmed positive specimens shall be retained in accordance with the provisions of section 2.4(h) of these Guideline.

Section 3.10 Documentation.

The Laboratory shall maintain and make available for at least 2 years documentation in accordance with the specifications in section 2.4(m).

Section 3.11 Reports.

The laboratory shall report test results in accordance with the specifications in section 2.4(g).

Section 3.12 Certification.

(a) *General.* The Secretary may certify any laboratory that meets the standards in these Guidelines to conduct urine drug testing. In addition, the Secretary may consider to be certified any laboratory that is certified by a DHHS-recognized certification program in accordance with these Guidelines.

(b) *Criteria.* In determining whether to certify a laboratory or to accept the certification of a DHHS-recognized certification program in accordance with these Guidelines, the Secretary shall consider the following criteria:

(1) The adequacy of the laboratory facilities;

(2) The expertise and experience of the laboratory personnel;

(3) The excellence of the laboratory's quality assurance/quality control program;

(4) The performance of the laboratory on any performance tests;

(5) The laboratory's compliance with standards as reflected in any laboratory inspections; and

(6) Any other factors affecting the reliability and accuracy of drug tests and reporting done by the laboratory.

Section 3.13 Revocation.

(a) *General.* The Secretary shall revoke certification of any laboratory certified under these provisions or accept revocation by a DHHS-recognized certification program in accordance with these Guidelines if the Secretary determines that revocation is necessary to ensure the full reliability and accuracy of drug tests and the accurate reporting of test results.

(b) *Factors to Consider.* The Secretary shall consider the following factors in determining whether revocation is necessary:

(1) Unsatisfactory performance in analyzing and reporting the results of drug tests; for example, a false positive error in reporting the results of an employee's drug test;

(2) Unsatisfactory participation in performance evaluations or laboratory inspections;

(3) A material violation of a certification standard or a contract term or other condition imposed on the laboratory by a Federal agency using the laboratory's services;

(4) Conviction for any criminal offense committed as an incident to operation of the laboratory; or

(5) Any other cause which materially affects the ability of the laboratory to ensure the full reliability and accuracy of drug tests and the accurate reporting of results.

(c) *Period and Terms.* The period and terms of revocation shall be determined by the Secretary and shall depend upon the facts and circumstances of the revocation and the need to ensure accurate and reliable drug testing of Federal employees.

Section 3.14 Suspension.

(a) *Criteria.* Whenever the Secretary has reason to believe that revocation may be required and that immediate action is necessary in order to protect the interests of the United States and its employees, the Secretary may immediately suspend a laboratory's certification to conduct urine drug testing for Federal agencies. The Secretary may also accept suspension of certification by a DHHS-recognized certification program in accordance with these Guidelines.

(b) *Period and Terms.* The period and terms of suspension shall be determined by the Secretary and shall depend upon the facts and circumstances of the suspension and the need to ensure accurate and reliable drug testing of Federal employees.

Section 3.15 Notice; Opportunity for Review.

(a) *Written Notice.* When a laboratory is suspended or the Secretary seeks to revoke certification, the Secretary shall immediately serve the laboratory with written notice of the suspension or proposed revocation by personal service or registered or certified mail, return receipt requested. This notice shall state the following:

(1) The reasons for the suspension or proposed revocation;

(2) The terms of the suspension or proposed revocation; and

(3) The period of suspension or proposed revocation.

(b) *Opportunity for Informal Review.* The written notice shall state that the laboratory will be afforded an opportunity for an informal review of the suspension or proposed revocation if it so requests in writing within 30 days of the date of mailing or service of the notice. The review shall be by a person or persons designated by the Secretary and shall be based on written submissions by the laboratory and the Department of Health and Human Services and, at the Secretary's discretion, may include an opportunity for an oral presentation. Formal rules of evidence and procedures applicable to proceedings in a court of law shall not apply. The decision of the reviewing official shall be final.

(c) *Effective Date.* A suspension shall be effective immediately. A proposed revocation shall be effective 30 days after written notice is given or, if review is requested, upon the reviewing official's decision to uphold the proposed revocation. If the reviewing official decides not to uphold the suspension or proposed revocation, the suspension shall terminate immediately and any proposed revocation shall not take effect.

(d) *DHHS-Recognized Certification Program.* The Secretary's responsibility under this section may be carried out by a DHHS-recognized certification program in accordance with these Guidelines.

Section 3.16 Recertification.

Following the termination or expiration of any suspension or revocation, a laboratory may apply for recertification. Upon the submission of evidence satisfactory to the Secretary that the laboratory is in compliance with these Guidelines or any DHHS-recognized certification program in accordance with these Guidelines, and any other conditions imposed as part of the suspension or revocation, the Secretary may recertify the laboratory or accept the recertification of the laboratory by a DHHS-recognized certification program.

Section 3.17 Performance Test Requirement for Certification

(a) *An Initial and Continuing Requirement.* The performance testing program is a part of the initial evaluation of a laboratory seeking certification (both performance testing and laboratory inspection are required) and of the continuing assessment of laboratory performance necessary to maintain this certification.

(b) *Three Initial Cycles Required.* Successful participation in three cycles of testing shall be required before a laboratory is eligible to be considered for inspection and certification. These initial three cycles (and any required for recertification) can be compressed into a 3-month period (one per month).

(c) *Six Challenges Per Year.* After certification, laboratories shall be challenged every other month with one set of at least 10 specimens—a total of six cycles per year.

(d) *Laboratory Procedures Identical for Performance Test and Routine Employee Specimens.* All procedures associated with the handling and testing of the performance test specimens by the laboratory shall to the greatest extent possible be carried out in a manner identical to that applied to routine laboratory specimens, unless otherwise specified.

(e) *Blind Performance Test.* Any certified laboratory shall be subject to blind performance testing (see section 2.5(d)). Performance on blind test specimens shall be at the same level as for the open or non-blind performance testing.

(f) *Reporting—Open Performance Test.* The laboratory shall report results of open performance tests to the certifying organization in the same manner as specified in section 2.4(g)(2) for routine laboratory specimens.

Section 3.18 Performance Test Specimen Composition.

(a) *Description of the Drugs.* Performance test specimens shall contain those drugs and metabolites which each certified laboratory must be prepared to assay in concentration ranges that allow detection of the analyte by commonly used immunoassay screening techniques. These levels are generally in the range of concentrations which might be expected in the urine of recent drug users. For some drug analytes, the specimen composition will consist of the parent drug as well as major metabolites. In some cases, more than one drug class may be included in one specimen container, but generally no more than two drugs will be present in any one specimen in order to imitate the type of specimen which a laboratory normally encounters. For any particular performance testing cycle, the actual composition of kits going to different laboratories will vary but, within any annual period, all laboratories participating will have analyzed the same total set of specimens.

(b) *Concentrations.* Performance test specimens shall be spiked with the drug classes and their metabolites which are required for certification: marijuana, cocaine, opiates, amphetamines, and phencyclidine, with concentration levels set at least 20 percent above the cutoff limit for either the initial assay or the confirmatory test, depending on which is to be evaluated. Some performance test specimens may be identified for GC/MS assay only. Blanks shall contain less than 2 ng/ml of any of the target drugs. These concentration and drug types may be changed periodically in response to factors such as changes in detection technology and patterns of drug use.

Section 3.19 Evaluation of Performance Testing.

(a) *Initial Certification.* (1) An applicant laboratory shall not report any false postive result during performance testing for initial certification. Any false positive will automatically disqualify a laboratory from further consideration.

(2) An applicant laboratory shall maintain an overall grade level of 90 percent for the three cycles of performance testing required for initial certification, i.e., it must correctly identify and confirm 90 percent of the total drug challenges for each shipment. Any laboratory which achieves a score on any one cycle of the initial certification such that it can no longer achieve a total grade of 90 percent over the three cycles will be immediately disqualified from further consideration.

(3) An applicant laboratory shall obtain quantitative values for at least 80 percent of the total challenges which are ±20 percent or ±2 standard deviations of the calculated reference group mean (whichever is larger). Failure to achieve 80 percent will result in disqualification.

(4) An applicant laboratory shall not obtain any quantitative values that differ by more than 50 percent from the calculated reference group mean. Any quantitative values that differ by more than 50 percent will result in disqualification.

(5) For any individual drug, an applicant laboratory shall successfully detect and quantitate in accordance with paragraphs (a)(2), (a)(3), and (a)(4) of this section at least 50 percent of the total drug challenges. Failure to successfully quantitate at least 50 percent of the challenges for any individual drug will result in disqualification.

b. *Ongoing Testing of Certified Laboratories. (1) False Positives and Procedures for Dealing with Them.* No false drug identifications are acceptable for any drugs for which a laboratory offers service. Under some circumstances a false positive test may result in suspension or revocation of certification. The most serious false positives are by drug class, such as reporting THC in a blank specimen or reporting cocaine in a specimen known to contain only opiates. Misidentifications within a classs (e.g., codeine for morphine) are also false positives which are unacceptable in an appropriately controlled laboratory, but they are clearly less serious errors than misidentification of a class. The following procedures shall be followed when dealing with a false positve:

(i) The agency detecting a false positive error shall immediately notify the laboratory and the Secretary of any such error.

(ii) The laboratory shall provide the Secretary with a written explanation of the reasons for the error within 5 working days. If required by paragraph (b)(1)(v) below, this explanation shall include the submission of all quality control data from the batch of specimens that included the false positive specimen.

(iii) The Secretary shall review the laboratory's explanation within 5 working days and decide what further action, if any, to take.

(iv) If the error is determined to be an administrative error (clerical, sample mixup, etc.), the Secretary may direct the laboratory to take corrective action to minimize the occurrence of the particular error, in the future and, if there is reason to believe the error could have been systematic, may require the laboratory to review and reanalyze previously run specimens.

(v) If the error is determined to be a technical or methodological error, the laboratory shall submit to the Secretary all quality control data from the batch of specimens which included the false positive specimen. In addition, the laboratory shall retest all specimens analyzed positive by the laboratory from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for the day-to-day management of the laboratory's urine drug testing. Depending on the type of error which caused the false positive, this retesting may be limited to one analyte or may include any drugs a laboratory certified under these Guidelines must be prepared to assay. The laboratory shall immediately notify the agency if any result on a retest sample must be corrected because the criteria for a positive are not satisfied. The Secretary may suspend or revoke the laboratory's certification for all drugs or for only the drug or drug class in which the error occurred.

However, if the class is one of a less serious error for which effective corrections have already been made, thus reasonably assuring that the error will not occur again, the Secretary may decide to take no further action.

(vi) During the time required to resolve the error, the laboratory shall remain certified but shall have a designation indicating that a false positive result is pending resolution. If the Secretary determines that the laboratory's certification must be suspended or revoked, the laboratory's official status will become "Suspended" or "Revoked" until the suspension or revocation is lifted or any recertification process is complete.

(2) *Requirement to Identify and Confirm 90 Percent of Total Drug Challenges.* In order to remain certified, laboratories must successfully complete six cycles of performance testing per year. Failure of a certified laboratory to maintain a grade of 90 percent on any required peformance test cycle, i.e., to identify 90 percent of the total drug challenges and to correctly confirm 90 percent of the total drug challenges, may result in suspension or revocation of certification.

(3) *Requirement to Quantitate 80 Percent of Total Drug Challenges at ±20 Percent or ±2 standard deviations.* Quantitative values obtained by a certified laboratory for at least 80 percent of the total drug challenges must be ±20 percent or ±2 standard deviations of the calculated reference group mean (whichever is larger).

(4) *Requirement to Quantitate within 50 Percent of Calculated Reference Group Mean.* No quantitative values obtained by a certified laboratory may differ by more than 50 percent from the calculated reference group mean.

(5) *Requirement to Successfully Detect and Quantitate 50 Percent of the Total Drug Challenges for Any Individual Drug.* For any individual drug, a certified laboratory must successfully detect and quantitate in accordance with paragraphs (b)(2), (b)(3), and (b)(4) of this section at least 50 percent of the total drug challenges.

(6) *Procedures When Requirements in Paragraphs (b)(2)—(b)(5) of this Section Are Not Met.* If a certified laboratory fails to maintain a grade of 90 percent per test cycle after initial certification as required by paragraph (b)(2) of this section or if it fails to successfully quantitate results as required by paragraphs (b)(3), and (b)(4), or (b)(5) of this section, the laboratory shall be immediately informed that its performance fell under the 90 percent level or that it failed to successfully quantitate test results and how it failed to successfully quantitate. The laboratory shall be allowed 5 working days in which to provide any explanation for its unsuccessful performance, including administrative error or methodological error, and evidence that the source of the poor performance has been corrected. The Secretary may revoke or suspend the laboratory's certification or take no further action, depending on the seriousness of the errors and whether there is evidence that the source of the poor performance has been corrected and that current performance meets the requirements for a certified laboratory under these Guidelines. The Secretary may require that additional performance tests be carried out to determine whether the source of the poor performance has been removed. If the Secretary determines to suspend or revoke the laboratory's certification, the laboratory's official status will become "Suspended" or "Revoked" until the suspension or revocation is lifted or until any recertification process is complete.

(c) *80 Percent of Participating Laboratories Must Detect Drug.* A laboratory's performance shall be evaluated for all samples for which drugs were spiked at concentrations above the specified performance test level unless the overall response from participating laboratories indicates that less than 80 percent of them were able to detect a drug.

(d) *Participation Required.* Failure to participate in a performance test or to participate satisfactorily may result in suspension or revocation of certification.

Section 3.20 Inspections.

Prior to laboratory certification under these Guidelines and at least twice a year after certification, a team of three qualified inspectors, at least two of whom have been trained as laboratory inspectors, shall conduct an on-site inspection of laboratory premises. Inspections shall document the overall quality of the laboratory setting for the purposes of certification to conduct urine drug testing. Inspection reports may also contain recommendations to the laboratory to correct deficiencies noted during the inspection.

Section 3.21 Results of Inadequate Performance.

Failure of a laboratory to comply with any aspect of these Guidelines may lead to revocation or suspension of certification as provided in sections 3.13 and 3.14 of these guidelines.

Appendix B to Part 40—Urine Custody and Control Form

The urine custody and control form shall meet the requirements of § 40.23. The following is a sample form that meets those requirements:

BILLING CODE 4910-62-M

URINE CUSTODY AND CONTROL FORM

STEP 1 -- TO BE COMPLETED BY EMPLOYEE/APPLICANT

Employee I.D. #_____ [PRE-PRINTED SPECIMEN I.D. #] Employer Name: _____
Social Security No.
or Employee No.

STEP 2 -- TO BE COMPLETED BY EMPLOYER REPRESENTATIVE/OR COLLECTOR Reason for Test (Check One)

☐ Pre-employment ☐ Post Accident ☐ Random ☐ Periodic Medical

☐ Other(Specify)_____.

STEP 3 -- COLLECTOR MUST NOTE THAT TEMPERATURE OF SPECIMEN HAS BEEN READ. RECORD IF NOT WITHIN THE RANGE OF 32.5 - 37.7C/ 90.5 - 99.8 F:_____ ☐ WITHIN RANGE

STEP 4 -- TO BE INITIATED BY THE PERSON COLLECTING SPECIMEN AND COMPLETED AS NECESSARY THEREAFTER:

Purpose of Change	Released By Signature/Print Name	Received By Signature/Print Name	Date
Provide Specimen for Testing	DONOR		

STEP 5 -- (SEE BELOW -- TO BE COMPLETED BY EMPLOYEE)

STEP 6 -- BEFORE COMPLETING THIS STEP HAVE EMPLOYEE COMPLETE STEP 5 BELOW. To be completed by person collecting specimen:

Collector's Name_____ Date of Collection_____
Print (First, M.I., Last)

Collection Site_____ ( )_____
Facility Name and Location Telephone

Remarks concerning collection: _____

I certify that the specimen identified on this form is the specimen presented to me by the employee providing the certification below, that I have certified that it bears the same identification number as that set forth above, and that it has been collected, labeled and sealed as required by the instructions provided.

_____
Signature of collector

STEP 7 -- TO BE COMPLETED BY THE LABORATORY: Accession No. _____

I certify that the specimen identified by this accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements, and that the results attached are for that specimen.

_____ _____ _____
Printed Name Signature Date

Copy No. 1: Original

URINE CUSTODY AND CONTROL FORM

STEP 1 -- TO BE COMPLETED BY EMPLOYEE/APPLICANT

Employee I.D. #_____ [PRE-PRINTED SPECIMEN I.D. #] Employer Name: _____
Social Security No.
or Employee No.

STEP 2 -- TO BE COMPLETED BY EMPLOYER REPRESENTATIVE/OR COLLECTOR Reason for Test (Check One)

☐ Pre-employment ☐ Post Accident ☐ Random ☐ Periodic Medical

☐ Other(Specify)_____.

STEP 3 -- COLLECTOR MUST NOTE THAT TEMPERATURE OF SPECIMEN HAS BEEN READ. RECORD IF NOT WITHIN THE RANGE OF 32.5 - 37.7C/ 90.5 - 99.8 F:_____ ☐ WITHIN RANGE

STEP 4 -- TO BE INITIATED BY THE PERSON COLLECTING SPECIMEN AND COMPLETED AS NECESSARY THEREAFTER:

Purpose of Change	Released By Signature/Print Name	Received By Signature/Print Name	Date
Provide Specimen for Testing	DONOR		

STEP 5 -- (SEE BELOW -- TO BE COMPLETED BY EMPLOYEE)

STEP 6 -- BEFORE COMPLETING THIS STEP HAVE EMPLOYEE COMPLETE STEP 5 BELOW. To be completed by person collecting specimen:

Collector's Name_____ Date of Collection_____
Print (First, M.I., Last)

Collection Site_____ ( )_____
Facility Name and Location Telephone

Remarks concerning collection: _____

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_____
Signature of collector

STEP 7 -- TO BE COMPLETED BY THE LABORATORY: Accession No. _____

I certify that the specimen identified by this accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements, and that the results attached are for that specimen.

_____ _____ _____
Printed Name Signature Date

STEP 8 -- TO BE COMPLETED BY EMPLOYEE OR APPLICANT PROVIDING SPECIMEN:

Name _____ Duty Location _____
Last/First/M.I.

Job Title: _____ Date of Birth _____

If you wish to have prescription or over-the-counter medications that you may have taken or been administered within the past 30 days considered as your test results are reviewed, you may list them here or provide that information separately to your employers' Medical Review Officer:

_____

_____

I certify that the urine specimen identified on this form is my own; that it is fresh and has not been adulterated in any manner; and that the identification information provided on this form and on the collection bottle is correct. I consent to the submission of this specimen to the certified laboratory designated by my employer, to the analysis of the specimen for controlled substances as provided by Federal requirements, and to the release of test results from that analysis to the Medical Review Officer designated by my employer.

_____ _____
Signature Date

Copy No. 2: Medical Review Officer

URINE CUSTODY AND CONTROL FORM

STEP 1 -- TO BE COMPLETED BY EMPLOYEE/APPLICANT

Employee I.D. #_____ [PRE-PRINTED SPECIMEN I.D. #] Employer Name: _____
Social Security No. or Employee No.

STEP 2 -- TO BE COMPLETED BY EMPLOYER REPRESENTATIVE/OR COLLECTOR Reason for Test (Check One)

☐ Pre-employment ☐ Post Accident ☐ Random ☐ Periodic Medical

☐ Other(Specify)_____.

STEP 3 -- COLLECTOR MUST NOTE THAT TEMPERATURE OF SPECIMEN HAS BEEN READ. RECORD IF NOT WITHIN THE RANGE OF 32.5 - 37.7C/ 90.5 - 99.8 F:_____ ☐ WITHIN RANGE

STEP 4 -- TO BE INITIATED BY THE PERSON COLLECTING SPECIMEN AND COMPLETED AS NECESSARY THEREAFTER:

Purpose of Change	Released By Signature/Print Name	Received By Signature/Print Name	Date
Provide Specimen for Testing	DONOR		

STEP 5 -- (SEE BELOW -- TO BE COMPLETED BY EMPLOYEE)

STEP 6 -- BEFORE COMPLETING THIS STEP HAVE EMPLOYEE COMPLETE STEP 5 BELOW. To be completed by person collecting specimen:

Collector's Name_____ Date of Collection_____
Print (First, M.I., Last)

Collection Site_____ ( )_____
Facility Name and Location Telephone

Remarks concerning collection: _____

I certify that the specimen identified on this form is the specimen presented to me by the employee providing the certification below, that I have certified that it bears the same identification number as that set forth above, and that it has been collected, labeled and sealed as required by the instructions provided.

_____
Signature of collector

STEP 7 -- TO BE COMPLETED BY THE LABORATORY: Accession No. _____

I certify that the specimen identified by this accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements, and that the results attached are for that specimen.

_____ _____ _____
Printed Name Signature Date

STEP 5 -- TO BE COMPLETED BY EMPLOYEE OR APPLICANT PROVIDING SPECIMEN:

Name _____ Duty Location _____
Last/First/M.I.

Job Title: _____ Date of Birth _____

If you wish to have prescription or over-the-counter medications that you may have taken or been administered within the past 30 days considered as your test results are reviewed, you may list them here or provide that information separately to your employers' Medical Review Officer:

_____

_____

I certify that the urine specimen identified on this form is my own; that it is fresh and has not been adulterated in any manner; and that the identification information provided on this form and on the collection bottle is correct. I consent to the submission of this specimen to the certified laboratory designated by my employer, to the analysis of the specimen for controlled substances as provided by Federal requirements, and to the release of test results from that analysis to the Medical Review Officer designated by my employer.

_____ _____
Signature Date

Copy No. 3: Employee

URINE CUSTODY AND CONTROL FORM

STEP 1 -- TO BE COMPLETED BY EMPLOYEE/APPLICANT

Employee I.D. #_____ [PRE-PRINTED SPECIMEN I.D. #] Employer Name: _____
Social Security No.
or Employee No.

STEP 2 -- TO BE COMPLETED BY EMPLOYER REPRESENTATIVE/OR COLLECTOR Reason for Test (Check One)

☐ Pre-employment ☐ Post Accident ☐ Random ☐ Periodic Medical

☐ Other(Specify)_____.

STEP 3 -- COLLECTOR MUST NOTE THAT TEMPERATURE OF SPECIMEN HAS BEEN READ. RECORD IF NOT WITHIN THE RANGE OF 32.5 - 37.7C/ 90.5 - 99.8 F:_____ ☐ WITHIN RANGE

STEP 4 -- TO BE INITIATED BY THE PERSON COLLECTING SPECIMEN AND COMPLETED AS NECESSARY THEREAFTER:

Purpose of Change	Released By Signature/Print Name	Received By Signature/Print Name	Date
Provide Specimen for Testing	DONOR		

STEP 5 -- (SEE BELOW -- TO BE COMPLETED BY EMPLOYEE)

STEP 6 -- BEFORE COMPLETING THIS STEP HAVE EMPLOYEE COMPLETE STEP 5 BELOW. To be completed by person collecting specimen:

Collector's Name_____ Date of Collection_____
Print (First, M.I., Last)

Collection Site_____ ( )_____
Facility Name and Location Telephone

Remarks concerning collection: _____

I certify that the specimen identified on this form is the specimen presented to me by the employee providing the certification below, that I have certified that it bears the same identification number as that set forth above, and that it has been collected, labeled and sealed as required by the instructions provided.

_____
Signature of collector

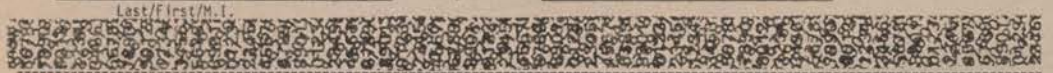
STEP 7 -- TO BE COMPLETED BY THE LABORATORY: Accession No. _____

I certify that the specimen identified by this accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements, and that the results attached are for that specimen.

_____ _____ _____
Printed Name Signature Date

STEP 5 -- TO BE COMPLETED BY EMPLOYEE OR APPLICANT PROVIDING SPECIMEN:

Name _____ Duty Location _____
Last/First/M.I.



I certify that the urine specimen identified on this form is my own; that it is fresh and has not been adulterated in any manner; and that the identification information provided on this form and on the collection bottle is correct. I consent to the submission of this specimen to the certified laboratory designated by my employer, to the analysis of the specimen for controlled substances as provided by Federal requirements, and to the release of test results from that analysis to the Medical Review Officer designated by my employer.

_____ _____
Signature Date

Copy No. 4: Collector

URINE CUSTODY AND CONTROL FORM

STEP 1 -- TO BE COMPLETED BY EMPLOYEE/APPLICANT

Employee I.D. #_____ [PRE-PRINTED SPECIMEN I.D. #] Employer Name: _____
Social Security No.
or Employee No.

STEP 2 -- TO BE COMPLETED BY EMPLOYER REPRESENTATIVE/OR COLLECTOR Reason for Test (Check One)

☐ Pre-employment ☐ Post Accident ☐ Random ☐ Periodic Medical

☐ Other(Specify)_____.

STEP 3 -- COLLECTOR MUST NOTE THAT TEMPERATURE OF SPECIMEN HAS BEEN READ. RECORD IF NOT WITHIN THE RANGE OF 32.5 - 37.7C/ 90.5 - 99.8 F:_____ ☐ WITHIN RANGE

STEP 4 -- TO BE INITIATED BY THE PERSON COLLECTING SPECIMEN AND COMPLETED AS NECESSARY THEREAFTER:

Purpose of Change	Released By Signature/Print Name	Received By Signature/Print Name	Date
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Collector's Name_____ Date of Collection_____
Print (First, M.I., Last)

Collection Site_____ ( )_____
Facility Name and Location Telephone

Remarks concerning collection: _____

I certify that the specimen identified on this form is the specimen presented to me by the employee providing the certification below, that I have certified that it bears the same identification number as that set forth above, and that it has been collected, labeled and sealed as required by the instructions provided.

_____
Signature of collector

STEP 7 -- TO BE COMPLETED BY THE LABORATORY: Accession No. _____

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_____ _____ _____
Printed Name Signature Date

STEP 8 -- TO BE COMPLETED BY EMPLOYEE OR APPLICANT PROVIDING SPECIMEN:

Name _____ Duty Location _____
Last/First/M.I.

Job Title: _____ Date of Birth _____

I certify that the urine specimen identified on this form is my own; that it is fresh and has not been adulterated in any manner; and that the identification information provided on this form and on the collection bottle is correct. I consent to the submission of this specimen to the certified laboratory designated by my employer, to the analysis of the specimen for controlled substances as provided by Federal requirements, and to the release of test results from that analysis to the Medical Review Officer designated by my employer.

_____ _____
Signature Date

Copy No. 5: Employer

[FR Doc. 88-26611 Filed 11-15-88; 3:48 pm]
BILLING CODE 4910-62-C

federal register

Monday
November 21, 1988

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Part 61 et al.
Anti-Drug Program for Personnel Engaged in Specified Aviation Activities; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

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

[Docket No. 25148; Amdt. Nos. 61-81, 63-25, 65-32, 121-201 and 135-28]

RIN 2120-AC33

Anti-Drug Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations to require domestic and supplemental air carriers, commercial operators of large aircraft, air taxi and commuter operators, certain commercial operators, certain contractors to these operators, and air traffic control facilities not operated by the FAA or the U.S. military to have an anti-drug program for employees who perform sensitive safety- or security-related functions. A special provision has been added to the rule that provides that the final rule does not apply to any person where compliance with the final rule would violate the domestic law or policy of another country. Testing under the rule will be conducted by an employer prior to employment, periodically, randomly, after an accident, based on reasonable cause, and after an employee returns to duty to perform a sensitive safety- or security-related function for an employer. The final rule also will require that an employer provide EAP education and training services to employees and supervisors. The rule is necessary to prohibit an employee from performing a sensitive safety- or security-related function for an employer while that employee has a prohibited drug in his or her system or if that employee has used drugs as evidenced by a drug test showing the presence of drugs or drug metabolites. The rule is intended to ensure a drug-free aviation workforce and to eliminate drug use and abuse in commercial aviation.

EFFECTIVE DATE: This final rule is effective on December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Dr. Robert S. Bartanowicz, Acting Deputy Director, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-9679.

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 amendment number identified in 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 procedure.

Background

On December 4, 1986, the Federal Aviation Administration (FAA) issued an advance notice of proposed rulemaking (ANPRM) (51 FR 44432; December 9, 1986) entitled "Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities." The ANPRM invited comment from the public on drug and alcohol abuse by personnel in the aviation industry and the options available to the FAA for regulatory or other action in the interest of aviation safety. The FAA received over 650 written comments in response to the issues raised in the ANPRM.

On March 3, 1988, the FAA issued a notice of proposed rulemaking (NPRM) (53 FR 8368; March 14, 1988) entitled "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities." The NPRM set forth an analysis of the comments received on the ANPRM and proposed regulations for public comment. The FAA received over 260 written comments on the proposals contained in the NPRM.

The FAA also held a series of public hearings on the regulations proposed in the NPRM. These hearings were held on June 2, 1988, in Washington, DC; June 7, 1988, in Denver, Colorado; and June 9, 1988, in San Francisco, California. Each of the hearings was recorded by a court reporter. The transcript of each hearing and any statements or other material, submitted to the hearing panel during the hearings, have been placed in the public docket. This material also has been reviewed in the development of the final rule.

Current Rules. The FAA's comprehensive anti-drug program is one action in a long history of actions to combat the use of drugs and alcohol in the aviation industry. The focus of the majority of these actions has been on commercial aviation personnel, particularly the cockpit and cabin crew. For example, pilots, flight attendants, flight engineers, and flight navigators may not act as a crewmember of a civil aircraft within eight hours after drinking an alcoholic beverage; while under the influence of alcohol; with 0.04 percent, or more, alcohol in their blood; or while using any drug that affects their faculties in any way contrary to safety. Also, crewmembers may be tested in the context of receiving medical care immediately after an accident. When there is a reasonable basis to suspect that one of these individuals has violated any of the above restrictions, these crewmembers must furnish, to the FAA, the results of any test taken within four hours of acting, or attempting to act, as a crewmember that indicates the presence of alcohol or any such drug in the person's system. Moreover, pilots, flight attendants, flight engineers, and flight navigators are required to submit to a test to indicate the percentage of alcohol in the blood when requested by a law enforcement officer who suspects that a crewmember may have violated a State or local law governing the operation of an aircraft while under the influence, or impaired by, drugs or alcohol.

The FAA may deny an application for a certificate or rating for up to one year, or may suspend or revoke an existing certificate or rating, in the case of any pilot, flight engineer, or flight navigator who has been convicted of violating a Federal or State law relating to drug trafficking or possession; who has violated the proscriptions described above; who has refused to furnish the results of any test that would indicate the presence of alcohol or drugs taken within four hours of acting, or attempting to act, as a crewmember; or who has refused to submit to an alcohol test requested by a law enforcement officer investigating violations of State or local laws. The FAA also may deny an application for a certificate or rating for up to one year, or may suspend or revoke an existing certificate or rating, in the case of any air traffic control tower operator, aircraft dispatcher, mechanic, repairman, or parachute rigger who has been convicted of a violation of a Federal or State law relating to drug trafficking or possession.

The Aviation Drug-Trafficking Control Act of 1984, which added language to sections 602 and 609 of the Federal Aviation Act of 1958, mandates that the FAA take certain actions regarding airmen involved in drug trafficking activities. The Administrator is required to revoke the airman certificate of any airman who has been convicted of violating any Federal or State law

relating to a controlled substance, other than simple possession, if an aircraft was used in, or was used to facilitate, the commission of the offense and the person served as an airman, or was onboard the aircraft, in connection with the commission of the offense. The Administrator has no discretion to review the conviction for the substantive offense. Under the 1984 legislation, the Administrator was prohibited from reissuing a certificate to that airman for up to five years but could reissue a certificate after an absolute minimum of one year, in certain extremely limited circumstances, if revocation was excessive and contrary to the public interest. As part of the Federal Aviation Administration Drug Enforcement Assistance Act of 1988, Congress amended sections 602 and 609 of the FAA Act, among other amendments to the Act, in October 1988. The statutory language now provides that the Administrator shall not issue an airman certificate to any person whose certificate has been revoked for aviation drug trafficking activities unless the airman is acquitted of the offense, a conviction upon which revocation is based is reversed on appeal, or the Administrator determines that issuance of an airman certificate will facilitate law enforcement efforts after a request from a Federal or State law enforcement official. The final rule requiring a comprehensive anti-drug program for employees in commercial aviation is consistent with these previous actions taken by the FAA.

The FAA's commitment to a drug-free workforce also applies to its own employees. The Department of Transportation began random drug testing of DOT employees in safety- and security-sensitive functions in September 1987. The Secretary's goal is to establish and maintain a drug-free workplace as intended by Executive Order 12564 and as directed by Presidential memorandum dated October 4, 1986. It is the opinion of the Department of Transportation that random drug testing is the most effective means of determining the presence of drugs or drug metabolites that may adversely affect an employee's performance of safety- or security-sensitive job functions. Pursuant to the Department's program, an employee of the Department will be removed from Federal service under several circumstances: refusal to enter or to successfully complete a drug rehabilitation or abatement program; repeat usage of drugs; refusal to provide a urine specimen for drug testing; adulteration or substitution of a urine specimen; on-duty use of illegal drugs; or a determination that a DOT employee has engaged in illegal drug trafficking.

In order to ensure that aviation safety is not compromised by a failure to detect drug users in the aviation industry, the FAA believes that it is appropriate and necessary to establish a comprehensive anti-drug program at this time.

Existing Industry Programs. As part of their comments to the ANPRM and the NPRM, many employers note that they have implemented drug testing programs or employee rehabilitation programs. For example, although their drug testing programs were not specifically described, Martin Aviation implemented a drug testing program in February 1987 and Suburban Airlines has required preemployment drug testing of flight crew applicants for over a year. Federal Express Corporation currently conducts preemployment testing of all applicants and "reasonable suspicion testing" of all employees.

Tramco, Inc. is a certificated repair station employing over 600 individuals and repairing over 100 aircraft per year. Tramco instituted a drug testing and counseling program "several years ago" and believes that the program yields substantial benefits to both employees and employers. Tramco tests all applicants for jobs and conducts tests based on probable cause. Tramco's tests based on probable cause are triggered by reports of employee drug use, employee attendance patterns that may suggest a drug problem, accidents, and observation by supervisors. A Tramco employee who tests positive for drugs is suspended for a minimum of one week and may not return to work until a drug test shows no evidence of drug use. Tramco estimates that, consistent with general statistics, 20 percent of its workforce has had some involvement with controlled substances. As of the time of its comment to the NPRM, Tramco identified 10 percent of its employees as individuals who had used drugs.

Rocky Mountain Helicopters, Inc. implemented a drug testing program for its employees in July 1986. Rocky Mountain Helicopters tests all pilots, mechanics managers, and others who can affect aviation safety using preemployment, random, probable cause, and postaccident testing. Rocky Mountain Helicopters does not pay an employee's rehabilitation costs but will consider rehiring any employee who completes an approved rehabilitation program. Petroleum Helicopters, Inc. began a preemployment and periodic testing program in 1982 and supports mandatory drug testing. Petroleum Helicopters denies employment to any applicant, and discharges any employee, who tests positive in a drug test. Petroleum Helicopters does not concur with the proposal to provide a rehabilitation opportunity to employees on the basis that an employer should not accept the risk of repeated illegal drug use among maintenance or flight personnel.

The FAA believes that the comprehensive anti-drug program, promulgated by this final rule, is not a novel concept. In light of the FAA's long history of regulatory action in the area of drug use in aviation and the significant number of industry drug testing programs currently implemented by aviation employers, the FAA believes that the agency is justified in requiring the commercial aviation industry to implement similar comprehensive anti-drug programs.

Discussion of Comments

General Overview of the Major Issues

The FAA received 261 comments in response to the NPRM. The FAA considered all timely-filed comments submitted in response to the NPRM and the testimony of 20 individuals who presented statements at the three public hearings held by the FAA. During the public hearings, the Secretary of Transportation, James H. Burnley, requested information from several individuals who presented statements at the hearings. The comment period for the NPRM closed on June 13, 1988. In order to accommodate the individuals who submitted supplemental information pursuant to the Secretary's request, the FAA also considered comments that were submitted as late as July 1, 1988.

There were several major themes presented by the commenters. Many commenters focus on the lack of evidence of significant drug use or drug abuse in the aviation industry. The commenters particularly stress this point with respect to the cockpit crew based on age, income, managerial supervision, close working relationships with peers, periodic medical exams to determine fitness for duty, and professionalism of the crew. Based on the lack of evidence, these commenters conclude that establishment of a drug testing program is unwarranted and unconstitutional. Regardless of the amount of evidence, the majority of commenters agree with the FAA's assessment that drug use and substance abuse have no place in the aviation environment. Some commenters note

that the FAA's anti-drug stance is commendable, but the true issue is the type of program that evolves from that stance. Many commenters support the FAA's efforts to develop a comprehensive anti-drug program that would achieve a drug-free commercial aviation workforce and agree that a program to achieve a drug-free aviation environment is beneficial.

There is substantial, although not universal, support for a drug testing program using state-of-the-art urine testing. The gas chromotography/mass spectrometry (GC/MS) method, approved by the Department of Health and Human Services (DHHS), is recognized by the commenters as the most accurate method of analysis for the presence of drugs or drug metabolites in urine if rigorous collection and analysis procedures, such as those contained in the DHHA mandatory guidelines, are followed. (As discussed in detail elsewhere in this preamble, the Department of Transportation is publishing "Procedures for Transportation Workplace Drug Testing Programs" which are adopted in this final rule in lieu of the DHHS guidelines. These DOT-wide procedures closely resemble the DHHS guidelines and are used because the DHHS guidelines are not drafted for application by entities other than Federal agencies.) While some concerns were raised about the testing procedures, these concerns generally involve drug testing programs and procedures in the early 1980s that did not embody the critical safeguards of a properly-administered testing program.

Certain types of testing proposed in the NPRM receive significant support by the commenters. These types of testing include preemployment testing and postaccident testing. Periodic testing and testing based on reasonable cause received substantial support from the commenters. Some support for testing based on reasonable cause is predicated on traditional constitutional standards that apply to a search of the person.

There is significant and strongly-held opposition to random testing. However, the FAA's drug testing program, including random testing as a critical element, is supported by some commenters. The objections to random testing are based on legal or constitutional issues, privacy issues, and the invasive nature of random testing based on personal grounds, cost issues, and the absence of a demonstrated need for a comprehensive testing program assuming a low level of drug use in the industry.

Of those commenters who address the issue, there is agreement that the complexity, cost, and operational impact burdens of the rule would be significantly greater on small entities in the aviation industry. Finally, the commenters express significantly different opinions in the area of employee assistance programs (EAP). The primary differences surround the issues of the circumstances under which an employee is offered an opportunity for rehabilitation and the entity or individual who is responsible for payment of rehabilitation costs. Several major air carriers have already addressed this issue through insurance coverage or by labor-management agreement. However, even some of these organizations, although supportive of EAPs, oppose a broad, Federally-mandated EAP requirement. Labor organizations clearly support expansive EAP opportunities and services. Small entities oppose EAP requirements on many grounds, including cost and possible negative coworker attitudes exhibited toward rehabilitated employees.

The commenters differ regarding the method of achieving a drug-free aviation workforce and the manner in which the FAA would be involved in any program. The primary differences arise regarding the type and scope of testing used to identify sensitive safety- or security-related personnel who use drugs and the choices offered to those individuals who are identified as drug users.

Labor Unions and Organizations Representing Employees. In general, unions or organizations representing employees in aviation oppose the comprehensive mandatory drug testing proposed in the NPRM. Labor unions and employee organizations favor EAP and broad rehabilitation rights for all employees. These organizations oppose random drug testing but, with some qualifications, these organizations see a role for preemployment testing, postaccident testing, testing based on reasonable cause, and testing during and after rehabilitation to monitor an individual's progress.

The International Association of Machinists and Aerospace Workers (IAM) opposes any industry-wide drug and alcohol testing until hard evidence of an industry drug problem that jeopardizes aviation safety is substantiated and documented. The Independent Union of Flight Attendants (IUFA) opposes all forms of mandatory drug testing of employees. The Independent Federation of Flight Attendants (IFFA) objects generally to drug testing as unwarranted governmental intervention into labor-management relations but would support preemployment screening and postaccident testing if reasonable cause for such testing can be objectively illustrated. IFFA objects specifically to random testing in any form as unconstitutional and contrary to labor law. IFFA believes that the focus of any drug testing program should be limited to impairment on the job and states that no currently available testing procedure can determine drug impairment on the job. The Association of Flight Attendants (AFA) believes that drug testing of flight attendants is not warranted. However, AFA and the Association of Professional Flight Attendants (APFA) support preemployment testing of applicants seeking jobs in the industry if that testing is not used to discriminate against applicants on the basis of disabilities unrelated to drug use. AFA also would not oppose postaccident testing of pilots or probable cause drug testing of employees who are under the influence of drugs if these samples were collected by an FAA inspector. APFA opposes random testing, postaccident testing absent individualized suspicion, and testing based on reasonable cause as proposed. The Flight Engineers' International Association (FEIA) opposes all testing except in the case where probable cause exists to believe that an employee is impaired by drugs; in order to protect employees from harassment, FEIA states that any determination to test an employee based on probable cause for impairment should be reviewed by a neutral party. The Teamsters Union could support preemployment screening; testing based on reasonable suspicion to believe that an employee's actual or current impairment has, or is, affecting job performance or workplace safety; periodic testing to maintain medical certification; and testing after an accident or a "near miss" if there is a reasonable basis to suspect that human error may have been a casual factor.

The Air Line Pilots Association (ALPA), representing 41,000 pilots employed by 44 large and small airlines, is firmly opposed to all forms of drug and alcohol abuse by airline personnel. ALPA primarily is opposed to random and periodic testing based on their belief that these tests are offensive, ineffectual, unjustified, and unconstitutional. ALPA believes that if there is drug use among commercial pilots, the incidence of drug use would be less than 0.5 percent. On this basis, ALPA asserts that widescale random testing of the relatively small aviation population will result in a significant number of false-positive test results. ALPA does not oppose testing prior to

employment, testing after an accident, testing in circumstances where there are reasonable grounds to suspect drug use, and testing to monitor rehabilitation.

ALPA believes that the approach to the drug abuse problem articulated in the NPRM is inappropriate. ALPA instead urges the FAA to consider an approach similar to the Human Intervention Motivation Study (HIMS) program developed to identify and treat alcoholism among pilots. The key elements of the HIMS program are education, peer involvement, intervention, confrontation, and rahabilitation. Although the HIMS program has focused on treatment of pilots who demonstrate a problem with alcohol, ALPA sponsored a HIMS drug abuse training program in November 1987 which the FAA attended.

Labor and employee organizations also strongly support limitations on an employer's ability to exclude any employee from an opportunity for rehabilitation and limitations on an employer's ability to discharge an employee. Most organizations, including IUFA, IFFA, AFA, and APFA, strongly support regulations that would require an employer to establish and participate in comprehensive, nonpunitive EAP services established by collective bargaining or negotiation and available to all employees. ALPA agrees that any regulations should clearly recognize that unions have collective bargaining rights under Federal labor laws; ALPA suggests that any anti-drug regulations promulgated by the FAA should ensure that the regulatory requirements do not interfere or override the union's collective bargaining rights. FEIA supports EAP services, mandatory for each carrier and paid for by the carrier, for rehabilitation of all employees regardless of the circumstances that precipitated a drug test. IAM suggests that FAA regulations should be guidelines, applicable only to carriers who have a documented substance abuse problem affecting aviation safety, that stress education, prevention, rehabilitation, and protection of an employee's privacy.

Employers and Organizations Representing Employers. Most employers support mandatory drug testing of employees and limitations on an employee's opportunity for rehabilitation. Part 121 and Part 135 certificate holders do not express the same opinions regarding the proposals in the NPRM. The general views held by Part 121 certificate holders are characterized by the comments submitted by the Air Transport Association of America (ATA). ATA supports the FAA's comprehensive drug testing program and favors an opportunity for rehabilitation only for those employees who volunteer for rehabilitation. In the area of EAP services, Part 121 certificate holders generally favor flexibility and latitude for an employer to design a company EAP. American Airlines, however, favors industry-wide standard EAP requirements.

Most Part 135 certificate holders and small aviation businesses object to the drug testing requirements proposed in the NPRM. The Regional Airline Association (RAA), which represents many Part 135 certificate holders, opposes random testing; RAA also suggests that the random selection rate be set at a rate less than the maximum 125 percent rate proposed in the NPRM if the FAA mandates a random testing requirement. The Primary objection of Part 135 certificate holders and small businesses is to the proposed requirement to offer an opportunity for rehabilitation to an employee. These organizations oppose mandated rehabiliation because of the economic burden that would be imposed on a small operator. The National Air Transport Association (NATA) suggests, in its June 2, 1988 testimony, that Part 135 certificate holders employing 100 or fewer covered employees should be exempted from all requirements of the proposed anti-drug program.

Grace Flying Service, Inc., a Part 135 certificate holder conducting single-engine air taxi services, flight instruction, and aerial application services, opposes drug testing of employees. Grace Flying Service strenuously objects to any drug tests, whether scheduled or random, and would be reluctant to test its employees even if testing is mandated by the FAA.

The National Business Aircraft Association (NBAA) concurs with the FAA's anti-drug program with certain reservations. NBAA primarily is concerned about the constitutionality of random drug testing and the FAA's reliance on laboratory testing results that may be unreliable in detecting drugs or drug metabolites proposed to be analyzed in the NPRM.

Individual Commenters. The FAA received 170 comments from individuals. The majority of these individuals are pilots employed by major airlines and self-employed pilots who would be subject to the requirements of the proposed rule. The FAA also received comments from general aviation pilots and individuals who are not employed in the commercial aviation industry. The vast majority of the individual commenters oppose the drug testing requirements of the proposed rule based on constitutional objections, failure of the FAA to demonstrate a drug problem in the aviation community, and perceived inaccuracies of drug testing collection and analysis. A minority of individual commenters generally support the FAA's anti-drug proposals and primarily support the testing requirements. These individuals are private citizens or consumers who base their support on the need to ensure that aviation personnel are drug free, particularly on the job. The strongest individual support is expressed by letters from the family and friends of a passenger who was killed in the crash of Continental Air Express Flight 2286 near Durango, Colorado. The comments from the family and friends of the deceased passenger urge the FAA to do everything within its statutory authority to prevent a similar tragedy in the future.

Specific Issues

Discussion of the constitutional issues regarding random and periodic drug testing. A number of commenters have questioned the constitutionality of drug testing programs for aviation personnel. Although the state of the case law is still evolving in rapid fashion and no definitive Supreme Court resolution of many relevant and complex issues has been achieved, the FAA feels confident that testing required under this rule will pass constitutional scrutiny. The FAA recognizes that there are legitimate and significant constitutional concerns surrounding drug testing in general and random drug testing as a specific component of drug testing. The FAA acknowledges the current widescale litigation and apparent disparate judicial opinions on drug testing programs.

FAA Response. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. As a threshold legal matter, the Fourth Amendment applies to "searches" conducted or mandated by the government and protects individuals against "unreasonable searches and seizures." Action of a private party does not constitute State (or Federal) action unless there exists a close nexus between the state and the action in question. *Jackson v. Metropolitan Edison,* 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972).

Assuming that the drug testing programs called for under the final rule do implicate the government, a second

issue then arises concerning whether urine tests under these programs are "searches" within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman v. James*, 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also, Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1553–1554 (6th Cir. 1988) (Guy, J., dissenting), *panel decision vacated and rehearing en banc ordered*, (August 3, 1988); *National Treasury Employees Union v. von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). *Cf. Mack v. United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of aviation personnel for illegal drugs are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search * * *," [*Camera v. Municipal Court*, 387 U.S. 523, 533 (1967)], the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment. *See e.g., Griffin v. Wisconsin*, 107 S.Ct. 3164, 3167 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. *See e.g., New Jersey v. T.L.O.*, 469 U.S. at 340–342; *O'Connor v. Ortega*, 107 S.Ct. 1492, 1501–1502 (1987) (plurality opinion) (upholding the search of a public employee's office for work-related noninvestigatory reasons on less than probable cause grounds); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561 (1976) (footnotes omitted) (while "* * * some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion").

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey v. T.L.O.*, 469 U.S. at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. at 337.

In scrutinizing whether particular searches comport with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. *See e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Thus, the courts must "*** consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. at 559.

Viewed in this light, it is beyond dispute that the public has an overriding interest in assuring that sensitive safety- and security-related aviation personnel perform their duties free of illegal drugs. The drug problem in society in general and evidence of drug use in the aviation industry in particular are documented elsewhere in the preamble of this final rule. The impairing effects of illegal drugs and the substantial risks to public safety posed by aviation employees who use illegal drugs underlies the compelling governmental interests in promulgating this final rule.

In contrast, the drug testing requirements of the final rule involve a minimal invasion of privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware v. Prouse*, 440 U.S. at 654–655 (footnote omitted); *New York v. Burger*, 107 S.Ct. 2636, 2648 (1987). The drug testing requirements of the final rule place significant constraints on an employer's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically-acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or postaccident testing also are severely circumscribed in order to limit an employer's discretion in administering such tests to employees. Also, the FAA will review the actual employer anti-drug programs, required to be submitted to the agency in accordance with provisions of the final rule, to ensure that discretion is in fact limited in the administration of drug tests under these programs. *Cf. National Treasury Employees Union v. Reagan*, No. 86–4058, slip op. at 14 (E.D.La. April 29, 1988) (holding that the constitutionality of Executive Order requiring Federal agencies to establish drug testing programs for Federal employees was not ripe for review since each agency had not implemented a finalized, particular plan).

The actual testing procedures that each employer is required to implement under this final rule also are tailored narrowly to respect an employee's reasonable expectation of privacy. The DOT procedures governing collection of urine samples, which are based on the DHHS guidelines, are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under the majority of circumstances, stringent laboratory safeguards, and provisions for challenging results. Other employee drug testing programs incorporating the collection and testing procedures of the DHHS guidelines have been upheld against constitutional attack. The DOT procedures so closely resemble the DHHS guidelines in all pertinent respects that the Department of Transportation is confident that these procedures also will be upheld. *See American Federation of Government Employees v. Dole*, 670 F.Supp. 45 (D.D.C. 1987), *appeal docketed*, No. 87–5417 (D.C.Cir. Dec. 11, 1987) (upholding the constitutionality of the Department of Transportation program for random drug testing of safety- and security-sensitive agency employees); *National Association of Air Traffic Specialists v. Dole*, 2 Ind.Emp.Rts. Cases (BNA) 68 (D.Alaska 1987) (denying a motion for a preliminary injunction against the FAA's use of urinalysis drug testing as part of an annual physical examination of the agency's air traffic specialists).

Equally significant is the fact that urine drug testing of sensitive safety-

and security-related employees is to be conducted in the "context" of the employment relationship. As the Supreme Court has pointed out, "[t]he operational realities of the workplace *** may make *some* employees' expectation of privacy unreasonable." *O'Connor v. Ortega*, 107 S.Ct. at 1498. This is particularly important in circumstances where the employee works in an industry in which his or her activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. at 2646] and, "in effect consent[] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271]. For these very reasons, two Federal courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n., Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (police officers).

It is beyond dispute that aviation has always been subject to pervasive regulation by the government and by employers themselves. As one Federal district court has noted:

> [t]he rationale of the Third Circuit upholding drug urinalysis for jockeys in order to protect the integrity of horse racing is even more compelling when the public need for air safety is considered. If horse racing is recognized as a closely or pervasively regulated activity, then aviation activities and the aviation industry are as much or possibly more closely regulated.
>
> Indeed, the creation of a federal agency charged with the responsibility for ensuring safe air travel reflects the public interest in air safety. * * * [T]he public perception of air safety not only is critical to the airline industry but to all who fly. * * * [C]lose and pervasive regulation of aviation related activities is well established and * * * air safety relates to serious risk or hazards which require close and constant attention. *National Association of Air Traffic Control Specialists v. Dole*, 2 Ind. Emp. Rts. Cases (BNA) at 78.

The FAA recognizes that a number of Federal and State courts have rejected government-mandated drug testing program of Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn v. City of Chattanooga*, 846 F.2d at 1553–1554 (Martin, J.) ("When determining, then, whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an inpaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 672 F.Supp. 779, 792 (D.N.J. 1987), *rev'd*, 850 F.2d 133 (3rd Cir. 1988) ("[T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented by the municipality in support of testing its police officers."); *American Federation of Government Employees v. Meese*, No. C–88–1419–SAW (N.D.Cal. June 16, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The FAA also is aware of the recent Ninth Circuit decision holding unconstitutional regulations promulgated by the Federal Railroad Administration—mandating blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents, and rule violations—because the rules do not require a showing of "particularized suspicion" drug or alcohol impairment prior to testing. *Railway Labor Executive' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988). The Ninth Circuit based its views, in part, on the proposition that "* * * the vast bulk of [railroad] safety regulation is directed at owners and managers of railroads, not employees." *Id.* at 585. The U.S. government disagrees with the Ninth Circuit panel's decision, which is contrary to rulings in other Federal appellate courts. Moreover, contrary to the Ninth Circuit's views of the Federal Railroad Administration's jurisdiction over railroad employees, FAA's jurisdiction over employees in the aviation industry is clear and should not be subject to challenge on this basis.

The Supreme Court has granted the government's petition for a *writ of certiorari* in *Railway Labor Executives' Association v. Burnley* and has ordered that this case be argued this term "in tandem" with *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the spring of 1989. However, in the absense of Supreme Court guidance, the FAA remains convinced that the need for drug testing by urinalysis in the aviation industry to determine fitness for duty of sensitive safety-or security-related employees and, thereby, to ensure public safety clearly outweighs the privacy interest of individuals in this class.

While not totally free from doubt, it is the opinion of the Department of Transportation that the FAA's anti-drug program, and similar regimens proposed by other administrations within the Department, will be determined to be constitutional. The critical need for properly-administered drug testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their system while performing sensitive safety- and security-related functions outweighs the reduced privacy interest of these employees.

Lack of Evidence of a Drug Problem in the Aviation Industry. Nearly every commenter who opposes drug testing in general, and random testing in particular, and even commenters who support the comprehensive drug testing proposals, raise the issue of lack of evidence of a drug problem in commercial aviation. On this basis, the commenters assert that the FAA can not justify the comprehensive proposals contained in the NPRM. ALPA, the Aircraft Owners and Pilots Association, (AOPA), and the organizations representing flight attendants maintain that the industry should police itself in the area of drug use and abuse.

FAA Response. The FAA made no attempt to obscure the lack of widespread evidence of drug use or abuse among commercial aviation personnel. However, after publication of the NPRM in the **Federal Register** on March 14, 1988, federal investigators released preliminary data showing that the captain of Continental Air Express Flight 2286, which crashed in Durango, Colorado on January 19, 1988, may have been impaired by drugs while operating the aircraft. A preliminary report of the National Transportation Safety Board (NTSB) indicates that toxicological test results show that the captain of Flight 2286 had cocaine and a cocaine metabolite in his system at the time of the crash. Seven passengers and the pilot and copilot died in the accident.

In 1983, the NTSB issued an Aircraft Accident Report (NTSB/AAR–84/11) on the crash of Central Airlines Flight 27 in Newark, New Jersey, on March 30, 1983. The NTSB determined that the probable cause of the crash of the Gates Learjet

nonscheduled, cargo-carrying aircraft included "impairment of the flight crew's judgment, decisionmaking, and flying abilities by a combination of physiological and psychological factors." The NTSB did not conclude that drug-impaired performance was the sole cause of the crash. However, the report does state that test results indicate that the captain had used marijuana and the copilot had used, or been exposed to, marijuana within the 24 hours preceding the crash. Also, toxicological tests indicate that the copilot's urine showed evidence of contra-indicated use of an antihistamine drug.

Additional evidence of illegal drug use by individuals employed in the airline industry appeared in the fall of 1986, when a series of articles in the Pittsburgh Press, based on interviews with emergency room staffs at area hospitals, highlighted 23 cases of airline flight crew drug abuse. Twenty of those cases involved cocaine overdoses, two were heroin reactions, and one dealt with valium and alcohol. Twelve cockpit crewmembers and eleven cabin crewmembers were among those treated by Pittsburg area hospitals for drug use. Personnel at those hospitals also indicated that they had treated numerous cases of drug abuse among non-flight employees, such as mechanics. The Pittsburgh Press also surveyed 17 drug treatment clinics across the country and found that more than 69 pilots had been treated for cocaine addiction. A subsequent FBI investigation of drug use in the Pittsburgh area produced evidence that a number of airline employees, including cockpit, cabin, and ground crewmembers, had used cocaine, marijuana, and other illegal drugs, sometimes on duty or shortly before reporting for duty.

The NPRM also included comments by a Part 121 and Part 135 certificate holder that implemented an unannounced drug testing program applicable to its employees. This company reported that 2.5 percent of its 180 pilots and 4 percent of its 240 mechanics tested positive for a trace, or more, of illegal drug in their system. Data from the airline industry regarding preemployment screening of applicants for various positions indicate that the number of positive drug tests ranges from 4.2 percent to 20 percent with results as high as 25 percent to 30 percent in some geographical locations.

Although this data does not show an overwhelming drug problem in commercial aviation, it does show concrete evidence of drug use in the commercial aviation sector. The FAA recognizes that commercial aviation personnel operate in a professional and highly-regulated environment. However, pursuant to the FAA's statutory mandate to ensure aviation safety, the FAA also must acknowledge that commercial aviation personnel are not immune to, nor insulated from, drug use or abuse that may affect safety-critical job performance. The FAA believes that any drug use in commercial aviation warrants preventive and proactive intervention by the FAA to ensure aviation safety. The FAA believes that this view is not inconsistent with the increasing awareness of several aviation employers who currently have, as disclosed in their comments, basic drug testing and employee rehabilitation programs for their employees.

Although not a universally-expressed opinion among the commenters, ATA "fully embrace[s] the philosophy, expressed in the NPRM, that individuals who wish to work in aviation activities that involve the safety of passengers, co-workers, and others must not use illicit drugs, even while off-duty." Several commenters, including RAA, note that to the extent any drug use is occurring in the aviation industry, it is a "safety issue and it is well within the purview of the FAA to develop a comprehensive, nationally applicable set of regulations." The Equal Employment Advisory Council (EEAC) believes that the workplace is an appropriate environment to intervene in the process of individual substance abuse. EEAC also believes that the FAA has correctly concluded that the purpose of drug testing is not to determine that an employee is impaired by drugs at the time of testing. Instead, testing is used to enable an employer rationally to determine if an employee has used drugs and to conclude reasonably that there is a possibility of future impairment based on subsequent use.

Comments that the Proposed Rules are Politically-Motivated. The FAA received many comments that state that the comprehensive anti-drug program proposed by the FAA is based solely on political perceptions and goals. The commenters stress that DOT and the FAA have surrendered to the public hysteria over drug use and unfavorable press reports of drug use in the aviation industry.

FAA Response. Because this issue is raised so frequently by the commenters, the FAA chooses to address these comments although they are beyond the scope of the rulemaking. The war against drugs is one of this Administration's top priorities. Also, Congress has enacted a substantial amount of legislation to address the use, distribution, importation, and interdiction of drugs in the United States and is considering enactment of additional legislation. Moreover, a significant number of public opinion polls indicate that the American public is deeply concerned about the effect of drug use by individuals in critical safety occupations, including aviation. The fact that the Administration, Congress, and the public are concerned about drug use is noteworthy. However, the FAA is issuing the comprehensive anti-drug program in this final rule because it is consistent with the FAA's statutory duty to promulgate minimum standards to ensure and promote aviation safety.

DHHS Guidelines. The FAA received numerous comments, including comments from drug testing laboratories and companies supplying drug testing equipment, on the guidelines for drug testing promulgated by the Department of Health and Human Services (DHHS). Many of the commenters state that the certification requirements for drug testing laboratories are too rigid because the DHHS guidelines require laboratories to have the capability to do both initial and confirmation testing at the same laboratory site. The Director of the Santa Maria Public Airport District and Psychemedics Corporation, a commenter at the San Francisco public hearing, suggest that the FAA use analysis of hair, in lieu of urinalysis testing, to test for drugs on the basis that hair analysis may be more accurate and more reliable. Psychemedics Corporation proposes that analysis of hair samples would produce more complete results because hair contains a "longitudinal" history of drug use that could reveal drug use in excess of 90 days before analysis. This commenter also notes that the two-step process of immunoassay and GC/MS analysis would still be used; the only change would be the material that was analyzed. Federal Express strongly opposes implementation of the DHHS guidelines because they are overly-burdensome on carriers with operations in multiple locations.

Some commenters also state that a split sample should be obtained from each individual in order to ensure the accuracy of the analysis. Several commenters raise the issue that specimens may be used by an employer to test for physiological states, including epilepsy and pregnancy, to discriminate against applicants and employees. A few commenters consider the requirement of "monitored" specimen collection, whether by listening to or

directly observing an individual, to be embarrassing and intrusive.

The AMA opposes the proposal to require employers to comply with the DHHS guidelines. The AMA states that these requirements would result in an undue hardship on aviation medical examiners who must comply with chain-of-custody procedures designed to ensure the integrity of the specimen.

The NTSB strongly concurs in the requirement that drug testing laboratories that analyze specimens pursuant to the drug testing program must meet the scientific and technical DHHS guidelines and must be certified by the Department of Health and Human Services. Insofar as the DHHS guidelines are inconsistent with other NTSB comments, the NTSB recommends that the FAA revise the guidelines for the industry drug testing program. ATA agrees that only DHHS-approved labs should be used for analyzing specimens but that the DHHS guidelines should be tailored to accommodate the particular needs of the aviation industry.

The SYVA Company and Drug Screening Systems, Inc. submitted comments to the FAA on the DHHS guidelines. Both companies are involved in the manufacture and supply of drug screening systems and equipment. These companies urge caution in the FAA's proposal to adopt the DHHS guidelines based on the restrictive and possibly burdensome nature of the requirements on employers required to conduct drug tests pursuant to the rule. These companies address several issues, including batch requirements, on-site collection, threshold drug levels, and development of new testing procedures not permitted under the current DHHS guidelines.

IFFA feels strongly that the Enzyme Multiplied Immunoassay Technique (EMIT) test should not be used as part of laboratory analysis of specimens because the test detects only the presence of a drug metabolite of the active drug and it often results in false-positive results, false-negative results, or misidentified results.

ALPA generally supports the proposal to make the DHHS guidelines applicable to collection and analysis of specimens. However, ALPA believes that the FAA's regulation should contain additional employee safeguards. First, the regulation should require split samples during collection. Second, the regulation should require that threshold drug levels determined by a confirmation test be consistent with the initial test to account for quantitative discrepancies in test results that are not attributable to deterioration of the sample. Third, ALPA suggests that an employee should be able to present the results of an independent test result to an MRO during review of test results to determine the validity of a positive test result. Fourth, the regulation should allow labor and management, through collective bargaining, to inspect laboratories and to perform quality control and administrative functions related to any anti-drug program.

Labor unions, including TWU and the Teamsters Union, advocate development and implementation of separate or additional guidelines to safeguard the selection and performance of laboratories analyzing specimens for drugs or drug metabolites.

EEAC believes that the DHHS guidelines are a valuable contribution to the goal of establishing procedural norms in collection and testing of specimens. However, EEAC believes that employers should establish individual procedures to ensure the integrity of a sample and its analysis. EEAC emphasizes that it is inappropriate for the FAA to impose such detailed requirements on private employers.

FAA Response. In the NPRM, the FAA proposed that all collection of specimens and drug testing take place in accordance with the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" published by the Department of Health and Human Services (53 FR 11970; April 11, 1988). The DHHS guidelines describe the collection and testing procedures applicable to all drug testing in the Federal government, and they include safeguards for the accuracy and privacy of collection and testing.

The Department of Transportation has determined that certain modifications of the DHHS guidelines are appropriate in the context of this and other DOT-operating administration drug-free workplace regulations. The result will be the DOT "Procedures for Transportation Workplace Drug Testing Programs," which will be codified at 49 CFR Part 40. These DOT procedures are intended to preserve, to the greatest extent practicable, the important safeguards provided by the DHHS guidelines.

Some of the modifications to the DHHS guidelines will be editorial in nature (e.g., references to responsibilities of "agencies" are changed to references to "employers"). Other modifications are intended to take into account differences in the situations of Federal agencies and DOT-regulated industries. For example, in testing at remote sites, DOT-regulated industries may find it necessary to conduct some kinds of testing in medical facilities or through the use of mobile units, rather than the more permanent collection sites contemplated by the DHHS guidelines. It may not be practicable for regulated employers to maintain on-site permanent logbooks. Consequently, the DOT procedures would permit alternative collection and recordkeeping procedures in these circumstances.

The Office of the Secretary in the Department of Transportation will publish elsewhere in today's **Federal Register** an interim final rule with request for comments entitled, "Procedures for Transportation Workplace Drug Testing Programs," that will codify the Department of Health and Human Services guidelines for drug testing at 49 CFR Part 40. This new part will set forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance and certification procedures. The rule will provide guidance on how this rule shall be implemented.

During the comment period on the FAA's NPRM, and those rules proposed by other DOT operating administrations, comments were received concerning the DHHS guidelines. These comments are noted in this preamble and also will be transferred to the Department of Transportation to be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

The FAA proposed only urine testing in the proposals contained in the NPRM. The suggestion of drug testing using analysis of hair specimens raises an issue within the expertise of the Department of Health and Human Services. Thus, at this time, DOT and the FAA do not intend to deviate from urinalysis as the technique for determining the presence of drugs or drug metabolities in an employee's system.

The FAA acknowledges the AMA comments regarding the inability of all aviation medical examiners to comply with the collection and chain-of-custody procedures contained in the DHHS guidelines due to the lack of appropriate facilities for collection. The FAA does not agree with the AMA that the requirements are overwhelming or overly-burdensome. Although the AMA was not specific regarding its objection to the collection and chain-of-custody procedures, DOT has included provisions in the DOT procedures to address some of the difficulties

associated with collection and chain-of-custody procedures that may not have been appropriate for private entities. However, the FAA and DOT believe that strict collection and chain-of-custody procedures are critical to ensure the integrity and identity of a specimen provided by an employee. Thus, DOT has retained these protections in its modification of the DHHS guidelines. Moreover, only those aviation medical examiners who choose to provide this service to commercial aviation personnel during a physical examination are required to conform to the minimum procedures contained in the DOT procedures.

Consistent with the suggestion of the NTSB and other commenters, the Department of Transportation will modify the DHHS guidelines to tailor the provisions for application by private entities. The DOT procedures will not modify the basic, technological aspects of the rule (e.g., DHHS certification of laboratories, testing methodologies, collection procedures, and chain-of-custody procedures). Any arguably substantive changes from the DHHS guidelines will be included only to reduce practical and administrative burdens on private entities. These changes will be discussed in an ancillary document published by the Department of Transportation in the **Federal Register**. DOT and the FAA believe that the DOT procedures will provide adequate and appropriate procedures for collection and testing of samples. Although the FAA anticipates that the DOT procedures will prove to be an effective and efficient method of collection and testing, experience under the testing program or a change in the circumstances or needs of the industry may warrant further regulatory revisions in the future.

Accuracy of Drug Test Results. Many commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters include the issues of false-positive test results, passive inhalation of illicit drugs, misidentification of licit drugs, and ingestion of food substances, including poppy seeds, resulting in a positive drug test result.

FAA Response. The FAA is aware of these expressed concerns because each of these issues surfaced in the early 1980s with the first series of drug testing programs introduced in the military and the private sector. In the early years of drug testing and analysis, laboratory security and analytical procedures had not reached today's level of sophistication. False-positive test results occur primarily in analysis of a specimen during an initial screening test, although contemporary screening tests, such as immunoassay tests, have become extremely accurate and approach 99 percent accuracy levels. Despite its increased accuracy, the initial screening test remains a less expensive test used only to yield a preliminary indication of the possible presence of drugs or drug metabolites. In order to ensure the integrity and accuracy of any test result, each positive initial screening test result must be confirmed using GC/MS analysis or another confirmatory procedure that may be subsequently approved by DHHS and incorporated into the DOT procedures. The GC/MS confirmation test is an extremely accurate and sophisticated test and is virtually error-free when used in compliance with the DHHS guidelines. The DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40), will be essentially identical to the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" published by the Department of Health and Human Services on April 11, 1988.

Employers must comply with the DOT procedures when conducting a testing program pursuant to the final rule. Like the DHHS guidelines, the DOT procedures will provide a system of checks and balances during collection and analysis of specimens. This system ensures the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An employer may only use a laboratory that complies with the DOT procedures. Also, an employer may only use a laboratory that has been certified by DHHS to process and analyze specimens required by the FAA rule. The DOT procedures regarding testing methodologies and technical matters will be identical to the DHHS guidelines. Thus, employers will be able to use any DHHS-certified laboratory since the laboratories will not necessarily be required to use different analytical techniques and testing methodologies for different entities conducting testing. The Department of Transportation expects that sufficient laboratories will have been certified for drug analysis by the Department of Health and Human Services by early 1989. However, the FAA will extend the compliance dates contained in this final rule if DHHS has not certified a sufficient number of laboratories to efficiently and accurately process and analyze specimens pursuant to the requirements of this final rule.

Since the mid-1980s, laboratories have become increasingly sophisticated in their analytical methods and chain-of-custody procedures. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens. For example, CompuChem Laboratories, a major drug testing laboratory, has analyzed over 500,000 urine samples, conducting discrete testing for nine different drugs which resulted in nearly five million distinct analyses of these specimens, since 1980. CompuChem also has analyzed approximately 750,000 urine samples for the presence of two different drugs, resulting in nearly 1.5 million analyses of these specimens, pursuant to its contract with the military. None of the over six million analyses performed for DOT, the military, and other private and public entities has resulted in a false-positive test result.

In late 1987, a CompuChem clerical worker incorrectly labeled two samples that belonged to DOT employees. Within hours after the test results were questioned by the medical review officer, CompuChem and the medical review officer had identified and corrected the error. CompuChem was not satisfied with its prompt resolution of the error. As stated in its comment to the NPRM, CompuChem has instituted an additional system of review, by CompuChem personnel and computer checks, to ensure that "* * * this one in a million error will not reoccur."

Another drug testing firm, PharmChem Laboratories, has conducted over eight million nonmilitary drug tests nationwide. In its statement to the FAA during the public hearing held in San Francisco on June 9, 1988, PharmChem notes that several courts have determined that the GC/MS confirmation test is "virtually 100 percent accurate, assuming that proper chain-of-custody procedures are followed."

The FAA does not believe that the issue of "passive inhalation" of marijuana smoke will prove to be a significant issue leading to false-positive test results. First, PharmChem's statement indicates that the DHHS threshold levels that would result in a positive drug test result for the presence of marijuana or marijuana metabolites (to be incorporated completely and without change in the DOT procedures) are set at a level sufficiently high to preclude the possibility of a positive test result based on passive inhalation of marijuana smoke. Second, studies conducted to simulate the conditions that result in passive inhalation have been conducted in artificially-devised and extremely confining areas that were

poorly ventilated. Also, in order to obtain a positive test result, testing was conducted immediately after this prolonged and intensive exposure to the marijuana smoke. Based on the FAA's knowledge of these studies, the FAA has concluded that it is highly unlikely that the identical circumstances would be encountered or accurately reproduced outside a laboratory.

Finally, the FAA believes that the safeguards that will be provided in the DOT procedures and by the medical review officer (MRO) review process, which are essentially identical to the DHHS guidelines, will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The DOT procedures will provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to evaluate an employee based on the MRO's knowledge of drug abuse disorders, and to verify that a confirmed positive test result is accurate should preclude misidentification of food substances or licit drugs taken in accordance with a valid prescription. In summary, the FAA believes that the two-step testing process, coupled with the DOT procedures, provides a process by which an individual is protected from erroneous false-positive drug test results.

Preemployment Testing. Most organizations and individuals do not object to the concept of preemployment testing. AOPA supports preemployment testing at the discretion of the employer. Operators who hire pilots or crewmembers pursuant to short-term contracts believe that a preemployment test is burdensome if required each time a pilot is rehired pursuant to a new contract. These entities suggest that preemployment tests be given only at the time of training or placement on a bid list for contracts.

Suburban Airlines has required preemployment testing of all flight crew applicants for over a year. Suburban supports 100 percent preemployment testing of the aviation employees proposed in the NPRM. The Director of the Santa Maria Public Airport District also supports preemployment testing and suggests that preemployment testing be implemented immediately.

The Soaring Society of America (SSA) believes that small business employers should have the option of requiring preemployment drug testing as a condition of employment. SSA feels that preemployment testing should be optional because applicants can circumvent detection in a preemployment drug test merely by abstaining from drug use for a short period of time before the preemployment test.

FAA Response. The FAA believes that preemployment testing is a necessary component of an effective anti-drug program. Pursuant to the rule, a preemployment drug test is required only when an applicant has been selected for employment in a sensitive safety- or security-related position with the employer. The preemployment testing provision does not require an employer to test each applicant for a sensitive safety- or security-related position. The rule simply states that an employer may not hire an applicant to perform sensitive safety- or security-related functions unless the applicant has passed a drug test. Therefore, the employer need only test an applicant before actually hiring the applicant for a sensitive safety- or security-related position.

The FAA has revised the proposed rules in ways which should ease the burden on operators who frequently rehire employees pursuant to short-term contracts. The FAA believes that the central issue regarding the frequency of preemployment testing is the continuity of an employee's involvement in an employer's drug testing program. An employer is required to conduct a preemployment test only the first time that an employee is hired pursuant to a contract with that employer so long as the individual remains in the employer's program, even during periods between contracts. The individual, thus, would be subject continuously to drug testing. In addition, so long as an employee is subject to an FAA-approved anti-drug program, another employer may use that employee to perform sensitive safety- or security-related functions. Thus, an individual who participates through a consortium would be able to provide services on a contract basis to multiple employers without having to submit to subsequent preemployment tests or to participate in another employer's drug testing program. If an employee has not been continuously subject to an FAA-approved anti-drug program, an employer would be required to conduct a preemployment drug test.

In the FAA's opinion, it would be permissible for an employer to allow a contract employee to continue in the employer's anti-drug program after termination of a contract. Particularly in the case of an employer who hires employees pursuant to a series of short-term contracts, both the employer and the employee benefit if the employee is continuously subject to a drug testing program. The employer could "rehire" the employee at any time but would not be required to give the employee another preemployment drug test. In addition, the employee could perform sensitive safety- or security-related functions for another employer on a temporary basis but would not be required to participate in another employer's anti-drug program or to submit to another preemployment drug test. To the extent that the employee is not covered by an FAA-approved anti-drug program, an employer would be required to conduct a preemployment drug test before the employee could be hired by a subsequent employer or rehired by a previous employer.

Periodic Testing. AOPA believes that periodic drug testing should not be part of an employer's drug testing program but should only be conducted based on the reasoned judgment of an aviation medical examiner. RAA supports periodic testing during medical certification at least once each calendar year. RAA believes that the employee should bear the cost of the periodic test. Federal Express does not oppose periodic testing but believes that it should be unrelated to the FAA medical examination.

The AMA opposes periodic drug tests as part of a routine medical examination because compliance with collection and chain-of-custody procedures, such as those contained in the DOT procedures and the DHHS guidelines, would be an undue burden on aviation medical examiners.

ATA stated that its association is not convinced that periodic testing effectively deters illicit drug use because of the relative ease with which this test can be circumvented by abstinence. SSA generally does not endorse periodic testing because an employee can avoid detection by relatively short-lived abstinence before any announced periodic test.

FAA Response. The FAA agrees with the commenters that announced periodic testing can be circumvented by an employee's abstinence from drug use. However, periodic testing does enable an employer to identify those employees who are so heavily-dependent on drugs that they are unable to abstain from drug use for even a short period of time prior to a periodic test.

The FAA has modified the periodic testing requirement of the regulation. Under the proposed regulation, an employee who holds a medical certificate would have been required to submit a specimen for drug testing as part of each medical examination required pursuant to Part 67. The revised

section makes it clear that an individual is required to submit a specimen for drug testing during the first medical examination of the employee during the calendar year after implementation of the anti-drug program. Therefore, pilots who hold Class I medical certificates, who are required to have periodic medical examinations at 6-month intervals, must be tested only once during one of the medical examinations of the year pursuant to the anti-drug program.

The revised section also states that an employer may discontinue periodic testing after the first year of program implementation when the employer has implemented its random testing program according to the implementation schedule and, therefore, is conducting a significant number of random tests. The periodic testing requirement will ensure that all current employees who hold medical certificates will be tested once during the first year of implementation of an employer's anti-drug program; most of the employees who hold medical certificates also will be subject to random selection for testing during part of the first year of implementation. The majority of random testing programs will be operational after the first year of implementation and periodic testing, which is less effective than random testing, will no longer be a necessary component of an employer's anti-drug program. The FAA anticipates that these revisions will provide maximum drug detection capability and ease the transition to a full random testing program. The FAA considers the revision to be appropriate to relieve some of the significant economic and administrative burdens noted by the commenters who believe that periodic testing is an ineffective and ineffective drug deterrent.

Random Testing. Most individual commenters oppose random testing for a variety of reasons. Among these reasons is the lack of evidence of drug use or abuse in aviation to warrant random testing, invasion of individual privacy, and violation of constitutionally-protected rights.

AOPA opposes random testing primarily on the basis of the unsettled constitutional issues surrounding random testing and the burden imposed by this testing method on law abiding citizens. AOPA suggests that the FAA delay promulgation of a final rule until the issues raised by random testing are substantially resolved by the Supreme Court in *Railway Labor Executives' Association* v. *Burnley* and *National Treasury Employees Union* v. *von Raab* (cited previously). AOPA states that, by awaiting any Supreme Court decision, the FAA could ensure that the final rule is in conformity with guidance enunciated in the Supreme Court's opinion in *Burnley* and *von Raab.* One commenter submitted comments individually, as national litigation counsel for AOPA, and on behalf of the California Aviation Council and the Orange County Aviation Association. This commenter states that the NPRM is an unconstitutional invasion of privacy and a violation of an individual's procedural due process rights. The commenter believes that the NPRM should be withdrawn to await the Supreme Court's impending decisions.

The AMA supported random testing only as part of a comprehensive rehabilitation program. The AMA believes that random testing is not cost effective, is unnecessarily intrusive, and, without confirmation testing, random screening tests are inaccurate.

In addition to soliciting comments on the general concept of random testing, the FAA solicited comments on an appropriate random testing rate of up to 125 percent. Several small business entities, including TEMSCO Helicopters, Inc., Henson Airlines, and Tramco, Inc., oppose the random testing requirement based on the financial and administrative burdens associated with a 125 percent testing rate, transportation of employees to the collection site, and replacement of personnel during testing. TEMSCO Helicopters suggests that a random testing rate of 10 percent will enable the industry to determine if there is a drug problem in aviation without overburdening the industry. RAA also believes that a 125 percent random testing rate is overreaching and unwarranted; however, if the FAA proceeds with a random testing provision, RAA suggests that a 50 percent random testing rate is appropriate. Although Suburban Airlines strongly supports random testing, Suburban believes that a 50 percent random testing rate of the employees proposed in the NPRM would relieve the unjustifiable economic burden on a cost-benefit basis. ERA Aviation, Inc., a Part 121 and Part 135 certificate holder operating more than 12 helicopters and 12 airplanes, believes that unannounced random testing is the most effective deterrent to drug abuse. However, ERA questions a requirement to randomly test 125 percent of the employees on an annual basis. ERA believes that random testing of 25 percent to 50 percent of the affected employee groups, coupled with periodic testing, would provide a sufficient deterrent to drug use if the penalties for positive test results were severe.

NTSB opposes the random testing requirement of the proposed rules. However, if random testing were included in the final rule, the NTSB believes that a relatively high random testing rate would be a more effective deterrent to drug use. The acting Chairman of the NTSB did not concur with the NTSB's position regarding random testing; the acting Chairman supports random testing provided that the random testing rate is sufficiently high to serve as a deterrent to drug use.

ATA, American Airlines, and Delta Airlines support the FAA's mandatory random testing provision because it would provide the maximum deterrent effect to illicit drug use. ATA supports a random testing rate of 50 percent based on a review of Department of Defense and private industry drug testing programs. American Airlines also supports the mandatory random testing provision and a 125 percent random testing rate. A consultant to American Airlines on the issue of drug abuse prevention in the workplace, who submitted an affidavit attached to comments by American Airlines, is convinced that random drug testing is "the only powerful and proven means of detecting drug use and drastically reducing drug use and thereafter preventing further drug problems from occurring." On the other hand, Federal Express states that random testing should be permitted, but not mandated, by regulation. Federal Express states that if the FAA ultimately mandates random testing, carriers should be allowed to choose a random testing rate between 15 percent to 50 percent. Federal Express also believes that carriers should be free to set different random testing rates for different groups of employees.

There was almost universal opposition to random testing by unions and organizations representing employees. ALPA, the Transport Workers Union of American (TWU), and the International Brotherhood of Teamsters (Teamsters Union) are adamantly opposed to random testing. ALPA (Council #12) concurs in ALPA's general opposition to random drug testing of professionals in the aviation industry. The Teamsters Union states that a drug testing program is a change in working conditions which, in accordance with Federal labor law, is a mandatory subject of collective bargaining.

SSA does not oppose random testing of employees. However, in order to provide a workable and effective anti-

drug program for small business, SSA suggests that entities employing 12 or fewer full-time employees be exempted from the random testing requirement. SSA defines "full-time employees" as those individuals who work for an employer at least 30 hours per week or 5 days per week and have maintained that schedule for at least 90 days.

One commenter, who spoke at the San Francisco public hearing on June 9, 1988, has been a practicing physician for 24 years and has devoted the past seven years to the exclusive practice of aviation medicine. This commenter has worked regularly with EAP representatives and has been involved with "* * * hundreds of airline employees before, during and after treatment for drug and alcohol dependencies." Based on the commenter's extensive experience in drug and alcohol use by aviation employees, he observes that the present system of relying on "* * * peer and supervisory identification, and a highly visible employee assistance program," and on a scheme of "preemployment, for-cause and fitness-for-duty drug testing, enables significantly impaired employees to remain in the workforce." Therefore, this commenter concludes that in order to eliminate those remaining risks, "* * * there is nothing more we can do short of random testing."

FAA Response. While noting the constitutional issues surrounding the issue of random testing discussed previously, the FAA continues to believe that unannounced testing based on random selection is a fundamental component of an effective drug testing program. Unannounced, random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the aviation community by reducing or eliminating drug use by sensitive safety- or security-related aviation personnel. Unannounced, random testing programs initiated by the military, including the Coast Guard, and private industry show declining drug use, evidenced by a decrease in the number of individuals who test positive for drugs, over the course of the drug testing program.

The FAA received many comments regarding the proposed random testing rates. Several commenters suggest a random testing rate of 125 percent because that rate would result in the most significant deterrent to drug use in the aviation industry. However, other commenters who address this issue believe that a 125 percent random testing rate would be excessive and would impose a significant economic burden, particularly on small aviation businesses. The commenters propose a range of random testing rates starting at 10 percent annually. The majority of the commenters suggest that an annual 50 percent random testing rate for the aviation industry is appropriate. These commenters believe that the 50 percent testing rate accomplishes several goals consistent with the intent of the proposal.

In response to the commenters, the FAA has substantially revised the random testing proposal in the NPRM in order to reduce the practical and administrative burdens associated with initiating an unannounced testing program based on random selection of employees. The FAA's approach also is designed to provide a random testing rate that balances cost effectiveness and burdens on employees and employers but still results in an effective and credible deterrent to drug use.

For some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no random drug testing of employees directly to random testing of 50 percent of the covered employees. For example, if required to have tested 50 percent of all covered employees by the end of the first year, employers might have to test at rates far above a 50 percent rate toward the end of the year, to make up for lower rates at the beginning of the year. Employers should be permitted to start the program at a lower testing rate and work up to a 50 percent rate as experience is gained and the testing procedure becomes administratively routine. The FAA does not want to create a situation which might lead to inadvertent mistakes by requiring initial unannounced testing based on random selection at too high a rate.

The final rule, therefore, provides an implementation procedure that would allow employers to phase in unannounced drug testing based on random selection of employees during the first 12 months in which tests are required to be conducted. Employers would not be required to reach an annualized rate of 50 percent until the last test collection of the first year of the program. The total number of unannounced tests based on random selection of employees during the first 12 months of the employer's testing program would have to equal at least 25 percent of the covered employee population. Also, the employer is required to space the tests reasonably throughout the year. This approach will provide a sufficient level of deterrence to drug use and will permit the employer to phase in the 50 percent rate.

Suppose, for example, that an employer has 1000 sensitive safety- or security-related employees. At a 50 percent annual rate, the employer would be required to conduct 500 unannounced tests based on random selection during a year. Under the phased approach, however, the employer could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first year, the annualized rate of 50 percent was achieved. Thus, if the employer's drug testing plan contemplated administration of unannounced tests based on random selection on 12 occasions during the year, the employer would need to collect 42 urine specimens for analysis (500 divided by 12) on the last occasion, but could collect fewer specimens until then. Overall, the employer would have to collect at least 250 specimens for analysis during the first year. In subsequent years, the employer is required to maintain the 50 percent annualized rate for unannounced testing based on random selection of employees.

The FAA believes that the final rule provides a moderate, but substantial, level of testing based on random selection that enables an employer to increase random testing gradually during the first year of program implementation. During subsequent years of the program, the employer must maintain an annualized rate of 50 percent of the covered employees. In order to determine the appropriate number of employees that must be tested to reach the appropriate "annualized rate" for the random testing program, the employer shall refer to the number of employees subject to the rule at the beginning of a calendar year.

At this time, the FAA believes that this phased program, ultimately reaching a testing level equivalent to 50 percent of the covered employees, will provide a sufficient deterrent to drug use without imposing an undue economic or administrative burden on employers and employees subject to the requirements of the regulation. In addition, the program will produce a sufficient data base at different annualized rates and testing levels for the FAA to analyze the scope of any drug problem in the commercial aviation industry generally or within any particular sector of the commercial aviation community. Analysis of the random drug testing data submitted by an employer will allow the FAA to determine if the

random testing program should be revised in any manner.

The phased program and the final 50 percent random testing rate is consistent with the random testing program currently applicable to safety- and security-sensitive employees of the Department of Transportation. DOT's random testing program began in September 1987; the random testing rate has gradually increased and will reach an annualized rate of 50 percent by October of this year. Data from September 1987 to the present show that the current detection rate found as a result of DOT's random drug testing program is 0.83 percent; data from February 1987 to the present show that the current detection rate for FAA and DOT's periodic (e.g., scheduled) testing program is 0.012 percent.

According to the provisions of the final rule, all employers are required to randomly select a sufficient number of employees to enable the employer to conduct unannounced testing of employees who perform sensitive safety- or security-related duties for the employer at the appropriate rate during the calendar year. In order to conduct enough tests to reach the required percentage, an employer may be required to select a number of employees who perform a sensitive safety- or security-related functions for unannounced testing that is in excess of the actual number to meet the required percentage. Selection of a greater number of employees enables the employer to reach the appropriate annualized rate despite absences due to vacations and medical leave or absences due to an inability to reach a collection site resulting from travel or duty requirements.

If a consortium has been established among employers or operators, the consortium would be required to select and to test the appropriate rate of the aggregate total of employees subject to the final rule who are covered by the consortium. The testing rate of the consortium will be attributed to each employer participating in the consortium. In the FAA's opinion, the consortium's testing rate can be attributed to each participating employer, although less than the appropriate percentage of the employees of a particular employer has been tested during a calendar year, without significantly decreasing the deterrent effect of a random testing program. An employer or consortium that develops a random selection scheme involving preliminary selection criteria, such as geographical zones, must specify these schemes or variations in the employer's anti-drug plan. The FAA realizes that these variations may provide administrative ease for an employer. However, the FAA must review these variations to ensure that the scheme does not dilute the required annualized rate required by the final rule.

The FAA received comments from small aviation businesses regarding the difficulty of testing a large number of employees on a random basis during the first year of implementation of the rule. In response to these comments, the FAA substantially revised the provisions of the proposed rule. Certain Part 135 certificate holders whose total workforce includes 11 to 50 sensitive safety- or security-related employees are given additional time to submit a random testing plan and to ensure that the appropriate percentage of the sensitive safety- and security-related employees are subject to unannounced drug testing on a random selection basis during a calendar year. The FAA encourages these employers to develop a comprehensive random testing plan as soon as possible. As discussed later, Part 135 certificate holders that employ 10 or fewer covered employees and those individuals or entities listed in § 135.1(b), who are otherwise exempt from the requirements of Part 135 but are included in the final rule because they are engaged in operations for compensation or hire, are given additional time to develop and implement an anti-drug program that includes random testing. The FAA notes that the final rule does not restrict the ability of these employers to submit a random testing program, and to implement that program, earlier than the timeframes contained in the final rule.

Some commenters address the issue of the difficulty in developing an efficient and successful random testing program. The FAA notes that the rule provides flexibility to an employer to begin the random testing program at a lower random testing rate so long as the required percentage of covered employees have been selected on a random basis and have been tested by the end of the first year after approval of the employer's anti-drug program or random testing plan. For example, an employer may test small increments of employees at the beginning of a period and may test a large percentage of employees at the end of the same period to achieve the annualized rate that is required by the final rule.

Postaccident Testing. AOPA supports postaccident testing if it is conducted by the NTSB. AOPA believes that postaccident testing should not be a part of an employer's drug testing program and should not be conducted by the FAA.

The NTSB comments that the 24-hour period provided for postaccident testing is excessive. The NTSB recommends that the FAA specify a maximum period of four hours for collection of a postaccident drug test and provide an appropriate penalty for failure to collect the specimen within the 4-hour period. The NTSB believes that delays of more than four hours in sample collection impair detection of a drug and its "psychoactive component(s)" in blood samples, particularly substances such as cocaine, marijuana metabolites, some amphetamines, and phencyclidine (PCP). The NTSB also suggests that blood testing is the preferable method for postaccident testing and suggests that the FAA permit this method of testing for the presence of drugs after an accident. ATA also suggests that postaccident testing should be conducted within 4 hours after an accident and, in no case, later than 12 hours after an accident.

ATA recommended that the NTSB's definition of "incident" should be added to the postaccident testing provision to cover situations when an aircraft is empty or when personal injury or physical damage is less severe than specified in the postaccident testing provision. ATA also believes that postaccident testing should be conducted unless a supervisor determines that an employee's drug use was not a contributing factor in the accident. FEIA believes that postaccident testing is "wasteful and intrusive" unless the accident clearly is caused by the person to be tested and there is individualized probable cause to believe that the employee was impaired at the time of the accident.

SSA does not completely endorse postaccident testing based on a variety of practical considerations that SSA believes are unresolved in the regulation as proposed. However, SSA states that postaccident testing, after an NSTB-defined accident, of any employee working for a small business should be conducted as deemed feasible by the employer. SSA believes that postaccident testing should be conducted within 24 hours if the employer determines that testing is feasible and appropriate. Also, if the employer determines that testing is not feasible, the FAA may request an explanation from the employer during the routine investigation of the accident.

FAA Response. In the NPRM, the FAA proposed that postaccident tests be conducted within 24 hours after an accident based on the possibility that

difficulties may arise after an accident in transporting an individual to a collection site or bringing a drug testing kit to the scene of the accident. The FAA is aware that extended delays in sample collection and testing after an accident may result in deterioration or elimination of a drug or a drug metabolite from a person's system. Recognizing these difficulties and concerns, the FAA has modified the postaccident testing provision. Under the final rule, an employer must conduct postaccident testing of an employee as soon as possible after the accident but in no case later than 32 hours after the accident. Selection of this time period comports with the DOT's postaccident drug testing program for DOT employees, which provides a maximum of 8 hours to determine if an employee is required to be tested and an additional 24 hours to actually obtain a sample for testing.

The FAA strongly encourages employers to promptly determine if an employee is subject to postaccident testing, particularly in cases where there is little or no uncertainty that an employee's performance was a contributing factor in the accident. The FAA intends to vigorously enforce the regulation where there is unreasonable delay in determining whether an employee should be tested under this provision or where there is unreasonable delay in testing after the determination to test is made. Although several commenters who address the issue suggest time periods of less than 24 hours, it is the FAA's opinion that a maximum period of 32 hours is a workable and reasonable accommodation that is appropriate for the aviation industry.

The NTSB's suggestion that the FAA require an employer to conduct postaccident testing within four hours after an accident is based on the time-sensitive nature of toxicological testing of blood samples. On the other hand, urinalysis testing does not involve the extreme time-critical considerations associated with collection and testing of blood samples. In the FAA's opinion, postaccident urinalysis testing is sufficient at this time to provide an indication of an individual's drug use that may have been a causal factor in an aviation accident.

Also, the FAA proposed only urine testing in the NPRM, specifically excluding blood testing as an option, for all drug tests that would be conducted under the anti-drug program. Therefore, the FAA considers the NTSB's suggestion to be beyond the scope of the notice and the FAA has not adopted NTSB's suggestion to permit postaccident testing by collecting a blood sample. In the aviation context, the significant proportion of serious accidents involving fatalities to crewmembers provides data with respect to drug involvement in those accidents. In the FAA's judgment, extending full toxicological testing to surviving crewmembers is not warranted at this time.

Presently, the FAA is not convinced that including the NTSB's definition of "incident" as a trigger for drug testing is warranted. As discussed below, the FAA believes that the revisions to the section providing for testing based on reasonable cause will adequately address circumstances that might qualify as "incidents." The current provisions allow sufficient, but limited, latitude to an employer to determine whether an employee should be tested following an incident or an accident not covered by the NTSB's definition of accident.

Although several commenters suggest that the FAA expand the scope of the postaccident testing provision, the FAA believes that the postaccident testing provision, limiting testing to only those employees whose performance may have been a cause of the accident, is appropriate. The FAA believes that it is inappropriate to require postaccident testing of an employee whose performance could not have been a cause of the accident merely because that employee happens to have been onboard or involved with an aircraft involved in an accident.

Testing Based on Reasonable Cause. The NTSB suggested that the FAA include "incidents," as defined by the NTSB's rules, as events that would trigger reasonable cause testing. RAA agrees with the requirement that two supervisors, one with training in the symptoms of drug abuse, must concur in the decision to test an employee based on reasonable suspicion of drug use. RAA believes that each carrier should determine the conditions which constitute reasonable suspicion. FEIA also believes that two supervisors, trained to detect symptoms of drug abuse, must concur in all decisions to test based on probable cause. ATA suggests that only one supervisor be required to trigger testing of an employee based on reasonable cause. In addition, ATA states that supervisors should not be required to have specialized training for the purpose of determining when reasonable cause exists to test an employee.

Tramco, Inc. believes that the proposed circumstances that would support a decision to test based on reasonable cause are too restrictive. Tramco believes that an employee's attendance patterns, tips from coworkers, "error rates," and other indirectly observable indications should also trigger testing based on reasonable cause. Tramco currently uses these triggers in its drug testing program; Tramco believes that the FAA's criteria will not result in detection of possible drug users because it is limited to physical and observable indices of gross impairment. SSA supports "for-cause" testing, as the employer deems necessary and feasible, if testing is conducted pursuant to the DHHS guidelines.

IAM and TWU believe that the criteria that would trigger testing based on reasonable cause are ill-defined. These organizations believe that testing based on reasonable cause will be a tool for employee harassment; these organizations suggest that supervisory personnel should be trained to recognize the symptoms of drug impairment or that at least one of the supervisors making the determination to test should be someone other than the employee's immediate supervisor. The Teamsters Union and IAM believe that decisions and determinations related to testing based on reasonable cause should be documented and supported in a written report.

The Newton Psychological Centre submitted a "basic identification profile," developed to aid supervisors of the Philadelphia Electric Company in identification of employees who may not be fit for duty. The profile is used to detect early warning signs of problems based on medical or psychological problems. The profile sets forth behavioral, emotional, physical, biological, and cognitive cues related to the use of marijuana, cocaine, alcohol, barbiturates, amphetamines, and heroin, or cues related to anxiety or depression. The company's policies regarding alcohol and substance abuse, job performance warning signs, and counseling and confrontation guidelines are printed on the profile.

FAA Response. As stated in the FAA's response to comments submitted on the postaccident testing provision, the FAA is not including a "postincident" testing provision at this time. However, the circumstances under which a supervisor could require an employee to submit to a test based on reasonable cause have been modified in the final rule. Based on the comments submitted, particularly by employers who have existing "reasonable cause" testing programs, the FAA has expanded

the list of circumstances that might trigger testing under this provision. Evidence of repeated errors on the job, regulatory or company rule violations, or unsatisfactory time and attendance patterns, if coupled with a specific, contemporaneous event that indicates probable drug use, could provide additional, cumulative evidence to support a decision to test an employee based on reasonable cause.

As proposed in the NPRM, an employer is permitted to test a specimen provided by an employee, collected pursuant to a reasonable cause determination, for the presence of any drug or drug metabolite listed in Schedule I or Schedule II of the Controlled Substances Act. The employer may test for these drugs, as part of the employer's approved anti-drug program, if the employer has specific approval from the FAA to include these controlled substances in the employer's anti-drug program. In addition, the testing for these additional drugs must be conducted in accordance with the DOT procedures to be codified in 49 CFR Part 40.

The FAA believes that the provision requiring two supervisors, one of whom has specialized training in detecting the symptoms of drug use, to concur in the decision to test an employee based on reasonable cause is appropriate for large companies. However, the FAA has revised this section of the rule in order to address the legitimate concerns of small employers, many of whom do not have more than one supervisor employed at the company. For companies that employ 50 or fewer employees who perform a sensitive safety- or security-related function, the rule specifies that only one supervisor is required to make the determination that would trigger testing of an employee based on reasonable cause. The FAA also has clarified the annual EAP training requirements for supervisors to make it clear that supervisors who make reasonable cause determinations must have specific training that will enable them to assess and demonstrate the basis for testing based on reasonable cause.

Testing after Return to Duty. ATA believes that the FAA should not set regulatory standards governing postrehabilitation testing. ATA, other employer and employee organizations, and many individual commenters believe that a schedule for postrehabilitation testing should be made by management in consultation with persons involved in an employee's rehabilitation program. In order to ensure continued disassociation from drugs, RAA supports a requirement for monthly screening, for 12 months, after an employee has completed rehabilitation.

APFA believes that a schedule for postrehabilitation testing should be determined by an employee's EAP counselor and should be limited to a reasonable period of no more than one year. AFA states that decisions regarding testing after rehabilitation should be the responsibility of the individual treatment facility used by the employee.

FAA Response. The FAA agrees with the commenters that suggest that unannounced testing during any rehabilitation and before an employee returns to duty should be determined by the persons involved in the employee's rehabilitation program. Decisions regarding the frequency of testing during any rehabilitation program appropriately lie with those individuals who are familiar with and involved in any employee rehabilitation program.

However, unannounced testing after an employee returns to duty is critical to ensure an employee's continued disassociation from drugs. The FAA believes that it is essential to require unannounced testing of employees who have returned to duty in a sensitive safety- or security-related position for an employer after failing a drug test given by an employer or after refusing to submit to a drug test required by the final rule. This type of testing is the most effective means of ensuring that an employee remains drug free while performing commercial aviation duties. Moreover, once an employee has returned to duty, the FAA and the employer have a substantial interest in requiring that employee to be drug free while performing sensitive safety- or security-related duties in commercial aviation. Therefore, the FAA has included a provision in the rule requiring an employer to monitor an employee who has returned to duty by providing unannounced drug testing, pursuant to a schedule determined by the MRO, for not more than 60 months after the employee has returned to duty.

The rule also provides that an employer must conduct unannounced testing of an individual who is hired to perform a sensitive safety- or security-related function after failing a drug test or after refusing to submit to a drug test for another employer and who has not previously been subject to return-to-duty testing. This section of the final rule addresses situations where an individual fails a drug test or refuses to submit to a drug test but does not return to duty for an employer. In this case, any subsequent employer would be required to test an individual for not more than 60 months after the individual is hired to ensure that the individual is drug free. In the FAA's opinion, if an employee failed a drug test given by a previous employer but returned to duty with that employer in accordance with the requirements of this final rule, a subsequent employer would not be required to reevaluate a prior employer's return-to-duty decision. An employer would be required to test this individual prior to employment but would not be required to monitor the employee after the employee was hired. Pursuant to the final rule, the medical review officer (MRO) has the discretion to determine the appropriate level of unannounced testing for an individual or an employee. The FAA believes that it is appropriate to allow the MRO to tailor the frequency of this type of testing to adequately address differences between individuals, the level and type of drug use, and any treatment or counseling program.

The FAA notes that the MRO also is require to ensure that an employee has been tested for drugs, in accordance with the procedures in the final rule and the DOT procedures, before being hired or returning to duty. In most cases, the MRO will not be required to arrange testing for an employee because the employee will have taken a drug test as part of any employee rehabilitation program. However, the MRO must ensure that an individual or employee has been tested, in accordance with the procedures of Appendix I to Part 121 and the DOT procedures, before the MRO can make a recommendation that an individual be hired or than an employee be returned to duty after failing a drug test or after refusing to submit to a drug test. In the FAA's opinion, a preemployment drug test would suffice to satisfy this requirement of the final rule.

Employee Assistance Programs and Rehabilitation. The FAA sought comment in the NPRM regarding three different EAP options. These options specified the circumstances under which an employee would be given the opportunity to seek rehabilitation. Option 1 would allow all employees to seek an opportunity for rehabilitation regardless of how the employee's drug use was detected. Option 2 would allow most employees, except those employees whose drug use was detected as a result of postaccident testing or testing based on reasonable cause, to seek an opportunity for rehabilitation. Option 3 would only allow employees who volunteer to seek rehabilitation and

would exclude all employees whose drug use was detected by any other means. Under all three options, an employer would not be required to offer an opportunity for rehabilitation or to provide job security to any employee who was identified as a drug user on the job.

Employer organizations tend to support the third option proposed in the NPRM regarding rehabilitation and reemployment or job security opportunities that should be offered to employees. Part 121 certificate holders, as generally noted by ATA, support the third option. For example, Delta Airlines believes that the most effective deterrent to drug use is the threat of losing a job. On that basis, Delta states that mandatory rehabilitation and an opportunity for continued employment would diminish the effectiveness of the rule. American Airlines disagrees with ATA's position and supports the first option. Federal Express supports the third option if the FAA mandates rehabilitation. The Helicopter Association International (HAI) states that requiring an employer-sponsored rehabilitation program whenever required testing of an employee produces a positive drug test result places an unwarranted burden on the employer. HAI believes that an employer should have the right to dismiss an employee if any drug test conducted during employment produces a positive test result. HAI states that the employer should have the ability to decide which employees, based on the "value" of the employee to the organization, would be offered an opportunity for rehabilitation.

Small Part 135 certificate holders generally state that an employer should have the right to fire any employee who uses drugs and feel that an opportunity for rehabilitation should not be offered to any employee who uses drugs. These small employers base their position on the potential liability to the company of rehiring a known drug user, the expense to the company of holding the employee's job open, or replacing an employee on a temporary basis, during rehabilitation.

The AMA reaffirmed its long-standing support of employment-based treatment and assistance programs for employees with alcohol or drug problems. The AMA believes that the FAA should require an employer to provide one opportunity for rehabilitation to any employee who voluntarily enrolls in an EAP and to any employee who is identified as a drug user through testing.

NTSB generally concurred in the concept of requiring an employer to provide EAP services to employees. The NTSB recommended that employers be required to offer one opportunity for rehabilitation to employees who volunteer for an EAP and for employees who are identified as drug users through any type of drug testing.

Most small business entities, TEMSCO Helicopters, Inc. and Overseas Air Transport Corporation for example, object to a regulatory provision that would require an employer to provide job security to an individual enrolled in rehabilitation. This objection is based on the financial burden of keeping a job open for an employee who is unable to perform his or her duties and the elimination of an employer's discretion to fire an employee who uses drugs. RAA believes that an employee who has successfully completed rehabilitation, as determined by the head of the rehabilitation program and airline management, should be offered an opportunity to return to duty. Executive Air Fleet (EAF), a Part 135 certificate holder with 200 employees subject to testing, would support job security for an employee who voluntarily sought rehabilitation and who had three to five years of service with the company. SSA also believes that an employee's length of employment may be a reasonable factor to consider when specifying an employer's obligation to retain or rehire an employee participating in rehabilitation. SSA also states that holding an employee's job open during inpatient rehabilitation will greatly complicate small business operations for an unknown time period. Henson Airlines states that, under its existing program, employees will be fired as a result of a positive alcohol or drug test. ERA Aviation, Inc. strongly objects to any Federally-mandated rehabilitation and rehire requirement. ERA Aviation objects to the cost of providing EAP services, but more important, objects to assuming the potential liability problems that could result from rehiring a known user of illegal substances even if that employee has successfully completed a rehabilitation program.

Several small operators, including TEMSCO Helicopters, Inc., object to the requirement to provide an opportunity for rehabilitation to employees identified as drug users. Henson Airlines provides an opportunity for rehabilitation only to employees who voluntarily enroll in rehabilitation. RAA supports these views. Organizations such as the American Association of Airport Executives (AAAE) and ATA believe that an opportunity should be offered only to employees who volunteer for rehabilitation. SSA states that there should be no requirement that a small business retain or rehire any employee who tests positive for drugs as a result of any unplanned drug test, including postaccident or for-cause testing. ATA believes that limiting rehabilitation and reemployment to volunteers has the dual effect of making safety the industry's highest priority and containing the costs associated with rehabilitation. AAAE believes that any employee who tests positive for drugs should be dismissed immediately. AAAE comments that employers and employees should be free to negotiate broader rehabilitation and reemployment rights as part of a collective bargaining agreement.

Labor organizations are strong supporters of broad EAP opportunities and services. TWU and FEIA believe that all employees who test positive, regardless of the reason for testing, should be given at least one opportunity for rehabilitation. FEIA supports the requirement for at least one rehabilitation opportunity because a positive drug test is not proof of impairment on the job. The Teamsters Union believes that negotiated, client-specific rehabilitation programs should be available to employees who volunteer and for employees who test positive on one occasion. Labor organizations comment that all rehabilitation costs should be paid by the employer either directly or as part of an employee benefit or insurance package. TWU concurs with this position, insofar as it relates to the first positive test result, unless the employee has engaged in conduct that would otherwise justify suspension or discharge under an applicable collective bargaining agreement.

ALPA states that there is no valid reason to limit access to an EAP only to employees who volunteer for rehabilitation. Based on experience in the HIMS program, only 15 percent of the pilots treated for alcoholism were self-referred; 85 percent of the pilots were discovered by the union or management, or both. ALPA believes that rehabilitation should be made broadly available to any employee who could benefit from an EAP and that, in some cases, a second opportunity for rehabilitation may be appropriate. ALPA urges the FAA to revise the proposed regulation to require employers to pay the cost of rehabilitation programs that are mandated by the regulation.

ALPA believes that traditional EAP techniques that are tailored to a specific population, such as the HIMS program, will be more effective in deterring drug use than the anti-drug program proposed in the NPRM. During the 15-year period

that the HIMS program has been in effect, 800 pilots have participated in rehabilitation for alcoholism yielding a long-term success rate of 93 percent. ALPA states that the average "off line time" for pilots involved in the HIMS program is approximately 120 days: 30 days for treatment; 30 days for aftercare treatment, observation, and processing; and 45 to 60 days for processing of an FAA application. The recovery rate for pilots who participate in one rehabilitation opportunity is 85 percent. Of the 15 percent of the pilots who suffer a relapse after the first treatment, approximately 50 percent are successfully treated in their second rehabilitation opportunity.

FAA Response. Most comments regarding rehabilitation deal with the issue of whether, and under what circumstances, to offer rehabilitation and to provide job security to an employee and the length of any employee rehabilitation period. The FAA carefully considered the various arguments submitted by the commenters on the issue of EAP services and rehabilitation opportunities for employees. The FAA understands, and considered, the arguments raised in defense of broad rehabilitation opportunities and job security for aviation personnel who use drugs.

However, the FAA reviewed the two options that included provisions providing broad rehabilitation opportunities and job security to employees whose drug use was detected through testing under the final rule. Many of the commenters oppose rehabilitation opportunities and job security for employees who fail to discontinue drug use and wait to be detected by testing. The FAA agrees with these commenters and believes that a strong message must be conveyed to drug users that the use of drugs is unacceptable in the aviation industry. The FAA's primary duty, pursuant to statutory mandate, is to consider the adverse safety consequences surrounding the issue of drug use by senstivie safety- and security-related aviation personnel. On this basis, the FAA has determined that employers should not be obligated to offer an opportunity for rehabilitation or to provide job security to employees who fail a drug test or who use drugs on the job. The FAA understands that broad rehabilitation opportunities and job security for employees, without regard to the manner of detection of drug use, may help those employees who are unable to help themselves. But, the FAA believes that it is inconsistent with the agency's safety responsibilities to promote the message that drug use in the aviation industry will be tolerated until an individual's drug use is detected through testing. The FAA believes that it is inappropriate to place the agency and an employer in the anomalous position of allowing any employee who uses illegal drugs to work in a sensitive safety- or security-related position and whose drug use may adversely affect aviation safety. Rather, the FAA believes that it is appropriate and consistent with its statutory safety mandate to prohibit an employee who fails a drug test, who refuses to submit to a drug test, or who uses drugs on the job from acting in a sensitive safety- or security-related position. The FAA is convinced that the comprehensive testing program of sensitive safety- and security-related employees, combined with an employee assistance program to educate and train all personnel, is consistent with the statutory duty to promote aviation safety and will reduce any drug use in the aviation community.

The FAA also carefully reviewed the third option presented in the NPRM that would provide an opportunity for rehabilitation and job security to an employee who admitted his or her drug use and who volunteered for rehabilitation before being detected through drug testing. However, in the FAA's opinion and as noted by the commenters, there are several issues related to employee rehabilitation and retention or reemployment benefits that must be considered in development of the final rule.

For example, the term "rehabilitation" generally means the period of time during which an employee is receiving treatment or counseling for a drug problem. The length of any rehabilitation period is dependent on several factors such as the availability and enrollment period of rehabilitation services, the length and extent of treatment for the level of use and the type of drug used, collection and analysis of tests given during rehabilitation, and the review process that may lead to a recommendation to return to duty in a sensitive safety- or security-related position. The term "rehabilitated" generally means that an employee is determined to be drug free and, based on the employee's progress and prognosis during rehabilitation, the employee may return to work. The fact that an employee has returned to work does not mean that the employee is exempt from follow-up or aftercare treatment and counseling.

The FAA is aware of the wide variety of rehabilitation programs that vary both in the length of treatment and type of treatment depending on the substance used and the availability of rehabilitation and treatment services. One standard rehabilitation and treatment program, generally necessary for those individuals who require intensive inpatient care followed by outpatient care and counseling sessions, specifies 28 days of inpatient care. Other programs may involve shorter periods of time for inpatient care, may involve outpatient treatment only, or may involve a combination of inpatient and outpatient care of varied duration. For example, some treatment programs may require three to four sessions, given on two or three nights a week, over a six to eight week period and followed by less frequent meetings or counseling sessions. Other treatment programs might involve individual or group counseling sessions on a weekly basis, over a period of one year or more. An additional factor that affects the length or treatment or rehabilitation is the availability of private or community services in a particular area.

The FAA reviewed these variables to determine if a timeframe for voluntary rehabilitation and job security could be developed and included in the final rule. The FAA carefully considered the comments from many aviation businesses that oppose any regulatory requirement to offer rehabilitation and to retain or rehire any employee who admits to illegal drug use. The commenters base their objections on several factors including elimination of an employer's discretion to terminate an employee; undue complication of operations due to potential extended absences of employees enrolled in rehabilitation; and negation of an employer's ability to tailor rehabilitation opportunities and job security to a particular employee population. The most strenuous objections are based on the substantial and unwarranted burdens, both administrative and financial, associated with rehabilitation and job security for employees. Based on financial information submitted by the commenters, it appears that expenses of rehabilitation and job security opportunities as proposed would seriously affect large aviation entities and would probably overwhelm small companies.

After review of the considerable variables in treatment and the extensive arguments presented by the commenters, the FAA concluded that a reasonable accommodation of burdens on employers who may not be able to absorb employee absences and realistic opportunities for employee rehabilitation can not be imposed in the

abstract. Thus, the FAA does not agree with the commenters who state that the FAA should specify an opportunity for rehabilitation and the amount of time during which an employer is required to provide job security for an employee enrolled in rehabilitation.

Many employers in the aviation industry currently offer rehabilitation opportunities and job security benefits to employees. The FAA anticipates that those employers will continue to offer these opportunities and benefits to employees and that other employers may elect to include these components in any negotiated employee benefit package. Because many aviation entities have resolved the relative administrative, personnel, operational, and financial issues that surround employee rehabilitation and job security requirements, the FAA believes that the aviation industry is able to design appropriate programs and services for its employees. The FAA believes that, in light of the variables and burdens addressed above, issues regarding an adequate amount of time for rehabilitation, an appropriate amount of time to receive a recommendation to return to duty in a sensitive safety- or security-related position, and job security matters, are best addressed in the specific employment context.

Thus, an employer is not required to offer an opportunity for rehabilitation, to provide job security, or to provide the resources for rehabilitation to any employee. At the same time, employers may offer these opportunities and benefits to employees; the FAA urges employers to consider the experience of employers who have developed rehabilitation programs.

The final rule does not prohibit an employer from reassigning an employee to a position that does not involve the performance of sensitive safety- or security-related duties. The final rule also does not dictate whether an employee is required or permitted to use vacation time, sick leave, or leave without pay in order to accommodate the employee's time away from his or her sensitive safety- or security-related position. The FAA believes that issues such as termination, reassignment, hiring of temporary employees to fill a position, or policies regarding an employee's absence from a position, are issues that are appropriately the subject of employer and employee negotiation or collective bargaining.

The NPRM did not propose to require an employer to pay for an employee's rehabilitation and final rule also does not address this issue. Indeed, since an employer is permitted to terminate an employee who fails a drug test or who refuses to submit to a drug test, and such employee does not have a right to return to duty for that employer, this issue is not relevant to the final rule. However, the employer may cover an employee's rehabilitation expenses through an employee benefit package, insurance coverage, or as a matter of collective bargaining negotiated between the employer and the employee. The FAA considers these areas to be a matter between employers and employees and, as such, are left to the discretion of the employer or to be negotiated during collective bargaining.

EAP Education and Training Programs. ATA states that the FAA should not specify the details and contents of an employer's EAP. The Teamsters Union believes EAP services should be negotiated between labor and management and that rehabilitation programs should be client-specific.

ALPA believes that EAP services should be tailored to be specific employee population as the HIMS program is tailored to pilots in commercial aviation.

Various labor organizations conclude that EAPs, instead of mandatory testing, are the preferable method to conduct an anti-drug program. AFA also urges the FAA to separate the administration of any drug testing programs, if mandated at all, from administration of an EAP.

The FAA received considerable data in response to the ANPRM and the NPRM regarding the availability of EAP services. Some of these commenters included specific, existing EAPs that are recommended by the industry. The Association of Labor-Management Administrators and Consultants on Alcoholism, Inc., (ALMACA) submitted an extensive, recommended industry EAP in response to the ANPRM.

Although most commenters think that EAPs are valuable, employer and employee organizations differ on the mechanics and content of an EAP education and training component. Labor unions generally favor broad EAP services. The majority of employer organizations favor EAPs that are designed to meet the specific needs of the company and oppose regulatory action by the FAA in this area.

FAA Response. The FAA believes that an employer should have the ability to design an EAP that would best serve its employees. The ability to tailor an EAP is particularly important for small aviation employers who may not have the financial and administrative resources to support a company-sponsored EAP. Therefore, the FAA has made no changes to the proposed minimal EAP education requirements. However, the FAA has revised the EAP training requirements. The FAA deleted the minimum requirement of 60 minutes of annual training for all employees. The FAA retained the 60-minute training requirement for supervisors who will make determinations to test an employee based on reasonable cause. The FAA believes that it is appropriate to require a full 60 minutes of initial training for presently-employed and newly-hired supervisors making reasonable cause determinations because of the need for increased awarness and recognition of signs that may indicate drug use. The employer has the discretion to determine the reasonable recurrent training for supervisory personnel who have the authority to make reasonable cause determinations. The FAA believes that this flexibility will enable employers to address specific issues or needs that may arise as a result of the employer's anti-drug program.

The rule permits an employer to develop and provide these minimum services as part of an internal program or the employer may contract with community agencies or other aviation companies to provide these services to employees. The employer is permitted to provide additional education and training, beyond the minimum requirements of the rule, to its employees. The FAA believes that employers will not have substantial difficulty developing education and training programs for employees because of the significant number of model EAPs submitted to the FAA in response to the ANPRM.

Small Aviation Entities and Businesses. The National Air Transport Association (NATA) represents numerous Part 135 certificate holders in the aviation industry. NATA states that the anti-drug program would have significant cost impact on Part 135 certificate holders and, particularly, small aviation operators. NATA recommends that Part 135 certificate holders, with 100 or fewer covered employees should be excluded from the requirement to submit and implement an anti-drug program. A number of other small Part 135 certificate holders responding to the NPRM also argue for exclusion from the anti-drug program.

AOPA urges the FAA to exempt from the rule operators and their employees who currently are exempt from the requirements of Part 135. AOPA contends that these operators are invariably small businesses who would be unable to withstand the financial and administrative burdens of the proposed regulations. Several commenters involved in single pilot—single aircraft

operations noted the difficulty of complying with most of the provisions of the proposed rules.

Atlantic Aero, Inc., a fixed based operation employing more than 100 people, and Sunwest Aviation support efforts to address the drug problem but state that modifications to the proposal are necessary to avoid an unjustified administrative and financial burden on small operators.

SSA feels that the proposed anti-drug program is inappropriate for small businesses that rely on student instruction as the economic base of activities or for certified flight instructors acting as independent contractors. SSA believes that the FAA has failed to account for the practical differences between large corporate entities and small businesses. SSA suggests that the FAA develop four separate anti-drug programs that would address the particular needs and concerns of Part 121 certificate holders, Part 135 certificate holders, flight schools, and small businesses or independent contractors.

A commenter speaking as national litigation counsel for AOPA and on behalf of the California Aviation Council and the Orange County Aviation Association, conveys the concerns of flight instructors, small fixed base operators, banner towers, crop dusters, and other small aviation entities that do not provide scheduled air carrier service who are affected by the proposal. This commenter notes that the NPRM is an unwarranted, overreaching invasion of the domestic aviation community's right to be free from governmental intrustion because of the lack of evidence of any drug problem among commercial aviation professionals. The commenter states that this lack of evidence supports the history or responsible self-regulation by the commercial aviation community.

The National Association of Flight Instructors (NAFI) states that the anti-drug program proposed in the NPRM is tailored for a large aviation organization and, therefore, is not appropriate for a small organization or a freelane flight instructor that is not employed by any company. NAFI believes that testing of a flight instructor each time that instructor performs flight instruction duties will be impossible. In addition, NAFI is concerned about the quality and reliability of laboratory analysis; the constitutionality of drug testing; and the administrative and economic burden on small entities related to EAP services, MRO requirements, and job security for employees enrolled in rehabilitation. Two individual commenters believe that sole-proprietorships and businesses that employ 10 or fewer employees should be excluded from any requirement to implement an anti-drug program.

FAA Response. The FAA understands the economic and practical concerns expressed by Part 135 certificate holders as well as those entities or individuals, listed in § 135.1(b), who are otherwise exempt from the requirements of Part 135 but are affected by the regulation because they are engaged in operations for compensation or hire. For the purposes of the requirements of the anti-drug program, the FAA has tailored the final rule in an attempt to accommodate small aviation entities, particularly those Part 135 certificate holders who employ 50 or fewer employees who are covered by this final rule and those entities or individuals, listed by this final rule and those entities or individuals, listed in § 135.1(b), who are otherwise exempt from the requirements of Part 135 but are included in the comprehensive anti-drug program because they conduct operations for compensation or hire.

The FAA believes that it would be counterproductive to the goals of the anti-drug program to impose requirements on small aviation entities who would be unable to comply with them because of substantial financial, administrative, and logistical difficulties. The vast majority of the difficulties are associated with the requirements of implementing a random testing program and providing rehabilitation programs and services to employees. Therefore, the FAA has revised the proposed rule to provide a tiered implementation plan that would allow small aviation entities to develop and implement a comprehensive anti-drug program, over specific time periods, in accordance with a schedule determined by the FAA. The language of the rule does not prohibit an employer from implementing its anti-drug program sooner than required by the FAA's schedule if the employer is able to comply with the rule requirements and the provisions of its anti-drug program at an earlier date.

Part 121 certificate holders and Part 135 certificate holders that have more than 50 covered employees, and contractors to these certificate holders, will be required to follow the schedule that was proposed in the NPRM with one exception. As proposed, these employers must submit an anti-drug plan to the FAA not later than 120 days after the effective date of the rule and must implement the anti-drug program not later than 180 days after approval of the anti-drug program by the FAA. However, these employers are required to implement preemployment testing of applicants for sensitive safety- or security-related positions not later than 10 days after approval of the employer's anti-drug plan by the FAA. The FAA believes that it is appropriate to require accelerated implementation of preemployment testing for these employers because many of these employers have existing preemployment testing programs and, generally, these employers have the available financial and administrative resources that enable them to begin testing.

Part 135 certificate holders that have 11 to 50 covered employees, and contractors to those certificate holders, will be required to submit an interim anti-drug program, that sets forth all required drug testing except mandatory random drug testing, not later than 180 days after the effective date of the final rule. The employer must implement preeployment testing, periodic testing, postaccident testing, testing based on reasonable cause, and testing after an employee's return to duty not later than 180 days after approval of the anti-drug program by the FAA. These employers must submit an amendment of their interim anti-drug program to the FAA, that contains the procedures for implementing an unannounced testing program of employees who are randomly selected at the applicable annualized testing rate, not later than 120 days after approval of the interim anti-drug program by the FAA. The employer must continue implementation of the remainder of the program and must implement the random testing provision not later than 180 days after approval of the amended anti-drug program by the FAA.

Part 135 certificate holders with 10 or fewer covered employees and those entities or individuals, listed in § 135.1(b), who are otherwise exempt from the requirements of Part 135 but are included in the comprehensive anti-drug program because they conduct operations for compensation or hire, and any contractors to these employers, must submit an anti-drug plan to the FAA for approval, that includes procedures for all types of testing mandated by the rule, not later than 360 days after the effective date of the final rule. These employers must implement the approved anti-drug program not later than 180 days after approval of the plan by the FAA. The FAA believes that this extension of time will enable small aviation entities to evaluate random drug testing programs of other companies, to develop an appropriate method by which to comply with the drug testing provisions of the rule, and to participate in any association or

consortium that may be available to provide specimen collection, testing assistance, and EAP services. Also, the FAA believes that it is appropriate to require these employers to submit a plan that includes random testing, as opposed to implementation of random testing after other testing is implemented, because these employers will have a significant amount of time to develop and implement a comprehensive anti-drug program for their employees.

New aviation businesses that come into existence after the effective date of the rule, and that are subject to the requirements of the final rule, will be required to comply with the schedule that is appropriate for the size of the company and their particular operations. The FAA believes that it is appropriate to adhere to the same time schedules that are set forth for existing aviation entities in order to treat similarly-situated entities in a similar manner. However, it is possible that the timeframes may be accelerated for new businesses in the furture as existing employer programs and consortia develop and continue to provide services to the aviation community.

The FAA has identified an issue that could unduly burden small commercial operators who do not hold a Part 121 certificate or a Part 135 certificate, who conduct operations listed in § 135.1(b), and who are included in this final rule because they conduct operations for compensation or hire. Under the terms of the proposed rule, these commercial operators would have been unable to contract for aircraft maintenance or preventive maintenance services. The proposed rule would have prohibited commercial operators from using the services of employees who work for fixed base operators and repair stations that service only general aviation aircraft if the employees of these entities were not subject to an FAA-approved comprehensive anti-drug program. In an effort to relieve this unintended burden, the FAA has included a new provision in the final rule directed solely at those individuals or entities. This provision states, in essence, that an individual who is otherwise authorized may perform maintenance and repair work on a commercial operator's aircraft, even if that individual is not covered by a comprehensive anti-drug program, in two specific instances. First, an individual who is not covered by the final rule can perform emergency repairs on an aircraft if the aircraft could not be operated safely to a location where a covered employee could perform the repairs. Second, an individual who is not covered by the final rule can perform aircraft maintenance and preventive maintenance repairs on an aircraft if the operator would be required to transport the aircraft more than 50 nautical miles further than the closest available repair point from the operator's principal base of operations in order to have the work performed by a covered employee. The FAA believes that this narrow exemption from the requirements of the final rule will benefit the small commercial operators subject to the final rule but will not adversely affect the enhanced aviation safety intended by the final rule.

Medical Review Officer (MRO). Several small entities, including EAF, believe that an MRO should have the responsibility to determine if an employee has been successfully rehabilitated and to determine when an employee may return to duty. ATA also recommends that an MRO be involved in the determination of an employee's successful rehabilitation. However, ATA notes that it would not always be feasible for an MRO to personally interview each employee who has a positive test result and recommends that the final rule accommodate that situation. RAA and Federal Express oppose any regulatory provision that would require an airline to appoint or to designate an MRO as part of an anti-drug program.

APFA believes that an MRO should be an independent physician who could assist labor and management EAP officials during analysis of drug test results and determination of the validity of test results in each employee's case. AFA believes that it is imperative that an MRO have specific training in toxicology and addictive diseases. Even with this training, AFA believes an MRO should be responsible for monitoring any testing program and interpreting test results to determine if referral to an EAP is warranted for a particular employee. AFA states that evaluation and referral for treatment and determinations regarding an employee's readiness to return to work should be made only by an EAP treatment professional. IUFA states that only the health care professional with whom an employee has been working is qualified to make a determination of when an employee is fit to return to duty. If an MRO and the responsible health care official disagree, a neutral third party should evaluate an employee and determine if an employee is fit to return to work. ALPA states that the determination of whether an individual has been rehabilitated, at least in the case of pilots, must be made by the Federal Air Surgeon under the medical certification procedures contained in Part 67 of the Federal Aviation Regulations.

FAA Response. In response to commenters who oppose the requriement to designate or appoint an MRO, the FAA notes that the rule does not require that each employer have its own individual MRO. The FAA anticipates that small companies will become part of, or will associate with, large companies or may participate in a consortium of small companies or associations, in order to comply with the MRO requirement of the final rule that will result in reasonable costs to small employers.

After consideration of the comments on the issue of MROs, the FAA has determined that the requirements proposed in the NPRM are appropriate. The FAA believes that the review and evaluation functions of an MRO provide critical and necessary safeguards for an employee who is subject to drug testing under the comprehensive anti-drug program. The FAA believes that the MRO will prove to be a beneficial asset to both employees and employers who are subject to the provisions of the final rule.

However, the FAA has expanded the role of the MRO after review of the comments and the proposed rule, although many of these responsibilities are contingent on an employer's decision to be involved in rehabilitation. For example, if an employer chooses to use an individual to perform a sensitive safety- or security-related function who has failed a drug test under this program and who has successfully completed rehabilitation, the MRO will develop an unannounced testing schedule for that individual. The MRO is the final arbiter in cases where an individual disputes a testing schedule after return to duty. Except in cases where the Federal Air Surgeon is involved, as discussed below, the MRO also is the final arbiter regarding return-to-duty recommendations. The MRO also shall review any rehabilitation program in which an employee or an applicant participated, after failing a drug test conducted in accordance with Appendix I to Part 121, to determine if an employee can return to duty or an applicant may be hired to perform a sensitive safety- or security-related function for an employer.

The FAA also has defined the factors that an MRO shall consider when making a return-to-duty determination. The MRO is required by the final rule to ensure that an individual is drug free as evidenced by a drug test; that an

individual has been evaluated by a rehabilitation counselor for drug use or abuse; and that an individual has complied with testing and counseling requirements of a rehabilitation program. Thus, the MRO will have significant and sufficient information to recommend, based on the MRO's professional opinion, that an individual or a current employee could perform a sensitive safety- or security-related function for an employer.

The FAA clarified the proposed requirement that the MRO "conduct a medical interview" with an employee as part of the review of a positive test result. The FAA did not intend that the proposal require a face-to-face interview with each employee. The final rule requires that the MRO provide an employee with an opportunity to discuss a positive test result with the MRO. Thus, for example, the MRO is permitted to discuss the positive test result with the employee by phone. The FAA believes that the clarification will relieve some administrative burdens on the MRO and employees in scheduling discussions of a positive test result. The FAA also added several requirements to the MRO's list of duties. First, the MRO is required to notify an employee of a confirmed positive test result within a reasonable time after verification of the result. Second, the MRO must process an employee's request to retest a specimen. The final rule provides that the employee's request to retest must be made in writing to the MRO within 60 days of notification of the confirmed positive test result.

In the NPRM, the FAA requested comment on who should make the decision that an employee had been successfully rehabilitated and could return to duty if the employee was drug free. ALPA specifically comments that return-to-duty determinations of pilots should be made by the Federal Air Surgeon consistent with the medical certification procedures contained in Part 67 of the Federal Aviation Regulations. Part 67 of the Federal Aviation Regulations define "drug dependence" as a "* * * condition in which a person is addicted to or dependent on drugs other than alcohol, tobacco, or ordinary caffeine-containing beverages, as evidenced by habitual use or a clear sense of need for the drug." After review of the comments and consideration of the medical standards contained in Part 67, the FAA has determined that the Federal Air Surgeon must be involved in the decision to return an individual who holds a Part 67 medical certificate to a sensitive safety-related position. The FAA believes that it would be contrary to the statutory mandate to determine the physical ability of an individual to perform duties pertaining to his or her airman certificate if the FAA failed to participate in a return-to-duty decision for an individual who holds a medical certificate.

Thus, the FAA has clarified the responsibilities of the MRO for situations where an employer voluntarily becomes involved in rehabilitation of employees or persons hired to perform sensitive safety- or security-related functions that require an individual to hold a medical certificate issue by the FAA. Under the rule, the MRO will perform all the duties and make all the determinations required in Appendix I for those individuals who do not hold a medical certificate issued pursuant to Part 67 of the Federal Aviation Regulations. For those individuals whose position with the employer requires them to hold a Part 67 medical certificate, the MRO is required to make a preliminary determination, consistent with the standard contained in Part 67, of probable drug dependence or a determination of nondependence. If the MRO makes a determination of nondependence based on his professional opinion, the MRO may recommend that an employee return to duty in a sensitive safety- or security-related position. The MRO is required to forward the finding of nondependence, the decision to return the employee to duty, and any supporting documentation, to the Federal Air Surgeon for review.

The FAA is aware that allowing an MRO to determine that an individual is not drug dependent and, therefore, may return to work in a sensitive safety- or security-related position without prior clearance by the Federal Air Surgeon may be controversial and may be viewed as inconsistent with aviation safety. However, in the FAA's opinion, it is consistent with aviation safety to provide subsequent FAA review of the treatment and any medical determination of nondependence that has been made by a competent licensed physician with knowledge of substance abuse disorders. The FAA also believes it is beneficial to provide subsequent review of an MRO's return-to-duty determinations, rather than initial review by the Federal Air Surgeon, so that an individual who is not dependent on drugs can return to work as soon as possible. Moreover, any individual who returns to work after rehabilitation is subject to unannouned testing as determined by the MRO and may be subject to ongoing counseling. Therefore, the FAA believes that initial determinations by an MRO and subsequent review by the Federal Air Surgeon will result in effective and fair treatment of individuals who are required to hold a medical certificate.

At any point that an MRO, in this professional opinion, makes a determination of probable drug dependence of an individual required to hold a medical certificate for a position, the MRO is required to report the name and other identifying information, and to forward all documentation that supports the determination, to the Federal Air Surgeon. If the MRO has made a probable drug dependence determination of an individual required to hold a medical certificate, the MRO may not make a recommendation to return that individual to duty. From that point forward, the Federal Air Surgeon is responsible for determining whether the individual may keep a medical certificate or may be issued a medical certificate consistent with the medical standards contained in Part 67 of the Federal Aviation Regulations. Since drug dependency is a disqualifying medical condition under Part 67 of the Federal Aviation Regulations, it is critical that the Federal Air Surgeon be aware of any determination of probable drug dependence. An individual subject to the medical requirements of Part 67 who has a history of drug dependency must receive a "special issuance" medical certificate, issued at the discretion of the Federal Air Surgeon pursuant to § 67.19, before returning to work in a sensitive safety-related position. The Federal Air Surgeon is required to determine if that individual is qualified to hold a medical certificate and is physically able to exercise the privileges of an airman certificate. This determination, and the discretion to grant a special issuance of a medical certificate, clearly are within the exclusive expertise of the Federal Air Surgeon.

The FAA has added a provision to the final rule that requires the MRO to report the name of any current employee required to hold a medical certificate to perform a sensitive safety-related function who fails a drug test. The MRO also is required to report the name of any individual who holds a medical certificate and applies for a position with the employer in which a medical certificate is required and who fails a preemployment drug test. The MRO is required to report the names of these individuals to the Federal Air Surgeon because a positive drug test result clearly is probative evidence of possible

drug dependence which is a disqualifying condition under the medical standards of Part 67 of the Federal Aviation Regulations. Therefore, the FAA added this requirement to ensure that the FAA is aware of conditions that may affect an individual's ability to physically perform the duties of an airman.

Administrative Matters and Reporting and Recordkeeping Requirements of Appendix I to Part 121. The FAA received very few comments regarding the reporting requirements of the proposed rules. ATA found the requirements of Appendix I to be acceptable. ATA recommended that the FAA establish a date to analyze the data collected regarding drug testing and rehabilitation and to review the regulations. Suburban Airlines, as part of its analysis of the costs of the proposals, estimates that the administrative costs and record retention costs of testing its 211 employees would be $8,500 per year. Federal Express supports auditing of annual, summary data by the FAA that is supplied by an employer regarding the employer's anti-drug program. Federal Express does not object to submitting an anti-drug program for the FAA's approval but believes that the 180-day implementation period will be insufficient if the final rule contains all of the requirements proposed in the NPRM.

FAA Response. The regulatory provision that require an employer to submit a comprehensive anti-drug program and summary reports of the employer's program are critical measures to provide oversight of the industry's implementation of the comprehensive anti-drug program. The FAA believes that these minimal requirements are necessary to properly monitor the industry and to ensure compliance with the final rule. In addition, evaluation of the industry's implementation of the anti-drug program and the results of testing and rehabilitation programs will enable the FAA to review any demonstrated trends of drug use in the aviation industry and to modify the rules if warranted by the data. These reporting requirements are consistent with the FAA's existing industry recordkeeping and reporting requirements.

The FAA has modified the proposed recordkeeping and reporting provisions in the final rule. First, the FAA has clarified the requirements and organization of material that must be submitted in the employer's semi-annual report and annual report. In order that the FAA may accurately assess information submitted by an employer, the revised final rule provides that the employer must submit the total number of tests performed; the total number of tests performed for each category of test; and the total number of positive test results for each category of test given by an employer. These requirements are in addition to the proposed requirement to provide information on the number of positive test results according to the function performed by an employee for each type of test and according to the type of drug indicated by a positive drug test result. The FAA anticipates that requiring an employer to report the additional information will not overburden an employer because drug testing laboratories commonly report the bulk of this information when reporting drug test results. For example, as part of the DOT procedures (49 CFR Part 40), a DHHS-certified laboratory is required to provide a monthly statistical summary of initial and confirmation urinalysis testing data of employees tested during the month to the person responsible for coordination of the drug program. The summary contains information on the number of specimens received for initial and confirmation testing; the number of specimens reported for initial testing; and the number of specimens reported positive for each of the five drugs or drug metabolites tested during initial and confirmation testing [DOT "Procedures for Transportation Workplace Drug Testing Programs;" 49 CFR Part 40).

The FAA had proposed that an employer only keep records relating to the specimen collection process in the NPRM. However, in light of other revisions to the proposed rule made in response to the comments, the employer also must retain records of test results and records relating to any employee rehabilitation. For example, the MRO is required to report the names of individuals holding a Part 67 medical certificate who fail a drug test and to forward test result and rehabilitation information regarding all individuals holding a medical certificate to the Federal Air Surgeon. Thus, the FAA has revised the recordkeeping provision of the proposed rule to require that an employer keep adequate information with which an employer and the FAA can evaluate the anti-drug program and determine any trends that may develop in the commercial aviation industry. Pursuant to the final rule, an employer is required to retain all confirmed positive test results and any rehabilitation records for five years. The employer may retain these records longer than five years although extended record retention is not required by the final rule. The FAA also added a provision to the final rule that requires an employer to keep any negative test results for a period of 12 months. However, all records retained by the employer are subject to limited release, as discussed below, for any period of time that the employer keeps these records.

Confidentiality of Test Results. Most small businesses, individuals, and labor unions support restrictions on the release of drug testing information. These commenters believe that the FAA should include a regulatory provision prohibiting the release of any drug testing information about an employee.

RAA believes that only the employer and the employee should have access to the results of the anti-drug program. Conversely, ERA Aviation suggests that employers should be required to report the name, social security numbers, and certificate numbers of employees testing positive to the FAA. TWU states that test results should be confidential as to all persons, except an applicant or employee, absent written consent or valid compulsory process. The laboratory may release confirmed positive test results or negative test results only to the employer's medical officer. TWU suggests that the medical officer may notify managerial or supervisory personnel who have a compelling need for the information to implement employer's policies or may notify the medical personnel responsible for an employee's rehabilitation.

RAA and Federal Express believe that job applicants should be required to disclose prior test results to subsequent employers as a condition of employment. ATA believes that records of applicants for employment who have tested positive in a preemployment drug test should be disclosed to third persons in limited situations, including authorization from the applicant, litigation by the applicant, pursuant to a valid subpoena, and by order of a court or administrative agency. However, ATA believes that test results, related personnel records, and rehabilitation data of incumbent employees should not be released to any person absent express consent of the employee. The Director of the Santa Maria Public Airport District believes that positive test results of all employees and applicants should be retained in a central database and should be available to potential aviation employers. Federal Express also believes that carriers should be free to exchange an employer's drug testing

results and that the FAA should insulate carriers from liability for this disclosure.

ALPA states that information regarding an employee's drug testing history should be treated as confidential information, and clearly stated in any final rule, since it is "extracted" from the employee by requiring the employee to submit to drug testing. A rule of confidentiality should apply to all information obtained pursuant to the regulation whether obtained as a result of testing, interview, or examination, or treatment of an employee. ALPA believes that the only effective and appropriate rule is a complete ban on disclosure of confidential drug testing information without the employee's written consent. ALPA believes that a complete ban on disclosure is required for ethical reasons and to encourage candor by employees when dealing with medical professionals.

As a general matter, EEAC advocates protecting the privacy of individuals who undergo drug tests. EEAC believes that sharing of drug testing information among employers in a safety-sensitive industry has superficial appeal. However, EEAC advocates caution in allowing a subsequent employer to rely solely on information obtained as a result of a different company's drug testing procedures.

FAA Response. The FAA has included a provision in the final rule that will govern release of records of an employee's drug testing results and any rehabilitation information. The FAA has decided that the legitimate individual privacy rights of an employee warrant strict limitations on the availability of an employee's drug testing results and rehabilitation information. The final rule provides that the release of an individual's drug test results and any information about an employee's rehabilitation program is permitted only with the specific, written consent of the individual. Due to the specific provisions discussed previously, this restriction does not override the requirement to report test results and any rehabilitation information to the Federal Air Surgeon of an applicant or an employee who holds a medical certificate who fails a drug test. The final rule also provides that the FAA is entitled to examine these records and that this information must be released to the NTSB as part of an accident investigation or to the FAA upon request.

Temporary Employees. The FAA solicited comments in the NPRM on the proposed definition of temporary employees and their eligibility for rehabilitation. RAA agrees with the FAA's proposed definition that temporary employees are those individuals who are hired for a period of less than 90 days. ATA and Federal Express propose a period of 120 days and TEMSCO Helicopters proposes a period of 150 days or less to determine an employee's eligibility for rehabilitation opportunities.

RAA and ATA agree with the FAA's proposal to exclude temporary employees from rehabilitation opportunities. RAA and ATA oppose the FAA's proposal to consider employees, who are eligible for reemployment by the same employer within 90 days following the original employment, as regular employees of the industry and, therefore, eligible for rehabilitation opportunities if they are rehired by the airline.

Several organizations, including TEMSCO Helicopters and ATA, comment that the time period of 90-day employment would adversely affect businesses who employ individuals on a seasonal or contract basis for longer periods of time. SSA states that small businesses should not be required to retain or to rehire a part-time or temporary employee who volunteers for, or otherwise participates in, rehabilitation.

FAA Response. In the NPRM, the FAA requested comment on the definition of a temporary employee and whether employers should be required to offer rehabilitation opportunities and job security to temporary employees. After consideration of the comments and due to deletion of the requirement to offer rehabilitation and job security to employees, a definition of temporary employees in the final rule is unnecessary. Therefore, an employer is not required by the rule to offer an opportunity for rehabilitation or to hold a position open for any temporary employee.

However, the final rule makes no distinction regarding testing of temporary employees. Thus, an employer is required by the final rule to include temporary employees in its drug testing program. The burden of testing temporary employees is slight when compared to the significant risk that a temporary employee who uses drugs poses to aviation safety. Thus, the FAA believes that it is important to test temporary employees for the presence of drugs or drug metabolites that may adversely affect performance of a sensitive safety- or security-related function. Many "temporary" employees, who actually are recurring seasonal employees or are regularly and containually rehired at the end of specified term, are "permanent" members of the aviation industry. The FAA firmly believes that these individuals clearly should be included in an employer's drug testing program in the interest of aviation safety. In addition, these employees, although they may consistently perform sensitive safety- or security-related functions pursuant to short-term contracts for different employers, should be included in EAP education programs because of their continuous involvement in commercial aviation activities.

Uniformity versus Flexibility. ATA, American Airlines, Delta Airlines, IUFA, and IFFA believe that all employers and employees should be subject to uniform minimum rules and requirements in the area of drug testing. These entities strongly believe that company-specific plans may dilute the effectiveness of the anti-drug program or lead to harassment of employees.

EEAC supports the concept of employer flexibility to design specific anti-drug programs. EEAC believes that each employer should determine the circumstances of employee drug testing and the content of employee assistance programs. EEAC supports preemployment testing, postaccident testing, periodic testing incident to scheduled physical examinations, and testing based on reasonable cause. EEAC believes employers should have the option or requiring random testing of employees.

EEAC readily endorses EAP services and rehabilitation of employees but believes that these benefits should not be mandated by the government. Decisions whether an employee has been rehabilitated and whether an employee should be permitted to return to work should be determined by the individual employer acting with the guidance of professionals involved in an employee's rehabilitation.

Federal Express believes that use of controlled substances at any time, whether on or off the job, should be prohibited due to the critical safety concerns in the aviation industry. Federal Express states that such a prohibition "* * * helps ensure safe operation of aircraft and protects employees and the general public from unnecessary safety hazards." However, Federal Express believes that the FAA should impose only minimum regulatory requirements of a drug testing and rehabilitation program and allow carriers to structure individual programs for their particular employees.

FAA Response. The FAA agrees with the Commenters who conclude that mandating minimum, uniform requirements for comprehensive anti-drug programs in the commercial aviation industry is necessary in order

to maximize the effectiveness of the program and to achieve a safe and drug-free commercial aviation workforce. The FAA believes that the comprehensive anti-drug program promulgated in this final rule meets the agency's statutory mandate to promote the safety of civil aircraft operating in air commerce and that it responds to the public's need for a safe aviation environment.

In response to the comments, particularly in the area of anti-drug programs implemented by small aviation entities, the FAA has addressed the need for employer flexibility by revising the program requirements or the implementation dates. The FAA has not included specific, detailed provisions regarding the content and requirements of an individual's treatment due to the significant variables that affect these components based on each individual, the type of drug used, and the level of any drug use, drug dependence, or drug addiction. Thus, in the area of an employee's rehabilitation treatment plan, the FAA agrees that this decision is best left to the discretion of those individuals who are significantly and directly involved in the employee's rehabilitation.

The FAA has imposed uniform, minimum requirements on employers and employees in other areas of the comprehensive program. Although employers are required to comply with the minimum requirements, employers may expand the minimum testing requirements to include other employees or may offer EAP services and rehabilitation opportunities to employees. If the employer expands its anti-drug program, any additional components of the employer's anti-drug program may not contradict or dilute the effectiveness of the FAA's final rule. As stated in the NPRM, while the FAA would not prohibit employers from taking independent actions beyond those required by the rule, such actions may not adversely affect the final rule and would not be authorized by the FAA. Therefore, additional benefits or more stringent procedures would not be considered part of the employer's approved program.

The FAA received many comments for revision of the final rule to include testing for additional drugs and permission for an employer to use analytical procedures that are not addressed in the DHHS guidelines. The Department of Transportation will address the issue of testing for additional drugs in the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40). DOT intends to follow the proposed DHHS guidelines which allow testing for other drugs, in addition to the five drugs specified in the appendix, only in the context of testing based on reasonable cause. Neither this final rule nor the DOT procedures address the issue of an employer's ability to test for drugs, other than the drugs specified by the FAA, to the extent that an employer has independent legal authority to test for other drugs.

Regulatory Consent. AOPA believes that the FAA should eliminate the regulatory section that would require a pilot to submit to a drug test requested by an employer, a local law enforcement officer, or an FAA inspector. AOPA asserts that the FAA does not have the authority or the expertise to administer a drug test and that refusal to sumbit to a test is best left to local law.

ATA agrees with the sanctions proposed for an employee's refusal to submit to a required test. Henson Airlines has an existing policy that an employee's refusal to submit to a drug or alcohol test will result in disciplinary action that could include dismissal from the company.

FAA Response. The FAA has not revised the provisions proposed in the NPRM that would provide sanctions for an employee's refusal to submit to a drug test required as part of the comprehensive anti-drug program. The FAA believes that the sanctions proposed in the NPRM are appropriate and are necessary to ensure compliance with the requirements of the anti-drug program. In response to AOPA's comment, the FAA would not "administer" a drug test under this provision. The FAA would simply request that the employee submit to a drug test, collected and analyzed consistent with the DOT procedures of 49 CFR Part 40, where testing would be otherwise authorized under an anti-drug program. This provision is necessary primarily in the area of postaccident drug testing where the FAA may be the only official at the scene of an accident with the authority to request that an individual submit to a postaccident drug test.

The FAA also believes that compliance with the testing requirements of the final rule is not an issue that is best left to local law. As a preliminary matter, the FAA has clear statutory authority to promote and maintain aviation safety. Second, the FAA is the entity that issues airman certificates and that is charged with ensuring that an airman is qualified to exercise the privileges of that Federal certificate. Finally, sanctions imposed pursuant to State or local law may vary widely among each jurisdiction and would subject similarly-situated employees to dissimilar treatment according to the content of the local law. Therefore, the FAA believes that it is appropriate to provide that an individual is disabled from performing a sensitive safety- or security-related function and to include sanctions for a failure to submit to a drug test to promote aviation safety and to ensure consistent treatment of individuals engaged in commercial aviation.

Existing Regulations. AOPA, several small aviation entities, and many individual commenters believe that the FAA's existing regulations, and increased FAA enforcement of these regulations, are sufficient to deal with any drug problem in the aviation industry.

A commenter speaking as national litigation counsel for AOPA and on behalf of the California Aviation Council and the Orange County Aviation Association believes that the types of testing proposed by the FAA are duplicative of the existing opportunities for testing in the periodic medical examination of commercial and air transport pilots. In addition, this commenter states that the FAA has the authority, pursuant to § 609 of the Federal Aviation Act, to reexamine or reinspect any airman at any time. Therefore, the commenter believes that the FAA could implement a lawful drug testing program within the existing infrastructure of the FAA's certification procedures. The commenter also states that the regulations proposed in the NPRM create an irreconcilable conflict with the FAA's safety-enhancement enforcement system. The commenter believes that the proposed anti-drug program will prove detrimental to aviation safety because the number of enforcement cases brought by the FAA for violations of the proposed regulations will overburden the FAA and the administrative law judges assigned to hear enforcement cases.

FAA Response. The FAA disagrees with the commenters who state that the comprehensive anti-drug program requirements are redundant and that increased enforcement of the existing regulations or reexamination of individual airmen will result in a drug-free commercial aviation environment. The existing regulations do not address the issue of drug testing of aviation personnel performing sensitive safety- or security-related functions in commercial aviation. Thus, in the FAA's opinion, enforcement of existing regulations or individual reexamination will not sufficiently deter any drug use

in commercial aviation. In addition, the existing regulations do not address the critical issues of procedural safeguards in collection and testing of samples for the presence of drugs or drug metabolites that are provided in the DOT procedures of 49 CFR Part 40.

Establishing a drug testing program within the existing "infrastructure" of the existing certification procedures is equivalent to implementing only a periodic testing requirement. Because of an individual's ability to circumvent periodic testing, based on a relatively short abstinence from drug use, periodic testing alone is not a sufficient deterrent to drug use in commercial aviation. The FAA believes that it is appropriate and necessary to provide minimum requirements, applicable to employers and employees, that will achieve a drug-free commercial aviation environment.

Preemption of State and Local Laws. ATA, Federal Express, and RAA recommend that the FAA insert a regulatory provision that explicitly proscribes State or local legislation that would interfere with the consistent and uniform testing and rehabilitation opportunities for aviation employees mandated by this final rule.

FAA Response. The FAA agrees with the commenters who are critically concerned about conflicting State and local laws that would interfere with an effective comprehensive anti-drug program. The FAA believes that inconsistent laws or regulations applicable to the subject matter of this final rule will frustrate the intent of the rule and severely hamper implementation and administration of an anti-drug program. Therefore, the FAA has included a preemption provision in the final rule that is intended to enhance the efficiency and effectiveness of the requirements of the final rule.

The FAA's issuance of the final rule preempts any State or local law, rule regulation, order, or standard that covers testing of commercial aviation employees for the presence of drugs or drug metabolites. The new rule does not preempt any State law that imposes sanctions for the violation of a provision of a State criminal code related to reckless conduct leading to actual loss of life, injury or damage to property, whether such provisions apply specifically to aviation employees or generally to the public. The scope of the authority preempted by this final rule and the authority reserved to the States is essentially identical to the provision in the regulations issued by the Federal Railroad Administration of the Department of Transportation (49 CFR 219.13).

Waivers or Exemptions. ATA believes that waivers and modifications of an employer's drug testing program should be granted if exceptional circumstances warrant the waiver or modification and if an equivalent level of safety can be maintained under the terms of the waiver. American Airlines advocates that all carriers should be subject to identical requirements and waivers should not be granted.

FAA Response. The final rule sets forth minimum requirements that must be included in an employer's anti-drug program. However, the rule generally does not set forth detailed program administration requirements in most areas of the program. Also, an employer is not prohibited from establishing an anti-drug program that goes beyond the minimum requirements promulgated by this rule. As a result of the FAA approval process of an employer's anti-drug program, a certain amount of discretion and flexibility is retained for an employer's administration of its anti-drug program.

On this basis, the FAA has determined that any requests for exemption from a requirement of this rule should be handled in the same manner as requests for exemptions of other FAA regulations under Part 11 of the Federal Aviation Regulations. The FAA believes that a case-by-case determination will be necessary to ensure that any exemptions from the requirements of this final rule are in the public interest.

Contractors

The FAA has revised the proposed rule as it applies to contractors whose employees perform sensitive safety- or security-related service for aviation entities subject to the rule. Under the proposed rule, contractors whose employees perform covered service to aviation entities were authorized to submit their own plans to the FAA to implement directly an anti-drug program. These contractor employees also could have been included in the anti-drug program of the aviation entity for whom they were providing services. However, for the final rule, the FAA concluded that all persons performing sensitive safety- or security-related functions should be under the plan of the aviation entity for whom they provide the services.

The FAA believes that administration of the anti-drug program would be vastly more efficient—for aviation entities directly subject to the rule, contractors, and the FAA—by reducing the proliferation of different plans submitted by a significant number of contractors who provide covered service to the same aviation entity. In addition, the FAA believes that limiting the submission of plans to those aviation entities directly subject to the rule will provide a more consistent approach to administration of industry anti-drug programs and will minimize the difficulties of ensuring compliance with the final rule. As noted earlier in this preamble, the final rule provides that an employee who is subject to the requirements of any employer's FAA-approved anti-drug program may provide sensitive safety- or security-related services to any other employer. Therefore, so long as a contractor employee is covered by one aviation entity's anti-drug program, the employee would be able to provide services for any employer subject to the rule. Thus, a contactor whose employees provide services to multiple aviation entities would not be subject to any greater burden than those entities directly subject to the rule.

Additional Issues

Alcohol. The NTSB, AMA, Henson Airlines, and other individual commenters suggest that the FAA include alcohol as a tested substance in any required testing program.

The FAA expressly excluded the issue of alcohol testing from this rulemaking for a variety of reasons stated in the NPRM; therefore, these comments are beyond the scope of this rulemaking. Excluding alcohol testing from this rulemaking should not be construed to mean that the FAA is ignoring the fact that alcohol may be a substance of widespread abuse in the aviation industry. As stated in the NPRW, the FAA will continue to review the effectiveness of regulations dealing with the issue of alcohol use and abuse in aviation and may consider additional rulemaking action in the future. In addition, employers are not prohibited from initiating alcohol testing programs for their employees if not otherwise prohibited from testing for alcohol.

The Department of Transportation will include a provision in the DOT precedures (49 CFR Part 40) that will enable an employer to test for the presence of alcohol in an employee's system. Pursuant to those procedures, the employer could include testing for alcohol in testing protocols only pursuant to FAA approval if the testing is authorized under the FAA regulations.

Testing for additional drugs. The NTSB recommends that the FAA expand the list of prohibited drugs to include those substances listed in Schedule III and Schedule IV of the Controlled Substances Act. The NTSB also

recommends that the FAA develop a medical exemption process to provide for a pilot's legitimate medical use of these substances. ATA recommends that mind-altering prescription drugs, such as barbiturates, benzodiazepines, methadone, and methaqualone, also be listed as prohibited drugs in any drug testing program. ERA Aviation supports this recommendation and suggests that propoxyphene, quaaludes, and codeine be added to the list of drugs that would be screened.

The five drugs specifically listed in Appendix I to Part 121 are the five drugs for which DHHS has set cutoff levels and testing protocols in its mandatory guidelines (53 FR 11970, 11973–11974; April 11, 1988). The Department of Transportation intends to adopt these cutoff levels and testing protocols verbatim in its procedures applicable to the aviation industry (49 CFR Part 40). An employer is required to test for marijuana, cocaine, opiates, phencyclidine (PCP), amphetamines, and metabolites of those drugs because of the incidence and prevalence of use of these drugs in the general population and based on the experience of the Department of Defense and the Department of Transportation in their drug testing programs. Because analysis of additional, less-frequently used drugs could result in substantial additional expense, the FAA believes that requiring an employer to test for these five drugs is appropriate at this time. Any testing for other drugs, beyond the specified drugs listed in the appendix, is authorized only in the context of testing based on reasonable cause. Only if, in that context, the FAA authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshhold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of the DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request.

The FAA is aware that listing the drugs that will be analyzed as part of a drug testing program may result in individuals using alternative drugs that are not analyzed pursuant to the final rule. As part of the agency's review and anlaysis of the industry's anti-drug programs, the FAA encourages the aviation industry to notify the FAA if different drugs are being used in the aviation community. As part of the FAA's oversight of the comprehensive anti-drug program, the FAA will seek statistical information, to the extent any information is available, from the National Institute on Drug Abuse (NIDA), other Federal agencies, and any other source to determine if additional, different drugs should be included in the comprehensive anti-drug program to ensure aviation safety.

Testing of other individuals. Several commenters, including the AMA, NTSB, ATA, and ALPA, suggest that the FAA expand the list of individuals to be tested, or defined as sensitive safety- and security-related employees, under the regulations. Several entities recommended that the FAA require testing of all individuals certificated by the FAA, including general aviation pilots. ALPA, ATA, and Martin Aviation recommend that any employee who performs a function in or around an aircraft (deicing, weight and balance computation, fueling, taxiing or towing aircraft, weather forecasting, baggage handlers, and cargo personnel) and supervisors of covered employees be subject to testing because these individuals affect aviation safety. Federal Express states that it would include ramp agents responsible for weight and balance of an aircraft, deicers, and fuelers in a drug testing program. Federal Express supports inclusion of aviation security screeners in a drug testing program although it does not employ these individuals. ALPA and American Airlines also urge the FAA to include corporate officers in any testing program. The Director of the Santa Maria Public Airport District suggests that the FAA amend Part 107, Part 108, and Part 139 to ensure that employees of certificated airport operators are included in the anti-drug program. Tramco, Inc. suggests that Part 145 be amended so that repair station employers are required to comply with the anti-drug requirements in the same manner as Part 121 certificate holders. Tramco also suggests that aircraft manufacturers be required to implement an anti-drug program.

After review of these various comments, the FAA has retained the basic regulatory list of functions proposed in the NPRM. However, the FAA has eliminated parachute rigging duties from the list of functions contained in Appendix I to Part 121. The activities performed by parachute riggers do not have a direct and significant impact on the safe operation of civil aircraft as do the other sensitive safety- and security-related functions listed in the appendix.

The FAA has not revised the rule to require drug testing of supervisory or managerial employees. However, the FAA notes that under the proposed rule and the final rule, supervisory or managerial employees who perform sensitive safety- or security-related functions for an employer are not permitted to perform these functions, either on a permanent or temporary basis, unless those employees are subject to the requirements of the employer's anti-drug program. Also, repair station employers and employees are subject to the requirements of an anti-drug program if these individuals provide contract service to an employer who is subject to the requirements of this final rule. Under the terms of the rule, a Part 121 certificate holder, a Part 135 certificate holder, or an entity or individual covered by the rule because they operate for compensation or hire may only use the services of persons who are subject to the requirements of an FAA-approved program. Therefore, although Part 145 was not amended, repair station employers and employees are included to the extent that they provide contract service or repair aircraft operated by an employer subject to the final rule.

The comprehensive anti-drug programs, proposed by the operating administrations within the Department of Transportation, focus on drug testing for various commercial transportation activities. The scope and direction of the FAA's comprehensive anti-drug program is consistent with the present Department-wide policy.

The FAA encourages the public and members of the aviation industry to submit information to the FAA (directed to the person listed in the heading "**FOR FURTHER INFORMATION CONTACT**") that may warrant inclusion of different drugs in a drug testing program or additional categories of employees to be tested. If it is necessary to preserve confidentiality of any information submitted to the FAA, the FAA encourages aviation industry representatives or trade associations to transmit the information to the FAA. The FAA will monitor the date gathered pursuant to this program, and will continue to review other information regarding drug use in private and commercial aviation, to determine if further rulemaking action in this area is required or necessary. The FAA may revise other sections of the Federal

Aviation Regulations, to broaden the applicability and scope of the comprehensive anti-drug program, if further study warrants this action. The final rule does not prohibit an employer from testing any other employee or group of employees, if the employer is not otherwise prohibited, that the employer determines should be tested for drugs to provide safety or efficiency in the workplace.

Conflict with foreign laws or policies. We have determined not to make the rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department of Transportation and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching a permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Administrator may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the **Federal Register**. While we recognize that any decision not to apply our rule to foreign citizens has the potential to create some anomalous conditions in competitive situations, it is the intention of the U.S. Government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Statutory authority. One commenter questions the authority of the FAA to promulgate regulations that proscribe recreational drug use by any airman during his or her free time that does not impair the airman's performance on the job. As stated by the commenter, the FAA's mandate is to ensure the safety of civil aviation and not to enforce criminal drug enforcement laws.

The FAA clearly has the statutory authority to mandate continuing eligibility requirements and minimum physical and medical standards to promote and develop safety in air commerce and civil aeronautics. For example, the FAA has clear authority to prohibit off-duty consumption of alcohol prior to aircraft operation to ensure that a crewmember is not impaired by alcohol while acting or attempting to act as a crewmember of a civil aircraft. Similarly, in the FAA's opinion, this broad authority includes the authority and ability to prohibit the presence of any drug or drug metabolite in an individual's system that may adversely affect aviation safety.

As noted in the NPRM, it often is difficult to detect the subtle and varying degrees of drug impairment to motor skills and judgment that are critical to aircraft operation or performance of sensitive safety- and security-related duties. Certain drugs or drug metabolites remain in an individual's system long after use and may impair an individual's subsequent performance. Indeed, the Vice President of a national firm providing consultation services on drug abuse prevention to American Airlines, with significant experience in identification and treatment of drug users, states that marijuana use disrupts recall and short-term memory and that there is serious impairment of skills appropriate to industrial operations for 10 to 12 hours after smoking a single marijuana cigarette. The FAA believes that it is clearly in the public interest and within the FAA's statutory authority to ensure that any "hangover effect" associated with recreational use of illegal drugs does not interfere with an individual's performance and, thus, jeopardize air safety.

Summary of Significant Changes From the Proposed Rule

The FAA amended several sections of the proposed rule in response to comments received from the public on the issues and in response to questions raised in the NPRM. Any changes that significantly altered the requirements of the anti-drug program are discussed previously and are summarized in this section.

The definition of an "employee" in Appendix I to Part 121 was amended to make it clear that employees of an entity that holds both a Part 121 certificate and a Part 135 certificate are to be considered employees of the Part 121 certificate holder. This will ensure that all employees of a single entity, regardless of the type of operating certificate held by the employer, are subject to the same requirements and time schedules for the purposes of an anti-drug program.

The definition of "employer" also was amended. This section was amended to make it clear that an employee of one company that has implemented an anti-drug program may perform sensitive safety- or security-related functions for another employer. For example, a mechanic employed by American Airlines, who is covered by American's anti-drug program, is permitted to perform maintenance duties or repair work on an aircraft owned by United Airlines.

The Department of Transportation has determined that certain modifications of the DHHS guidelines, proposed in the NPRM, are appropriate for this rulemaking. The FAA has referenced a DOT interim final rule (49 CFR Part 40), entitled "Procedures for Transportation Workplace Drug Testing Programs," in this final rule.

The FAA did not revise significantly the section of the appendix regarding the substances for which testing must be conducted. However, the appendix provides that testing for drugs listed in Schedule I and Schedule II of the Controlled Substances Act is permitted only during testing based on reasonable cause. In addition, the testing must be conducted in accordance with the DOT "Procedures for Transportation Workplace Drug Testing Programs" and pursuant to the employer's approved anti-drug program.

The FAA clarified the preemployment testing provision to make it clear that an employer may use a person to perform a sensitive safety- or security-related function who passed a previous preemployment drug test for an employer and has continuously been subject to testing under an approved anti-drug program even if the individual is not currently employed by that employer. The rule prohibits an employer from "hiring" any person after failing a preemployment drug test. The rule does not require an employer to test every applicant but only to test an applicant before he or she is actually hired by the employer.

The periodic testing provision was revised to make it clear that an

employee is only required to provide one specimen for testing during the employee's first periodic medical examination in the first calendar year of implementation of the final rule. Also, this section was revised to enable an employer to discontinue periodic drug testing of employees as part of a medical examination after the first full calendar year of implementation of the employer's anti-drug program. After the first year of implementation, the employer's random testing program should be fully implemented and periodic testing as part of a medical examination may be eliminated.

The FAA revised the random testing provision of the final rule in response to the comments and with reference to the plans of the random testing program started by the Department of Transportation. The final rule provides for phased implementation of unannounced testing based on random selection beginning with an annualized rate equal to 25 percent of covered employees during the first 12 months of program implementation. Thereafter, the employer must achieve and maintain an annualized testing rate equal to 50 percent of the covered employees. The FAA also added a provision that would enable an employer to randomly select employees for unannounced testing based on a method, other than the methods originally proposed in the NPRM, that has been approved by the FAA.

The FAA has amended the postaccident testing provision. The revised section requires an employer to ensure that postaccident testing is conducted as soon as possible but not later than 32 hours after an accident.

As discussed previously, the FAA has expanded the bases upon which an employer may substantiate the determination to test an employee based on reasonable cause. In order to address concerns expressed in the comments, the FAA has included a provision in this section that allows a small aviation employer to test an employee based on a determination of reasonable cause made by only one supervisor trained in detection of drug use symptoms. As proposed in the NPRM, an employer may test an employee performing a sensitive safety- or security-related function for any Schedule I or Schedule II drug, if the employer conducts the testing based on reasonable cause in a manner consistent with the employer's approved anti-drug program and the DOT procedures (49 CFR Part 40).

In response to comments specifically solicited in the NPRM, the FAA has included a provision for unannounced testing after an employee's return to duty. Employees who failed a drug test or who refused to submit to a drug test and who have not received a recommendation to return to duty from an MRO must be tested in accordance with the return-to-duty provision of the final rule. This section requires an employer to implement a reasonable program of unannounced testing, for not longer than 60 months, after an individual has been hired or an employee has returned to duty to perform a sensitive safety- or security-related function.

The FAA has expanded the role of the medical review officer (MRO). For example, the MRO will review rehabilitation programs to determine if an employee may return to duty or an individual may be hired to perform a sensitive safety- or security-related function for an employer. The MRO also is the final arbiter in the case of disputes regarding a schedule for unannounced testing after an employee's return to duty. The FAA has added several provisions to this section to describe the duties of an MRO and the involvement of the Federal Air Surgeon where an individual who holds a medical certificate tests positive for the presence of a drug or drug metabolite.

The FAA has added a provision that protects the confidentiality of employee drug testing results and any rehabilitation information. This information may be released by an employer only with the written consent of the employee. However, the FAA may examine test result and rehabilitation records and the information may be released to the NTSB as part of an accident investigation or to the FAA upon request.

For various reasons discussed previously and in response to many comments, the FAA determined that opportunities for rehabilitation and job security for employees will not be mandated by this final rule. Rehabilitation opportunities and job security issues may be considered by an employer and should be determined by employers and employees in the specific employment context.

The FAA has tailored the schedule proposed in the NPRM for submitting an anti-drug program to the FAA and implementation of an anti-drug program in response to comments received in response to the NPRM. These changes have been fully discussed previously. In essence, the large aviation companies are required to comply with the schedules proposed in the NPRM. Smaller aviation companies have additional time to develop and implement an interim anti-drug program and slightly broader timeframes to develop and submit a random testing program. The smallest aviation entities covered by the rule initially have additional time to develop and implement testing programs for their employees.

The FAA also has included a section in Appendix I to Part 121 to provide for the preemptive effect of these regulations regarding any State or local law covering the subject matter of drug testing of commercial aviation employees. However, issuance of the final rule does not preempt State criminal laws that impose sanctions for reckless conduct leading to death, injury, or property damage.

Comments on the Cost of the Anti-Drug Program

Most small entities object to the anti-drug program based on the financial and administrative burden that these entities believe would result from implementation of the rule as proposed. Executive Air Fleet (EAF) is a Part 135 certificate holder with 200 employees who would be covered by the proposed rules. Because drug testing is widespread in other industries, EAF states that the aviation industry should "move ahead" with the proposed rules. However, EAF states that the potential costs of an anti-drug program could be burdensome even to an operation the size of EAF. EAF estimates that drug testing as proposed in the NPRM would cost $25,000 annually to test its 200 covered employees. EAP services would cost up to $26 per employee. EAF believes that EAP services would have to be available to the total employee population, not only sensitive safety- or security-related employees, because it is a benefit offered to employees. Thus, EAF estimates that EAP services for a business employing 400 individuals would cost $10,400 annually.

Metro Air is a Part 135 certificate holder using two single-engine aircraft, two light twin-engine aircraft, and three helicopters. Metro Air also is a flight school operator using 15 aircraft. Metro Air employs six full-time pilots and four to five part-time pilots. Metro Air states that the proposed rule is not financially feasible for small commercial operators because the company is not in a position to retain or offer rehabilitation to an employee who tests positive for drugs and the cost of hiring an MRO to interpret test results would be prohibitive. Metro Air believes that the FAA should conduct all drug testing of employees and administer any rehabilitation offered to an employee.

Ryder Systems, Inc. employs over 40,000 individuals who perform a variety

of jobs in the transportation industry. Ryder Systems implemented an EAP in 1984. Ryder Systems estimates that 40 percent of the employees enrolled in the EAP due to controlled substance abuse problems require 28- to 30-day inpatient treatment that costs between $10,000 to $20,000. The average cost for controlled substance rehabilitation per employee is $3,000. On this basis, Ryder Systems believes that the FAA should only require that an employer establish an EAP and offer EAP services to an employee but should not specify the details of an EAP or rehabilitation program. However, Ryder Systems believes that the FAA should preserve the employer's discretion to determine EAP eligibility standards for employees, treatment of repeat offenders, and the conditions for allowing an employee to return to work.

American Airlines estimates that rehabilitation and treatment of an employee costs $8,000. For this reason and to ensure that the quality of treatment will lead to a reasonable prognosis for recovery, American Airlines believes that employers and contractors should be financially responsible for rehabilitation. Conversely, RAA and several small aviation entities, including Martin Aviation, Inc., believe that the FAA should not force airlines to incur the cost of employee rehabilitation due to the economic impact of the requirement on the regional airline industry.

RAA states that the average cost of a single random test would be $55 and that retesting for verification of positive results could cost up to $80 per test. On this basis, RAA estimates that the cost of random testing at a rate of 125 percent annually for regional airline pilots only will approach $500,000 annually. Due to the high cost of testing at a rate of 125 percent and the fact that the proposed rules would require testing of other aviation safety-related personnel in addition to pilots, RAA suggests that a random sampling rate of 50 percent would be appropriate.

Suburban Airlines employs 211 employees who would be covered by the proposed program. Suburban estimates that the FAA's program would cost over $28,000 annually at present employment levels. Based on Suburban's experience, 5 percent of intial tests indicate positive results for the presence of drugs and must be confirmed to verify the initial test results. Tramco, Inc., a certificated repair station, estimates that compliance with the anti-drug program will cost $24,000 annually plus counseling and lost time costs.

ALPA believes that the FAA incorrectly estimated the cost of the proposed anti-drug program and, therefore, the drug testing program is not justified by any reasonable cost-benefit analysis. ALPA states that the laboratory cost per test, assuming a random testing rate of 125 percent and a negotiated cost similar to the cost contained in the economic analysis, is merely a fraction of the total costs associated with a drug testing program. ALPA maintains that a drug testing program could cost at least $280 million per year. ALPA's estimate of cost is based on substantial administrative and personnel expenses, transportation of employees to a collection site, employee compensation during collection of a specimen, and compensation of employees who replace employees being tested during revenue flights.

A commenter speaking as national litigation counsel for AOPA and on behalf of the California Aviation Council and the Orange County Aviation Association believes that the FAA understated the costs and overgeneralized the benefits of the proposed rule contained in the economic summary of the NPRM. This commenter also believes that the FAA failed to consider more effective, practical, and less intrusive programs to deal with any drug problem that might exist in the aviation industry. The commenter states that the economic analysis fails to consider the potentially destructive economic effect of the proposed rules on small, commercial operators. Therefore, the commenter states that the FAA may not issue a final rule because the FAA has failed to meet the criteria of Executive Order 12291.

California Aeromedical Rescue and Evacuation, Inc. (CARE) does not believe that the proposed rules are reasonable due to the lack of evidence of a drug problem in aviation. CARE comments that the cost of maintaining a drug testing program, whether or not that program includes random testing, is significant. CARE employs 10 pilots, 4 mechanics, and approximately 45 flight nurses and flight medics. CARE estimates that the cost per test is $45 and, therefore, the fiscal impact on its operations will be between $8,000 to $12,000 per year. CARE believes that its scarce financial resources should be used for training, equipment, and maintenance. CARE states that preemployment and probable cause testing are wise and prudent measures. CARE predicts that including other types of testing will cause some of its employees to leave the company due to issues related to the constitutionality of unannounced testing without particularized suspicion of drug use. CARE states that the costs of litigation and training for new employees should be directed to other more useful avenues.

The commenters stress that while the costs developed by the FAA may be appropriate for larger companies, who are able to take advantage of "economies of scale," small aviation companies would incur significantly higher costs.

Two commenters who submitted a joint comment on the economic analysis contained in the NPRM dispute the benefits of the proposals in the NPRM, particularly with the FAA's estimate of the possible detection rate. These commenters present statistical analyses, using the data in the NPRM on general aviation pilots, to demonstrate, in their opinion, a considerably reduced detection rate and, therefore, considerably reduced benefits.

FAA Response. The FAA agrees that costs of screening and confirmation tests may reflect the bulk purchasing power of laboratory service for a large number of specimens and, therefore, may be applicable only to large aviation companies. However, the FAA lacks clear and definitive data regarding the extent to which "economies of scale" will affect or reduce costs. Although some commenters believe that the FAA failed to consider costs associated with administration of the anti-drug program, the initial Regulatory Evaluation and the FAA's total costs stated in the NPRM included these administrative costs.

The figures in the NPRM were based on average industry costs available to the FAA at the time of the NPRM. The FAA believes that the costs contained in the NPRM may closely equate to actual costs because the vast majority of personnel subject to the testing requirements of the proposed rule, by a ratio of 10 employees of large companies to one employee of small companies, are employees of large companies. Moreover, the FAA notes that small Part 135 certificate holders and other small aviation companies often are associated with larger companies. The FAA believes that small aviation operators could participate with large companies, much as these small companies contract for maintenance, reservations services, gate agents of larger companies, to conduct the required tests pursuant to the rules and, thus, take advantage of the economies of scale.

Nevertheless, the FAA increased the estimate of drug testing costs in an effort to respond to the concerns expressed by the commenters and to reflect the potential testing costs incurred by small aviation operators. For the purposes of the Regulatory Impact Analysis of the

final rule, the cost estimate of screening tests was increased to $25.00 per test; the cost estimate of confirmation tests was increased to $35.00 per test; and the administrative costs were increased to $35.00 per test.

The FAA recognizes that broad rehabilitation programs would be very costly and could be cost-prohibitive for small aviation companies. For a variety of reasons discussed previously, the final rule does not require an employer to offer an opportunity for rehabilitation to employees and the FAA has not mandated a minimum amount of time that an employer must hold a position open while an employee is prohibited from performing sensitive safety- or security-related functions.

In estimating the benefits that are expected to accrue as a result of a comprehensive anti-drug program, the FAA noted its lack of specific, available data in the NPRM. The FAA disagrees with the commenters who dispute the analysis of benefits provided by the FAA in the NPRM and notes that a comparison of the benefits determined by these commenters with the estimated costs of the rule would still result in a cost beneficial rule. No evidence is available to demonstrate that sole reliance on the data regarding deceased general aviation pilots is representative of the population of employees who are subject to testing under the provisions of the final rule.

Infrequent and sporadic data is available in the commercial aviation sector. The FAA can not rely solely on information deduced from the two commercial aviation accidents discussed previously. The information does not reveal any significant patterns that would assist the FAA's estimates of costs and benefits of the proposals and, in any event, this information is not generally representative of personnel who are not pilots but who are subject to the requirements of the rule. For these reasons, the FAA believes that it is appropriate to use the national NIDA study information to estimate the potential costs of the rule because it more accurately reflects the broad population of employees who would be tested pursuant to a comprehensive drug testing program.

Economic Summary

In accordance with the requirements of Executive Order 12291, the FAA reviewed the cost impact and benefits of this final rule. Cost factors were obtained from information in the public docket including comments received during the FAA's public hearings. Additional data were furnished by air carrier trade associations, public institutions, and major chemical and drug testing laboratories. This rulemaking does not meet the criteria of a "major" rule under Executive Order 12291 because it is not likely to have an annual effect on the economy of $100 million or more. A summary of the FAA's estimates of the costs and benefits is provided below. However, because the rulemaking is a costly undertaking, the FAA considers the final rule to be a "major" rule under Executive Order 12291. For this reason, the FAA prepared, and placed in the docket, a Regulatory Impact Analysis of the final rule. In addition, because the rule involves issues of substantial interest to the public, the FAA determined that the rulemaking is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

Costs. The FAA estimated that the requirements of the final rule, over the 10-year period from 1990 to 1999, will cost approximately $240.3 million in 1987 dollars (an average of $24.0 million per year) or approximately $135.2 million discounted over that 10-year period. The discounted cost includes (rounded to the nearest million) $97.1 million for random testing; $6.2 million for periodic testing, postaccident testing, testing based on reasonable cause, and return-to-duty testing; $8.6 million for preemployment testing; $10.6 million for blind samples submitted to laboratories; $10.3 million for EAP education and training cost; and $2.4 million for costs associated with preparation and submission of an employer's anti-drug program.

Costs of postaccident testing, testing based on reasonable cause, and return-to-duty testing are included as part of periodic testing costs. The FAA used one-half of one percent of the estimated population tested annually as the number that will be tested under one of these three circumstances. The analysis of these costs is set forth in the full Regulatory Impact Analysis (Exhibit A) included in the public docket.

The final rule will affect 149 entities that hold Part 121 certificates, 3,614 entities that hold Part 135 certificates providing scheduled and on-demand service, and contractors who provide services to those certificate holders. The rule also will affect an undetermined number of entities engaged in operations listed in § 135.1(b) for compensation or hire. The FAA has been unable to determine the exact number of these organizations due to the highly diversified and multipurpose nature of their operations. For purposes of analyzing the cost impact of the final rule on these entities, the FAA estimated that approximately 1,500 entities, the same number as repair stations, are engaged in operations listed in § 135.1(b) for compensation or hire. Based on these estimates, the FAA estimated that 538,000 persons will be subject to drug testing in 1991 pursuant to the requirements of the final rule.

The FAA estimated that the cost of an initial screening test for the presence of drugs or drug metabolites will be $25 per test. The FAA expects that 12.5 percent of initial screening tests will require confirmation testing in accordance with the guidelines and standards contained in Appendix I to Part 121. Of the total initial screening tests, 7.5 percent are expected to be confirmed as true positives; 5.0 percent are expected to result in false positive test results after confirmation. The remainder are not expected to be confirmed as positive either because the specimen failed to meet the minimum threshold to be scientifically considered as positive, or because the specimen did not show the presence of drugs or drug metabolites. Confirmation tests are estimated to cost $35 per test. The FAA notes that an employer can realize substantial savings by contracting with a drug testing laboratory for a fixed price that includes the cost of initial screening tests and confirmation tests rather than paying for these tests separately. For example, the Coast Guard currently pays a single, fixed price of $21 for screening tests and any resulting confirmation tests under a single contract with a drug testing laboratory.

The FAA estimated that a screening test will require 15 minutes of a person's time to provide information for chain-of-custody forms and to provide a urine sample for drug testing. Thus, the FAA included a factor equal to 25 percent of an average, fully allocated, hourly wage for each occupational group covered by the final rule. The FAA also assumed that affected persons will provide urine samples for testing while on duty. The FAA included $35 per test as an administrative cost to cover, among other things, collection of specimens, reporting and recordkeeping, and chain-of-custody procedure costs. The FAA recognizes that these costs can vary significantly depending on a number of variables. For example, specimens may be collected in a medical setting (i.e., in a hospital or a clinic, in the presence of medical doctors, nurses, medical technicians). Collection of specimens in a medical setting is not required by this rule. Less expensive settings and nonmedical personnel trained for specimen collection may be used by the

aviation industry. Collection sites may be either centrally located or dispersed throughout remote geographical locations. DOT's drug testing program and the FAA's periodic drug testing program illustrate the cost variations associated with specimen collection. DOT uses a contractor to collect specimens at various, dispersed locations throughout the country. DOT pays an average of $123 for each specimen collected. Specimens collected as part of the FAA periodic testing program are collected by aviation medical examiners. Collection costs for periodic tests range from $10 to $45 per specimen. The FAA considered these costs when estimating the administrative costs of the final rule. After consideration of the cost variations, the estimated administrative costs are representative of the costs expected in the aviation industry. The FAA increased the administrative costs contained in the NPRM on the basis of information submitted by commenters. The FAA believes that the aviation industry will find the most economical method of sample collection and will do so at costs that most closely mirror the costs charged to the FAA by aviation medical examiners for collection of specimens for periodic testing.

In the case of most postaccident testing, testing based on reasonable cause, and testing after return to duty triggered by refusal to submit to a test or failure of a previous drug test, the FAA assumed that collection costs for these tests are the same as the collection costs for random tests. However, the FAA assumed that the cost associated with collection of a small percentage of postaccident specimens would be $100 per test. The FAA used this higher figure to address the probability that postaccident specimens may be collected at a remote accident site or a location other than a site that the employer routinely collects specimens. Conversely, specimens collected for testing based on reasonable cause or testing after return to duty could be collected in a central location or at the same location where other specimens are collected pursuant to the requirements of the final rule.

Benefits. The FAA believes that three major benefits will result from the promulgation of the final rule. First, benefits will accrue from the prevention of potential injuries or fatalities and property losses due to accidents attributed to neglect or error on the part of employees performing sensitive safety- or security-related functions whose motor skills or judgment may be impaired by drugs. Second, benefits will accrue based on the potential reduction in employee absences from work, lost productivity, reduced medical and insurance costs due to on-the-job accidents, and improved general safety in the workplace. Third, broad benefits in the development of air commerce will accrue from projected diminished drug use by commercial aviation employees, thereby increasing public confidence in the commercial aviation transporation industry.

A review of the commerical aviation safety record shows that drug use may have been a cause or factor in only two recent aviation accidents. One accident was in 1983 and involved an all-cargo operation. The second accident was in 1988 and involved a passenger operation. Both accidents have been described previously in this rulemaking document. Drug use has not been established as a definitive causal factor of either accident. In the absence of readily-available statistical data depicting the extent of drug use by employees in commercial aviation and in light of the pernicious effects of drug use, the FAA does not consider the existing safety record to be an exclusive and valid indicator of the threat to aviation safety posed by aviation employee drug use. However, allegations of drug use by the pilot and copilot of Continental Air Express Flight 2286 that crashed on January 19, 1988, killing 9 people, reveal the significant and real potential for fatal aircraft accidents that may be related to the use of drugs in commercial aviation. In light of data regarding drug use by mechanics and repairmen submitted in reponse to the ANPRM, the FAA also is concerned about the potential for aviation accidents attributable to drug use by commercial aviation maintenance personnel.

The FAA estimates that $84.3 million in discounted benefits would result from promulgation of the final rule if one accident attributed to drug-impaired performance by an individual who performs a sensitive safety- or security-related function in commercial aviation, involving a narrow-body, three-engine, commercial aircraft carrying 133 passengers and 5 crewmembers, is prevented during the 10-year period from 1990 to 1999 (Exhibit E). Although not claimed as a benefit in this Regulatory Impact Analysis, the benefits associated with the prevention of a single accident, during the 10-year period from 1990 to 1999, would be considerably more if the accident involved a 4-engine, wide-body aircraft carrying 289 passengers and 19 crewmembers. In this event, discounted benefits would total $219.9 million.

The FAA also attempted to estimate benefits of the final rule, other than those benefits that may result from the prevention of aircraft accidents, associated with diminished drug use by commercial aviation personnel or any drug-deterrent effect that would result from promulgation of the final rule.

These estimated benefits consist of improved employee productivity as a result of drug use deterrence. A report released in 1987 by the National Institute on Drug Abuse (NIDA), entitled "Strategic Planning for Workplace Drug Abuse Programs," reveals that drug and alcohol abusers are involved in an additional 3.6 more accidents than nonabusers; file 1.5 additional workers' compensation claims than nonabusers; file 2.5 times more often for sick leave of 8 or more consecutive days than nonabusers; and incur 3 times the amount of normal medical costs than nonabusers.

In the absence of pertinent data, the FAA assumed that the rate of drug use by the 538,000 covered aviation personnel is approximately the same as the rate of drug use in the general population (e.g., 10 percent). The FAA also assumed that the productivity of employees who use drugs is 95 percent of the productivity of employees who do not use drugs.

In order to be conservative in estimating the costs of the final rule, the FAA assumed that 7.5 percent of the covered aviation personnel would produce test results that are confirmed positive for prohibited drug use. However, this estimate is premised on testing that produces optimum detection rates and the fact that drug users may continue to use drugs despite implementation of a comprehensive drug testing program that includes unannounced testing based on random selection. Realistically, the FAA expects that testing pursuant to the final rule will not achieve optimum detection rates and that some drug users will cease to use drugs rather than face the consequences of being detected by testing under the final rule.

The FAA hypothesized that 1.0 percent of the affected aviation population will stop using drugs voluntarily in the face of a comprehensive drug testing program. These individuals are expected to continue to perform sensitive safety- or security-related functions without the presence of drugs or drug metabolites in their systems. As noted above, the FAA assumed that drug users are 95 percent effective at their jobs compared to

employees who do not use drugs. Thus, the aviation industry would realize a 5 percent on-the-job productivity increase for each individual who ceases to use drugs. Therefore, the FAA estimated that employee productivity gains of $97.3 million, or $54.3 million discounted over the 10-year period from 1990 to 1999, will accrue to the aviation industry based on the reduction of illegal drug use and increased employee productivity (see Exhibit G).

Benefit/Cost Comparison. The total cost of compliance with the requirements of the final rule is estimated to be $240.3 million in 1987 dollars and $135.2 million, at a present worth discount rate of 10 percent, over the projected 10-year period form 1990 to 1999. The FAA has been unable to quantitatively estimate the accident prevention effectiveness of the final rule. Nevertheless, the FAA believes that drug use, unless stemmed, will continue to pose a threat to aviation safety. The FAA estimates that preventing one accident involving an average size, commercial, passenger aircraft during the 10-year period from 1990 to 1999 would result in discounted benefits of $84.3 million. Likewise, discounted benefits ensuing from increased employee productivity are estimated to be $54.3 million. Thus, total discounted benefits expected to result from promulgation of the final rule amount to $138.6 million. The benefit to cost ratio of the final rule is 1.03.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 requires a Federal agency to review any final rule to assess its impact on small businesses. In consideration of the cost information discussed previously and included in the full Regulatory Impact Analysis, the FAA certifies that the final rule may have a significant negative economic impact on a substantial number of small entities. In an effort to relieve the burden on small entities, the FAA modified the requirements of the final rule and provided alternative schedules and implementation periods directed solely at small aviation entities to provide some measure of relief from the costs associated with the rule. The FAA anticipates that these modifications will reduce burdens associated with the requirements of the final rule on small entities without adversely affecting aviation safety.

International Trade Impact Statement

The final rule will affect only domestic operators and, therefore, will have no impact on trade opportunities for U.S. firms doing business overseas or on foreign firms doing business in the United States. It should be noted that, unless compliance with this final rule would violate the domestic laws of policies of a foreign country or a foreign government contends that application of the rule raises questions of compatibility with foreign laws or policies, individuals employed at foreign repair stations under contract to U.S. certificate holders would not be able to perform maintenance or preventive maintenance work on U.S.-registered aircraft unless they participate in an anti-drug program. Thus, foreign repair stations may be affected economically. Likewise, this program also will result in an expense to U.S. certificate holders operating overseas because these entities will be required to establish anti-drug programs, which will not be required of their foreign competitors. The FAA is unable to estimate the possible competitive effect of these costs.

Paperwork Reduction Act Approval

In order to ensure compliance and effectiveness of the final rule, the FAA included necessary reporting and recordkeeping requirements in the provisions of the final rule. The final rule requires employers to maintain records related to employee drug testing and any rehabilitation and to submit periodic, written reports to the FAA that summarize an employer's anti-drug program. In accordance with the Paperwork Reduction Act of 1980, the recordkeeping and reporting requirements of the final rule have been submitted to the Office of Management and Budget (OMB) for approval.

Federalism Implications

The final rule adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule preeempts any State or local law that would prohibit or limit drug testing required under the rule. This preemption, under the FAA's statutory authority, is essential to ensure that the safety benefits are obtained throughout the nation's air transportation system. The rule also could have an indirect, economic impact on State and local governments, if persons who lose jobs as a result of a positive drug test require welfare benefits or other public social services. The FAA does not expect this impact to be significant, however. Therefore, in accordance with Executive Order 12612, the FAA determines that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Conclusion

The final rule requires domestic and supplemental air carriers, commercial operators of large aircraft, air taxi and commuter operators, certain commercial operators, certain contractors to these operators, located in the United States or in a foreign country, and air traffic control facilities not operated by the FAA or the U.S. military to have an anti-drug program for employees who perform, either in the United States or in a foreign country, sensitive safety- or security-related functions. Testing under this final rule will be conducted by an employer prior to employment, periodically, randomly, after an accident, based on reasonable cause, and after an employee returns to duty to perform a sensitive safety- or security-related function for an employer. The final rule also will require that an employer provide EAP education and training services to employees and supervisors. The rule is necessary to prohibit an employee from performing a sensitive safety- or security-related function for an employer while that employee has a prohibited drug in his or her system or if that employee has used drugs as evidenced by a drug test showing the presence of drugs or drug metabolites. The rule is intended to ensure a drug-free aviation workforce and to eliminate drug use and abuse in commercial aviation. The FAA believes that the final rule will reduce the potential for drug-related aviation accidents and will foster identification of commercial aviation employees who use drugs.

Pursuant to the terms of the Regulatory Flexibility Act of 1980, the FAA certifies that the final rule may have a significant negative economic impact on a substantial number of small entities. The final rule will not result in an annual effect on the economy of $100 million or more, but because the requirements of the final rule are important and costly undertakings, the FAA considers the final rule to be a major rule pursuant to the criteria of Executive Order 12291. In addition, the rule involves issues of substantial interest to the public; thus, the FAA determines that the final rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

List of Subjects

14 CFR Part 61

Air safety, Air transportation, Aircraft, Aircraft pilots, Airmen,

Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

14 CFR Part 63

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

14 CFR Part 65

Air safety, Air transporation, Aircraft, Airmen, Aviation safety, Drug abuse, Drugs, Narcotics, Safety, Transportation.

14 CFR Part 121

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

14 CFR Part 135

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

The Amendment

Accordingly, the FAA amends Parts 61, 63, 65, 121, and 135 of the Federal Aviation Regulations (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 continues to read as follows:

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

2. By adding a new § 61.14 to read as follows:

§ 61.14 Refusal to submit to a drug test.

(a) This section applies to—

(1) An employee who performs a function listed in Appendix I to Part 121 of this chapter for a Part 121 certificate holder or a Part 135 certificate holder; and

(2) An employee who performs a function listed in Appendix I to Part 121 of this chapter for an operator as defined in § 135.1(c) of this chapter. An employee of a person conducting operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to Section 405(h) of the Federal Aviation Act of 1958 is excluded from the requirements of this section.

(b) Refusal by the holder of a certificate issued under this part to take a test for a drug specified in Appendix I to Part 121 of this chapter when requested by a certificate holder, by an operator as defined in § 135.1(c) of this chapter, by a local law enforcement officer under his or her own authority, or by an FAA inspector, under the circumstances specified in that appendix, 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 that refusal; and

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

PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

3. The authority citation for Part 63, Subpart A, is revised to read as follows:

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

4. By adding a new § 63.12b to read as follows:

§ 63.12b Refusal to submit to a drug test.

(a) This section applies to—

(1) An employee who performs a function listed in Appendix I to Part 121 of this chapter for a Part 121 certificate holder or a Part 135 certificate holder; and

(2) An employee who performs a function listed in Appendix I to Part 121 of this chapter for an operator as defined in § 135.1(c) of this chapter. An employee of a person conducting operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to section 405(h) of the Federal Aviation Act of 1958 is excluded from the requirements of this section.

(2) Refusal by the holder of a certificate issued under this part to take a test for a drug specified in Appendix I to Part 121 of this chapter when requested by a certificate holder, by an operator as defined in § 135.1(c) of this chapter, by a local law enforcement officer under his or her own authority, or by an FAA inspector, under the circumstances specified in that appendix, 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 that 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 continues to read as follows:

Authority: 49 U.S.C. 1354, 1355, 1421, 1422, and 1427; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983).

6. By adding a new § 65.23 to read as follows:

§ 65.23 Refusal to submit to a drug test.

(a) This section applies to—

(1) An employee who performs a function listed in Appendix I to Part 121 of this chapter for a Part 121 certificate holder or a Part 135 certificate holder;

(2) An employee who performs a function listed in Appendix I to Part 121 of this chapter for an operator as defined in § 135.1(c) of this chapter. An employee of a person conducting operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to section 405(h) of the Federal Aviation Act of 1958 is excluded from the requirements of this section; and

(3) An employee of an air traffic control facility not operated by, or under contract with, the FAA or the U.S. military.

(b) Refusal by the holder of a certificate issued under this part to take a test for a drug specified in Appendix I to Part 121 of this chapter when requested by a certificate holder, by an operator as defined in § 135.1(c) of this chapter, by an employer as defined in § 65.46 of this part, by a local law enforcement officer under his or her own authority, or by an FAA inspector, under the circumstances specified in that appendix, 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 that that refusal; and

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

7. By adding a new § 65.46 to read as follows:

§ 65.46 Use of prohibited drugs.

(a) The following definitions apply for the purposes of this section:

(1) An "employee" is a person who performs an air traffic control function for an employer. For the purpose of this section, a person who performs such a function pursuant to a contract with an employer is considered to be performing that function for the employer.

(2) An "employer" means an air traffic control facility not operated by, or under contract with, the FAA or the U.S. military that employs a person to perform an air traffic control function.

(b) Each employer shall provide each employee performing a function listed in Appendix I to Part 121 of this chapter

and his or her supervisor with the training specified in that appendix. No employer may use any contractor to perform an air traffic control function unless that contractor provides each of its employees performing that function for the employer and his or her supervisor with the training specified in that appendix.

(c) 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 while that person has a prohibited drug, as defined in Appendix I to Part 121 of this chapter, in his or her system.

(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 a test or refused to submit to a test required by Appendix I to Part 121 of this chapter given by a certificate holder, by an employer, or by an operator as defined in § 135.1(c) 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 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.

(f) Each employer shall test each of its employees who performs any air traffic control function in accordance with Appendix I to Part 121 of this chapter. No employer may use any contractor to perform any air traffic control function unless that contractor tests each employee performing such a function for the employer in accordance with that appendix.

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

8. The authority citation for Part 121 continues to read as follows:

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

9. By adding a new § 121.429 to read as follows:

§ 121.429 Prohibited drugs.

(a) Each certificate holder shall provide each employee performing a function listed in Appendix I to this part and his or her supervisor with the training specified in that appendix.

(b) No certificate holder may use any contractor to perform a function listed in Appendix I to this part unless that contractor provides each of its employees performing that function for the certificate holder and his or her supervisor with the training specified in that appendix.

10. By adding a new § 121.455 to read as follows:

§ 121.455 Use of prohibited drugs.

(a) This section applies to persons who perform a function listed in Appendix I to this part for the certificate holder. For the purpose of this section, a person who performs such a function pursuant to a contract with the certificate holder is considered to be performing that function for the certificate holder.

(b) 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 while that person has a prohibited drug, as defined in that appendix, in his or her system.

(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 a test or refused to submit to a test required by that appendix given by a certificate holder or an operator as defined in § 135.1(c) of this chapter.

(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.

11. By adding a new § 121.457 to read as follows:

§ 121.457 Testing for prohibited drugs.

(a) Each certificate holder shall test each of its employees who performs a function listed in Appendix I to this part in accordance with that appendix.

(b) No certificate holder may use any contractor to perform a function listed in Appendix I to this part unless that contractor tests each employee performing such a function for the certificate holder in accordance with that appendix.

12. By adding a new Appendix I to Part 121 to read as follows:

Appendix I—Drug Testing Program

This appendix contains the standards and components that must be included in an anti-drug program required by this chapter.

I. *DOT Procedures.* Each employer shall ensure that drug testing programs conducted pursuant to this regulation comply with the requirements of this appendix and the "Procedures for Transportation Workplace Drug Testing Programs" published by the Department of Transportation (DOT) (49 CFR Part 40). An employer may not use or contract with any drug testing laboratory that is not certified by the Department of Health and Human Services (DHHS) pursuant to the DHHS "Mandatory Guidelines for Federal Workplace Drug Testing Programs" (53 FR 11970; April 11, 1988).

II. *Definitions.* For the purpose of this appendix, the following definitions apply:

"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 all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage (49 CFR 830.2).

"Annualized rate" for the purposes of unannounced testing of employees based on random selection means the percentage of specimen collection and testing of employees performing a function listed in section III of this appendix during a calendar year. The employer shall determine the annualized percentage rate by referring to the total number of employees performing a sensitive safety- or security-related function for the employer at the beginning of a calendar year or by an alternative method specified in the employer's drug testing plan approved by the FAA.

"Employee" is a person who performs, either directly or by contract, a function listed in section III of this appendix for a Part 121 certificate holder, a Part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter (except operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to section 405(h) of the Federal Aviation Act of 1958), or an air traffic control facility not operated by, or under contract with, the FAA or the U.S. military. Provided however that an employee who works for an employer who holds a Part 135 certificate and who also holds a Part 121 certificate is considered to be an employee of the Part 121 certificate holder for the purposes of this appendix.

"Employer" is a Part 121 certificate holder, a Part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter (except operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to Section 405(h) of the Federal Aviation Act of 1958), or an air traffic control facility not operated by, or under contract with, the FAA or the U.S. military. Provided, however, that an employer may use a person

to perform a function listed in section III of this appendix, who is not included under that employer's drug program, if that person is subject to the requirements of another employer's FAA-approved anti-drug program.

"Failing a drug test" means that the test result shows positive evidence of the presence of a prohibited drug or drug metabolite in an employee's system.

"Passing a drug test" means that the test result does not show positive evidence of the presence of a prohibited drug or drug metabolite in an employee's system.

"Positive evidence" means the presence of a drug or drug metabolite in a urine sample at or above the test levels listed in the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40).

"Prohibited drug" means marijuana, cocaine, opiates, phencyclidine (PCP), amphetamines, or a substance specified in Schedule I or Schedule II of the Controlled Substances Act, 21 U.S.C. 811, 812 (1981 & 1987 Cum.P.P.), unless the drug is being used as authorized by a legal prescription or other exemption under Federal, state, or local law.

"Refusal to submit" means refusal by an individual to provide a urine sample after he or she has received notice of the requirement to be tested in accordance with this appendix.

III. *Employees Who Must Be Tested.* Each person who performs a function listed in this section must be tested pursuant to an FAA-approved anti-drug program conducted in accordance with this appendix:

a. Flight crewmember duties.

b. Flight attendant duties.

c. Flight instruction or ground instruction duties.

d. Flight testing duties.

e. Aircraft dispatcher or ground dispatcher duties.

f. Aircraft maintenance or preventive maintenance duties.

g. Aviation security or screening duties.

h. Air traffic control duties.

IV. *Substances For Which Testing Must Be Conducted.* Each employer shall test each employee who performs a function listed in section III of this appendix for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines during each test required by section V of this appendix. As part of reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the FAA under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshhold.

V. *Types of Drug Testing Required.* Each employer shall conduct the following types of testing in accordance with the procedures set forth in this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40):

A. *Preemployment testing.* No employer may hire any person to perform a function listed in section III of this appendix unless the applicant passes a drug test for that employer. The employer shall advise an applicant at the time of application that preemployment testing will be conducted to determine the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs in the applicant's system.

B. *Periodic testing.* Each employee who performs a function listed in section III of this appendix for an employer and who is required to undergo a medical examination under Part 67 of this chapter, shall submit to a periodic drug test. The employee shall be tested for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs as part of the first medical evaluation of the employee during the first calendar year of implementation of the employer's anti-drug program. An employer may discontinue periodic testing of its employees after the first calendar year of implementation of the employer's anti-drug program when the employer has implemented an unannounced testing program based on random selection of employees.

C. *Random testing.* Each employer shall randomly select employees who perform a function listed in section III of this appendix for the employer for unannounced drug testing. The employer shall randomly select employees for unannounced testing for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs in an employee's system using a random number table or a computer-based, number generator that is matched with an employee's social security number, payroll identification number, or any other alternative method approved by the FAA.

(1) During the first 12 months following implementation of unannounced testing based on random selection pursuant to this appendix, an employer shall meet the following conditions:

(a) The unannounced testing based on random selection of employees shall be spread reasonably throughout the 12-month period.

(b) The last collection of specimens for random testing during the year shall be conducted at an annualized rate equal to not less than 50 percent of employees performing a function listed in section III of this appendix.

(c) The total number of unannounced tests based on random selection during the 12-months shall be equal to not less than 25 percent of the employees performing a function listed in section III of this appendix.

(2) Following the first 12 months, an employer shall achieve and maintain an annualized rate equal to not less than 50 percent of employees performing a function listed in section III of this appendix.

D. *Postaccident testing.* Each employer shall test each employee who performs a function listed in section III of this appendix for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs in the employee's system if that employee's performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The employee shall be tested as soon as possible but not later than 32 hours after the accident. The decision not to administer a test under this section must be based on a determination, using the best information available at the time of the accident, that the employee's performance could not have contributed to the accident. The employee shall submit to postaccident testing under this section.

E. *Testing based on reasonable cause.* Each employer shall test each employee who performs a function listed in section III of this appendix and who is reasonably suspected of using a prohibited drug. Each employer shall test an employee's specimen for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines or a metabolite of those drugs. An employer may test an employee's specimen for the presence of other prohibited drugs or drug metabolites only in accordance with this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40). At least two of the employee's supervisors, one of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test an employee who is reasonably suspected of drug use. In the case of an employer holding a Part 135 certificate who employs 50 or fewer employees who perform a function listed in section III of this appendix or an operator as defined in § 135.1(c) of this chapter, one supervisor, who is trained in detection of possible symptoms of drug use, shall substantiate the decision to test an employee who is reasonably suspected of drug use. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use.

F. *Testing after return to duty.* Each employer shall implement a reasonable program of unannounced testing of each individual who has been hired and each employee who has returned to duty to perform a function listed in section III of this appendix after failing a drug test conducted in accordance with this appendix or after refusing to submit to a drug test required by this appendix. The individual or employee shall be subject to unannounced testing for not more than 60 months after the individual has been hired or the employee has returned to duty to perform a function listed in section III of this appendix.

VI. *Administrative Matters.*—A. *Collection, testing, and rehabilitation records.* Each employer shall maintain all records related to the collection process, including all logbooks and certification statements, for two years. Each employer shall maintain records of employee confirmed positive drug test results and employee rehabilitation for five years. The employer shall maintain records of negative test results for 12 months. The employer shall permit the Administrator or the Administrator's representative to examine these records.

B. *Laboratory inspections.* The employer shall contract only with a laboratory that permits pre-award inspections by the employer before the laboratory is awarded a testing contract and unannounced inspections, including examination of any

and all records at any time by the employer, the Administrator, or the Administrator's representative.

C. *Employee request to retest a specimen.* Not later than 60 days after receipt of a confirmed positive test result, an employee may submit a written request to the MRO for retesting of the specimen producing the positive test result. Each employee may make one written request that a sample of the specimen be provided to the original or another DHHS-certified laboratory for testing. The laboratories shall follow chain-of-custody procedures. The employee shall pay the costs of the additional test and all handling and shipping costs associated with the transfer of the specimen to the laboratory.

D. *Release of Drug Testing Information.* An employer may release information regarding an employee's drug testing results or rehabilitation to a third party only with the specific, written consent of the employee authorizing release of the information to an identified person. Information regarding an employee's drug testing results or rehabilitation may be released to the National Transportation Safety Board as part of an accident investigation, to the FAA upon request, or as required by section VII.C.5 of this appendix.

VII. *Review of Drug Testing Results.* The employer shall designate or appoint a medical review officer (MRO). 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 qualifications.* The MRO must be a licensed physician with knowledge of drug abuse disorders.

B. *MRO duties.* The MRO shall perform the following functions for the employer:

1. Review the results of the employer's drug testing program before the results are reported to the employer and summarized for the FAA.

2. Within a reasonable time, notify an employee of a confirmed positive test result.

3. Review and interpret each confirmed positive test result in order to determine if there is an alternative medical explanation for the confirmed positive test result. The MRO shall perform the following functions as part of the review of a confirmed positive test result:

a. Provide an opportunity for the employee to discuss a positive test result with the MRO.

b. Review the employee's medical history and any relevant biomedical factors.

c. Review all medical records made available by the employee to determine if a confirmed positive test resulted from legally prescribed medication.

d. Verify that the laboratory report and assessment are correct. The MRO shall be authorized to request that the original specimen be reanalyzed to determine the accuracy of the reported test result.

4. Process employee requests to retest a specimen in accordance with section VI.C of this appendix.

5. Determine whether and when, consistent with an employer's anti-drug program, a return-to-duty recommendation for a current employee or a decision to hire an individual to perform a function listed in section III of this appendix after failing a test conducted in accordance with this appendix or after refusing to submit to a test required by this appendix, including review of any rehabilitation program in which the individual or employee participated, may be made.

6. Ensure that an individual or employee has been tested in accordance with the procedures of this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR Part 40) before the individual is hired or the employee returns to duty.

7. Determine a schedule of unannounced testing for an individual who has been hired or an employee who has returned to duty to perform a function listed in section III of this appendix after the individual or employee has failed a drug test conducted in accordance with this appendix or has refused to submit to a drug test required by this appendix.

C. *MRO determinations.* 1. If the MRO determines, after appropriate review, that there is a legitimate medical explanation for the confirmed positive test result that is consistent with legal drug use, the MRO shall conclude that the test result is negative and shall report the test as a negative test result.

2. If the MRO determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result that is consistent with legal drug use, the MRO shall refer the employee to an employer's rehabilitation program is available or to a personnel or administrative officer for further proceedings in accordance with the employer's anti-drug program.

3. Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the MRO may conclude that a particular drug test result is scientifically insufficient for futher action. Under these circumstances, the MRO shall conclude that the test is negative for the presence of drugs or drug metabolites in an employee's system.

4. In order to make a recommendation to hire an individual to perform a function listed in section III of this appendix or to return an employee to duty to perform a function listed in section III of this appendix after the individual or employee has failed a drug test conducted in accordance with this appendix or refused to submit to a drug test required by this appendix, the MRO shall—

a. Ensure that the individual or employee is drug free based on a drug test that shows no positive evidence of the presence of a drug or a drug metabolite in the person's system;

b. Ensure that the individual or employee has been evaluated by a rehabilitation program counselor for drug use or abuse; and

c. Ensure that the individual or employee demonstrates compliance with any conditions or requirements of a rehabilitation program in which the person participated.

5. Notwithstanding any other section in this appendix, the MRO shall make the following determinations in the case of an employee or applicant who holds, or is required to hold, a medical certificate issued pursuant to Part 67 of this chapter in order to perform a function listed in section III of this appendix for an employer:

a. The MRO shall make a determination of probable drug dependence or nondependence as specified in Part 67 of this chapter. If the MRO makes a determination of nondependence, the MRO has authority to recommend that the employee return to duty in a position that requires the employee to hold a certificate issued under Part 67 of this chapter. The MRO shall forward the determination of nondependence, the return-to-duty decision, and any supporting documentation to the Federal Air Surgeon for review.

b. If the MRO makes a determination of probable drug dependence at any time, the MRO shall report the name of the individual and identifying information, the determination of probable drug dependence, and any supporting documentation to the Federal Air Surgeon. The MRO does not have the authority to recommend that the employee return to duty in a position that requires the employee to hold a certificate issued under Part 67 of this chapter. The Federal Air Surgeon shall determine if the individual may retain or may be issued a medical certificate consistent with the requirements of Part 67 of this chapter.

c. The MRO shall report to the Federal Air Surgeon the name of any employee who is required to hold a medical certificate issued pursuant to Part 67 of this chapter and who fails a drug test. The MRO shall report to the Federal Air Surgeon the name of any person who applies for a position that requires the person to hold a medical certificate issued pursuant to Part 67 of this chapter and who fails a preemployment drug test.

d. The MRO shall forward the information specified in paragraphs (a), (b), and (c) of this section to the Federal Air Surgeon, Federal Aviation Administration, Drug Abatement Branch (AAM-220), 800 Independence Avenue, SW., Washington, DC 20591.

VIII. *Employee Assistance Program (EAP).* The employer shall provide an EAP for employees. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to an employee. Each EAP must include education and training on drug use for employees and training for supervisors making determinations for testing of employees based on reasonable cause.

A. *EAP education program.* Each EAP education program must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding drug use in the workplace.

B. *EAP training program.* Each employer shall implement a reasonable program of initial training for employees. The employee training program must include at least the following elements: The effects and consequences of drug use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug use and abuse; and documentation of training given to employees and employer's supervisory personnel. The

employer's supervisory personnel who will determine when an employee is subject to testing based on reasonable cause shall receive specific training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use in addition to the training specified above. The employer shall ensure that supervisors who will make reasonable cause determinations receive at least 60 minutes of initial training. The employer shall implement a reasonable recurrent training program for supervisory personnel making reasonable cause determinations during subsequent years. The employer shall identify the employee and supervisor EAP training in the employer's drug testing plan submitted to the FAA for approval.

IX. *Employer's Drug Testing Plan.*— A. *Schedule for submission of plans and implementation.* (1) Each employer shall submit a drug testing plan to the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Branch (AAM-220), 800 Independence Avenue, SW., Washington, DC 20591.

(2) Each employer who holds a Part 121 certificate and each employer who holds a Part 135 certificate and employs more than 50 employees who perform a function listed in section III of this appendix shall submit an anti-drug program to the FAA (specifying the procedures for all testing required by this appendix) not later than 120 days after December 21, 1988. Each employer shall implement preemployment testing of applicants for a position to perform a function listed in section III of this appendix not later than 10 days after approval of the plan by the FAA. Each employer shall implement the remainder of the employer's anti-drug program no later than 180 days after approval of the plan by the FAA.

(3) Each employer who holds a Part 135 certificate and employs from 11 to 50 employees who perform a function listed in section III of this appendix shall submit an interim anti-drug program to the FAA (specifying the procedures for preemployment testing, periodic testing, postaccident testing, testing based on reasonable cause, and testing after return to duty) not later than 180 days after December 21, 1988. Each employer shall implement the interim anti-drug program not later than 180 days after approval of the plan by the FAA. Each employer shall submit an amendment to its approved anti-drug program to the FAA (specifying the procedures for unannounced testing based on random selection) not later than 120 days after approval of the interim anti-drug program by the FAA. Each employer shall implement the random testing provision of its amended anti-drug program not later than 180 days after approval of the amendment.

(4) Each employer who holds a Part 135 certificate and employs 10 or fewer employees who perform a function listed in section III of this appendix, each operator as defined in § 135.1(c) of this chapter, and each air traffic control facility not operated by, or under contract with the FAA or the U.S. military, shall submit an anti-drug program to the FAA (specifying the procedures for all testing required by this appendix) not later than 360 days after December 21, 1988. Each employer shall implement the employer's anti-drug program not later than 180 days after approval of the plan by the FAA.

(5) Each employer or operator, who becomes subject to the rule as a result of the FAA's issuance of a Part 121 or Part 135 certificate or as a result of beginning operations listed in § 135.1(b) for compensation or hire (except operations of foreign civil aircraft navigated within the United States pursuant to Part 375 or emergency mail service operations pursuant to section 405(h) of the Federal Aviation Act of 1958) shall submit an anti-drug plan to the FAA for approval, within the timeframes of paragraphs (2), (3), or (4) of this section, according to the type and size of the category of operations. For purposes of applicability of the timeframes, the date that an employer becomes subject to the requirements of this appendix is substituted for [the effective date of the rule].

B. An employer's anti-drug plan must specify the methods by which the employer will comply with the testing requirements of this appendix. The plan must provide the name and address of the laboratory which has been selected by the employer for analysis of the specimens collected during the employer's anti-drug testing program.

C. An employer's anti-drug plan must specify the procedures and personnel the employer will use to ensure that a determination is made as to the veracity of test results and possible legitimate explanations for an employee failing a test.

D. The employer shall consider its anti-drug program to be approved by the Administrator, unless notified to the contrary by the FAA, within 60 days after submission of the plan to the FAA.

X. *Reporting Results of Drug Testing Program.* A. Each employer shall submit a semiannual report to the FAA summarizing the results of its drug testing program and covering the period from January 1–June 30. Each employer shall submit a annual report to the FAA summarizing the results of its drug testing program and covering the period from January 1–December 31. Each employer shall submit these reports no later than 45 days after the last day of the report period.

B. Each report shall contain:

1. The total number of tests performed and the total number of tests performed for each category of test.

2. The total number of positive test results by category of test; the total number of positive test results by each function listed in section III of this appendix; and the total number of positive test results by the type of drug shown in a positive test result.

3. The disposition of an individual who failed a drug test conducted in accordance with this appendix or who refused to submit to a drug test required by this appendix by each category of test.

XI. *Preemption.* A. The issuance of these regulations by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of this rule, including but not limited to, drug testing of aviation personnel performing sensitive safety- or security-related functions.

B. The issuance of these regulations does not preempt provisions of State criminal law that impose sanctions for reckless conduct of an individual that leads to actual loss of life, injury, or damage to property whether such provisions apply specifically to aviation employees or generally to the public.

XII. *Conflict with foreign laws or international law.* A. This appendix shall not apply to any person for whom compliance with this appendix would violate the domestic laws or policies of another country.

B. This appendix is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this appendix raises questions of compatability with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of this appendix to such person on or after January 1, 1990.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

13. The authority citation for Part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421–1431, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983).

14. By revising the introductory text of § 135.1(b) and adding new paragraph (c) and (d) to read as follows:

§ 135.1 Applicability.

* * * * *

(b) Except as provided in paragraph (c) of this section, this part does not apply to—

* * * * *

(c) For the purpose of §§ 135.249, 135.251, and 135.353, "operator" means any person or entity conducting an operation listed in paragraph (b) of this section for compensation or hire except operation of foreign civil aircraft navigated within the United States pursuant to Part 375 described in paragraph (b)(8) and emergency mail service operation pursuant to section 405(h) of the Federal Aviation Act of 1958 described in paragraph (b)(9). Each operator and each employee of an operator shall comply with the requirements of §§ 135.249, 135.251, and 135.353 of this part.

(d) Notwithstanding the provisions of paragraph (c) of this section, an operator who does not hold a Part 121 certificate or a 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 the requirements of an FAA-approved anti-drug program, to perform—

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would be required to transport the aircraft more than 50 nautical miles further than the closest

available repair point from the operator's principal place of operations to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to the requirements of this appendix can perform the emergency repairs.

15. By adding a new § 135.249 to read as follows:

§ 135.249 Use of prohibited drugs.

(a) This section applies to persons who perform a function listed in Appendix I to Part 121 of this chapter for a certificate holder or an operator. For the purpose of this section, a person who performs such a function pursuant to a contract with the certificate holder or the operator is considered to be performing that function for the certificate holder or the operator.

(b) No certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or an operator, either directly or by contract, any function listed in Appendix I to Part 121 of this chapter while that person has a prohibited drug, as defined in that appendix, in his or her system.

(c) Except as provided in paragraph (d) of this section, no certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or an operator, either directly or by contract, any function listed in Appendix I to Part 121 of this chapter if that person has failed a test or refused to submit to a test required by that appendix given by any certificate holder or any operator.

(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.

16. By adding a new § 135.251 to read as follows:

§ 135.251 Testing for prohibited drugs.

(a) Each certificate holder or operator shall test each of its employees who performs a function listed in Appendix I to Part 121 of this chapter in accordance with that appendix.

(b) No certificate holder or operator may use any contractor to perform a function listed in Appendix I to Part 121 of this chapter unless that contractor tests each employee performing such a function for the certificate holder or operator in accordance with that appendix.

17. By adding a new § 135.353 to read as follows:

§ 135.353 Prohibited drugs.

(a) Each certificate holder or operator shall provide each employee performing a function listed in Appendix I to Part 121 of this chapter and his or her supervisor with the training specified in that appendix.

(b) No certificate holder or operator may use any contractor to perform a function specified in Appendix I to Part 121 of this chapter unless that contractor provides each of its employees performing that function for the certificate holder or the operator and his or her supervisor with the training specified in that appendix.

Issued in Washington, DC, on November 14, 1988.

T. Allan McArtor,

Administrator.

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Part IV

Department of Transportation

Coast Guard

46 CFR Parts 4, 5 and 16

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; Final Rule

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 4, 5 and 16

[CGD 86-067]

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel

AGENCY: Coast Guard, DOT.

ACTION: Final Rule.

SUMMARY: These regulations require the establishment of anti-drug programs to reduce the incidence of drug abuse by commercial vessel personnel. These programs include pre-employment, periodic, random, post-accident and reasonable cause testing. The post-accident portion of the program also involves testing for alcohol use.

The Coast Guard believes these rules will discourage drug and alcohol use by commercial vessel personnel, reduce the potential for marine casualties related to drug and alcohol use, and enhance the safety of the maritime transportation industry.

EFFECTIVE DATE: This rule is effective on December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Commander John Koski, Project Manager, Marine Investigation Division (G-MMI), Office of Marine Safety, Security and Environmental Protection, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267-2215.

SUPPLEMENTARY INFORMATION: On July 8, 1988, the Coast Guard published a notice of proposed rulemaking, entitled "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel," in the **Federal Register** (53 FR 25926).

On July 26, 1988, the Coast Guard announced in the **Federal Register** (53 FR 28024) a series of public hearings on the notice of proposed rulemaking. These hearings were held on August 10, 1988 in Houston, Texas; August 12, 1988 in Chicago, Illinois; August 19, 1988 in Washington, DC; and August 22, 1988 in San Francisco, California. A total of 80 individuals made statements on the proposed rules at these hearings. Each hearing was recorded, and copies of the tapes, along with any written statements and other materials provided, have been placed in the public docket. The Coast Guard also received a total of 246 letters commenting on the proposed rules. All of this information has been reviewed and considered in the development of the final rule.

The Office of the Secretary of the Department of Transportation is publishing elsewhere in today's **Federal Register** an Interim Final Rule and request for comments entitled *Procedures for Transportation Workplace Drug Testing Programs.* These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human Services Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and state and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

Drafting Information

The principal persons involved in drafting this document are CDR John Koski, Project Manager, and Christena Green, Project Counsel, Office of Chief Counsel.

Background

The Coast Guard has explicit statutory authority to deny issuance of a license, certificate of registry, or merchant mariner's document to any individual who (1) has been convicted of violating a dangerous drug law of the United States or a state within 10 years of application, or (2) has ever been a user of, or addicted to, a dangerous drug (46 U.S.C. 7503). Similarly, the Coast Guard has statutory authority to revoke a license, certificate of registry, or merchant mariner's document of any individual who is, or has been, a user of, or addicted to, a dangerous drug (46 U.S.C. 7704(c)). The Coast Guard is further mandated to revoke the license, certificate of registry, or merchant mariner's document of any individual who has been convicted of violating a dangerous drug law of the United States or a state within a 10 year period before the beginning of the proceedings against that individual (46 U.S.C. 7704(b)). It is clear that these statutes intend to exclude drug users and violators of drug statutes from serving on U.S. merchant vessels.

As the Coast Guard stated in its notice of proposed rulemaking, these statutes are currently enforced by examining criminal conviction records of license and document applicants and holders, by the prosecution of those individuals operating a vessel negligently or while intoxicated, and through administrative remedies such as civil penalty actions and suspension and revocation proceedings. These methods are used, however, only after an incident occurs and the Coast Guard obtains evidence on which to base remedial or punitive action.

This final rule is a logical extension of existing regulations to ensure a drug-free working environment in the maritime community. The regulations provide for positive and aggressive action to identify users of dangerous drugs before they are involved in incidents which bring them to the attention of the Coast Guard. The regulations are intended to ensure that users of dangerous drugs are not issued licenses, certificates of registry, or merchant mariner's documents, and are not accepted for employment on vessels engaged in commercial operations. Drug users and abusers will either be deterred from continued drug use or will be faced with sufficient probability of being identified in the workplace and precluded from employment in the industry when such use is detected through chemical testing.

Discussion of Comments

General Overview of Major Issues

The Coast Guard received 246 written comments in response to the notice of proposed rulemaking. Despite the fact that some of these were received after the close of the comment period, all were considered in the formulation of these rules. In addition to the written responses, 80 individuals presented testimony at the four public hearings held by the Coast Guard.

All facets of the maritime industry presented their views, either as individuals, small operators, large corporations, unions, or associations. While there was universal support for a drug-free maritime working environment, there was serious concern about how the Coast Guard proposed to accomplish this goal.

Several sectors felt that the scope of the proposed regulations was too broad and would result in unbearable implementation costs, most notably among small operators. Many felt that only those people operating under the authority of a Coast Guard issued license or merchant mariner's document should be subjected to mandatory drug testing. Echoing this opinion, many others stated that employees serving aboard vessels in capacities which had nothing to do with the safe operation of the vessel should not be subject to the mandatory testing requirements.

Small operators and seasonal operators were seriously concerned that mandatory testing would result in shortages in their workforces, maintaining that potential employees would opt to go into other, equally well-

paying jobs which do not require them to be subjected to testing. In addition, a company administered testing program would erode the trust which has typically been established between management and the working members of small operations.

Commenters generally supported testing in conjunction with obtaining licenses and post-casualty testing, but felt that such programs should be administered by the Coast Guard and not private industry. There was a split of opinion regarding other types of testing (i.e., pre-employment, random, and reasonable cause): those companies and organizations which currently have effective anti-drug programs generally supported these types of testing, while those without such programs did not feel that all types of testing should be required. Even among those which had existing programs, there was concern that the strict parameters specified in the proposed rules would force them to abandon their programs in order to implement the procedures which are much more costly and more difficult to administer but, in their view, not necessarily more effective. Among individual commenters and labor unions, the opinion was almost universal that mandatory testing would be a violation of constitutional rights, with guilt being assumed until the individual could establish innocence.

Constitutional Issues

Numerous commenters questions the constitutionality of mandatory drug testing of maritime employees. Many commenters requested that the Coast Guard not proceed with this regulatory package until these issues have been resolved by the Supreme Court.

Response: Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the Coast Guard is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters is the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. As a threshold matter, the Fourth Amendment applies to "searches" conducted or mandated by the government and protects individuals against "unreasonable searches and seizures." Action of a private party does not constitute State or Federal action unless there exists a close nexus between the State and the action in question. *See Jackson v. Metropolitan Edison,* 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972).

Assuming that drug testing programs called for under the final rule do implicate the government, a second issue then arises concerning whether urine tests under these programs are "searches" within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman v. James,* 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also, Lovvorn v. City of Chattanooga,* 1988 U.S. App. Lexis 6952 (6th Cir. May 23, 1988) (Guy, J., dissenting); *National Treasury Employees Union v. von Raab,* 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). *Cf Mack v. United States, F.B.I.,* 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo,* that urine tests of merchant vessel personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States,* 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the government purpose behind the search * * *" the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment [citing *Camera v. Municipal Court,* 387 U.S. 523, 533 (1967)]. *See e.g., Griffin v. Wisconsin,* 107 S.Ct. 3164, 3167 (1987) (plurality opinion); *New Jersey v. T.L.O.,* 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. *See e.g., New Jersey v. T.L.O.,* 469 U.S. 325 at 340–342 (1976) (While "* * * some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure [,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion" *United States v. Martinez-Fuerte,* 428 U.S. 543, 560–561).

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *" *New Jersey v. T.L.O.,* 469 U.S. 328 at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell v. Wolfish,* 441 U.S. 520, at 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.,* 469 U.S. 325, at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. *See e.g., United States v. Montoya de Hernandez,* 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez,* 462 U.S. 579, 588 (1983); *Delaware vs. Prouse,* 440 U.S. 648, 653 (1979). Thus, the courts must "* * * consider the scope of the particular intrustion, the manner in which it is conducted, the justification for initating it, and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, at 559.

Viewed in this light, it is beyond dispute that the public has an overriding interest in assuring that merchant vessel personnel performing duties which directly affect the safety of a vessel's navigation or operations do so free of prohibited substances. The drug problem in society in general and evidence of drug use in the maritime industry in particular are discussed elsewhere in the preamble of this final rule. The impairing effects of drugs and the substantial risks to public safety posed by merchant vessel personnel who use drugs underlies the compelling governmental interest in promulating this rule.

In contrast, the drug testing requirements of the final rule involve a minimal invasion of privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware v. Prouse,* 440 U.S. 648, at 654–655; *New York v. Burger,* 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place constraints on an employer's discretion

in conducting drug testing. For example, the requirement for random drug tsting calls for selection of an employee to be tested in a scientifically acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule also are narrowly tailored to respect an employee's reasonable expectations of privacy. The procedures governing collection of urine samples, as referenced in the final rule, are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging results.

Equally significant is the fact that urine drug testing of employees performing sensitive safety-related duties is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make *some* employees' expectation of privacy unreasonable" *O'Connor v. Orgega*, 107 S.Ct. 1492 (1987). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. 2636 (1987)] and, "in effect consent [ ] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271)]. For these reasons, two Federal Courts of Appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n. Local 318 v. Township of Washington*, 1988 U.S. App. Lexis 8443 (3rd Cir. June 21, 1988) (police officers).

The Coast Guard recognizes that a number of Federal and State courts have rejected government-mandated drug testing program on Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn v. City of Chattanooga*, 1988 U.S.App. Lexis 6952 at 23 (6th Cir. May 23, 1988) (Martin, J.) ("When determining, then whether a mandatory drug search is "reasonable," we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n. Local 318 v. Township of Washington*, 672 F.supp. 779, 792 (D.N.J. 1987), *rev'd*, 1988 U.S.App. Lexis 8443 (3rd Cir. June 21, 1988) ("[T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officer.]"); *American Federation of Government Employees v. Meese*, No. C–88–1419–SAW (N.D. Cal. June 16, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The Coast Guard also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine testing after certain accidents, incidents, or rule violations is unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988). The Ninth Circuit based its views, in part, on the proposition that " * * * the vast bulk of [railroad] safety regulation is directed at owners and managers of railroads, not employees." *Id.* at 585. However, contrary to the circumstances in the railroad industry, the Coast Guard has a long history of regulating licensed and documented maritime personnel.

The Supreme Court has granted a government petition for a *writ of certiorari* in *Railway Labor Executives' Association v. Burnley*, and has ordered that this case be argued next term "in tandem" with *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the spring of 1989. However, in the absence of Supreme Court guidance, the Coast Guard is convinced that the need for drug testing by urinalysis in the maritime industry to determine fitness of maritime personnel for duty in sensitive safety-related positions, and, thereby, to ensure public safety, clearly outweighs the privacy interest of individuals in this class.

While not totally free from doubt, it is the opinion of the Department of Transportation that the Coast Guard's anti-drug progam, and similar drug testing regimens proposed by other administrations within the Department, will be determined to be constitutional. The critical need for properly administered drug testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their systems while performing sensitive safety- or security-related functions outweighs the reduced privacy interest of these employees.

Lack of Evidence of a Drug Problem in the Maritime Industry

Various segments of the maritime industry have asserted that there has been no demonstrated need to mandate industry-wide drug testing of maritime employees.

Response: The Coast Guard clearly stated in the preamble of the notice of proposed rulemaking that it did not have data which specifically identified the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage. However, many commenters submitted data to indicate that company-sponsored drug testing programs have resulted in significant documented reductions in drug usage among their employees. For example, a major maritime association testified that the lost-time incidence among its member companies has decreased by some 50 percent, and that much of this decline can be attributed to their drug interdiction programs. Other companies have reported similar successes. This information supports the Coast Guard contention that the marine industry is not immune to the drug probem that exists in society in general. It further illustrates that drug testing programs do decrease the incidence of drug usage by maritime personnel.

Accuracy of Drug Test Results

Many commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters raised the issues of false-positive test results, passive inhalation of illicit drugs, misidentification of licit drugs, and ingestion of food substances such as poppy seeds which may result in a positive drug test result.

Response: Each of these issues surfaced with the first series of drug testing programs introduced in the military and the private sector. Since that time, laboratories have been increasingly sophisticated in their analytical methods. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens. Today false-positive test results occur primarily during analysis of a specimen provided during an initial screening test. However, the initial screening test is used only to yield a preliminary indication of the possible presence of drugs. In order to ensure the integrity and accuracy of any test result, the Coast Guard has determined that each positive initial screening test result must be confirmed using Gas Chromotography/Mass Spectrometry (GC/MS). The GC/MS confirmation test is an extremely accurate test and is virtually error-free when properly conducted. This final rule specifies explicit procedures which must be followed to ensure accurate drug test results.

The final rule requires that employers establish and utilize drug testing programs which comply with the requirements of 49 CFR Part 40. These regulations are patterned after the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," published by the Department of Health and Human Services (DHHS) on April 11, 1988. These regulations provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An employer may only use a laboratory that complies with the regulations and has been certified by the DHHS to process and analyze specimens required by the Coast Guard rule.

Finally, the Coast Guard believes that the Medical Review Officer (MRO) review process that has been provided in 49 CFR Part 40 will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The procedures provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to interview and evaluate an employee, and to verify that a confirmed positive test result is accurate should preclude misidentification of licit drugs taken in accordance with a valid prescription or food substances. In summary, the Coast Guard believes that the two-step analysis process, coupled with the requirements for independent review by an MRO, provides a process by which an individual is protected from erroneous false-positive drug test results.

Periodic Testing in Conjunction With License Application or Renewal

While many commenters voiced support for the concept that applicants for original and renewed licenses, certificates of registry, and merchant mariner's documents should be subjected to drug testing, there was almost universal agreement that the costs and responsibility for administering such testing should be borne by the Coast Guard. Further, commenters generally feel that periodic testing has no deterrent value because an employee may temporarily abstain from drug use prior to such a test.

Response: The Coast Guard agrees with the commenters that predetermined periodic testing can be circumvented by a person's abstinence from drug use. However, periodic testing does enable the Coast Guard to identify those persons who are so heavily-dependent on drugs that they are unable to abstain from drug use for even a short period of time prior to a periodic test.

The suggestion that the cost for such testing be borne by the Coast Guard has not been adopted in the final rule. Costs for such testing should appropriately be borne by the person desiring a license, certificate of registry or merchant mariner's document, as are the costs for required physical examinations. There is no reason to impose these costs on the taxpayer, which would be the effect if the Coast Guard were to pay for the testing. Periodic testing will be required in conjunction with required physical examinations after implementation of the rule. However, the periodic testing requirement may be met by satisfactory evidence that an individual has passed a recent drug test or has been participating in a random drug testing program for the previous year.

Pre-employment Testing

Many commenters felt that pre-employment testing was a needless cost to incur since the job applicants would have been tested to obtain their license, certificate of registry or merchant mariner's document and would be immediately subject to the company's random testing program once he or she was hired. They also noted the transient nature of employment in the maritime industry, with mariners frequently signing on a vessel for a single trip, or being employed on a succession of vessels.

Response: The Coast Guard believes that pre-employment testing is a necessary component of an effective anti-drug program. The Coast Guard acknowledges that needless, redundant testing could result if all job applicants were required to undergo pre-employment drug testing. Accordingly, the final rule has been modified to permit employers to hire, without a pre-employment drug test, an individual who can provide satisfactory evidence that he or she has passed a previous pre-employment or periodic drug test within six months of applying for their position or if that individual can establish that, over the previous twelve months he or she has been subject to a random testing program meeting the requirements of these regulations.

Random Testing

Numerous comments were provided concerning the issue of random testing. Some addressed the constitutionality of the tests. Many companies were particularly concerned with the proposed method of selecting employees to be tested. For the widely-scattered and often remotely located maritime workforce, employers felt that random selection of a unit or vessel and unannounced testing of the entire employee complement would provide a satisfactory deterrent effect and would be the most cost-effective method of implementing a random testing program.

Most commenters believe that the proposed 125 percent random sampling rate was excessive and would impose a significant economic burden, particularly on small businesses. The commenters proposed a range of random sampling rates starting at 10 percent annually. The majority of the commenters suggest that a 50 percent random sampling rate for the maritime industry is appropriate. These commenters believe that the 50 percent sampling rate accomplishes a deterrence level consistent with the intent of the proposal.

Response: While noting the constitutional issues surrounding the issue of random testing, the Coast Guard believes that random testing is a fundamental component of an effective drug testing program. Random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the maritime community by reducing or eliminating drug use by maritime personnel. Random testing programs initiated by the military, including the Coast Guard, and private

industry show declining drug use, evidenced by a decrease in the number of individuals who test positive for drugs over the course of the drug testing program.

The Coast Guard agrees with the commenters who propose a 50 percent random sampling rate and, therefore, has revised the random sampling provision of the rule consistent with the majority of the comments received in response to the NPRM. The 50 percent sampling rate will provide a sufficient deterrent to drug use without imposing an undue economic or administrative burden on employers and employees subject to the requirements of the regulation. The frequency of testing and the development of a random selection method for testing has been left to the employer. The requirement remains, however, that the method chosen ensures that all employees have a substantially equal chance of being selected for testing and that no employee shall know in advance when such testing will occur. A properly designed unit testing program could meet these requirements.

For some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, employers might have to test at rates far above 50 percent toward the end of the year to make up for lower rates at the beginning. Employers should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively routine. We do not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule, therefore, provides an implementation procedure that would allow employers to phase in random drug testing during the first 12 months in which tests are conducted. Employers would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the year to permit the employer to phase into the 50 percent rate, and the total number of tests conducted would have to equal at least 25 percent of the covered population.

Suppose, for example, that an employer has 1000 sensitive safety- and security-related employees. At a 50 percent annual rate, 500 tests would have to be conducted during a year. Under the phase-in, however, the employer could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first year, the annualized rate of 50 percent was achieved. Thus, if the employer's drug testing plan contemplated administering random tests on 12 occasions during the year, the employer would need to administer at least 42 tests (500 divided by 12) on the last occasion, but could administer fewer tests until then. Overall, the employer would have to conduct at least 250 random tests the first year. In subsequent years, the 50 percent rate would be maintained.

Post-Casualty Testing

Numerous commenters felt that post-casualty testing was a law-enforcement function and was appropriately the responsibility of the Coast Guard. Employers generally objected to the proposal that post-casualty testing be conducted by crewmembers when medical personnel were not available.

Response: The Coast Guard appreciates this opinion. However, in many instances the Coast Guard would be unaware that a serious marine incident had occurred until receipt from a vessel master or owner of Form CG–2692, Report of Vessel Casualty. Since time is of the essence in post-casualty testing, the responsibility for ensuring that it is accomplished whenever practicable has been left with the employer.

DHHS Guidelines

Many companies expressed concern over the required use of DHHS Guidelines, especially with respect to random testing programs which they presently have in effect. They stated that such requirements would force them to drastically alter testing programs which have proven effective.

Response: In the notice of proposed rulemaking for this rule, the Coast Guard proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Drug Testing Programs of the Department of Health and Human Services (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the Federal government, and they include safeguards for accuracy and privacy of testing.

The Department of Transportation has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free regulations. The result is the DOT "Procedures for Transportation Workplace Drug Testing Programs," which will be codified at 49 CFR Part 40. These DOT Procedures are intended to preserve, to the greatest extent practicable, the important safeguards provided by the HHS Guidelines.

Some of the modifications to the DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to reference "employers"). Other modifications are intended to take into account differences in the situations of Federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities, through use of mobile units, or in ordinary toilet facilities, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for the regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on this drug-free workplace rule and those proposed by other operating administrations, comments were received concerning the DHHS Guidelines. These comments will be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

Applicability

Many comments were received that stated the scope of applicability of the proposed rule was too broad. They feel many positions in the marine transportation industry are not directly related to vessel navigation or safety, this being especially true in smaller vessel operations such as excursion boats, and on fish processing vessels. Requiring testing of caterers, bartenders, and musicians on small passenger vessels, or people involved in factory-type functions aboard fish processing vessels would prove excessively costly to the operators and such testing would not enhance the safety of navigation or vessel operation.

Response: The Coast Guard agrees with this view. The regulations in the final rule have been changed to eliminate pre-employment, for cause, and random testing requirements for employees whose duties do not directly affect a vessel's safe navigation or operation. In addition to the persons discussed above, the Coast Guard has determined that scientific personnel on

oceanographic research vessels can be exempted.

Employee Assistance Programs

Employee assistance programs received wide support with the exception of requiring rehabilitation as part of the program. There was strong opposition from employers to any mandated rehabilitation program. Employers feel it is essential for them to retain the right to terminate a person's employment, if they desire, should that person test positive for drugs. Union comments generally favor some requirement for rehabilitation of testing is mandated.

Response: The Coast Guard agrees that rehabilitation of an employee is not directly related to the safety of the vessel. The Coast Guard's concern is solely that persons who are impaired, or are likely to be impaired, are not carrying out safety-related duties. Employee rehabilitation should be a decision of the employer or agreed upon between labor and management during the collective bargaining process. The requirement for mandatory reinstatement of an employee who successfully completes rehabilitation has been deleted from the final rule. However, a person may not return to a safety-related position after testing positive for drugs without the MRO's recommendation. The person must agree to unannounced testing for a period of 60 months. In addition, the provisions of 46 CFR Part 5 concerning suspension or revocation of a license, certificate of registry, or merchant mariners document, and their restoration, apply.

Comments that the Proposed Rules are Politically-Motivated

Over 80 commenters addressed the "short" comment period allowed for evaluating the proposed regulations. Extentions of the comment period for 30 to 180 days were requested. Many commenters suggested that the proposed rules be reissued as an ANPRM, while others requested that an SNPRM be issued before publication of a final rule. The general perception of many in the industry was that the Coast Guard was rushing to final rule in this instance because of the up-coming elections in November.

Response: Because this issue was raised so frequently by the commenters, the Coast Guard chose to address these comments although they do not address the substance of the rule. The war against drugs is one of this Administration's top priorities. Also, Congress has enacted, and is considering, a substantial amount of legislation addressing the use, distribution, importation, and interdiction of drugs in the United States. Moreover, a significant number of public opinion polls indicate that the American public is deeply concerned about the effect of drug use by individuals in critical safety occupations, including the maritime industry. Development of this rule is motivated by the current political climate only to the extent that these attitudes coincide with the Coast Guard's statutory duties and authority. The Coast Guard is implementing these comprehensive anti-drug regulations because they are consistent with our statutory authority and responsibility to promulgate minimum standards to ensure and promote maritime safety.

Medical Review Officers

Numerous comments were received which indicated opposition to the requirement that employers hire a Medical Review Officer (MRO) to evaluate the results determined to be positive by a testing laboratory. Employers felt that the laboratories would best be able to ascertain the validity of positive test results and the requirement for an MRO represented an unnecessary expense.

Response: After consideration of the comments on the issue of the MROs, the Coast Guard has determined that the requirements to utilize an MRO are appropriate. The Coast Guard believes that the review and evaluation functions of an MRO, as set forth in 49 CFR Part 40, provide critical and necessary safeguards for an employee who is subject to drug testing under the comprehensive anti-drug program. The Coast Guard beleives that the MRO will prove to be a beneficial asset to both employees and employers who are subject to the provisions of the final rule.

Neither this rule nor 49 CFR Part 40 requires that each employer have its own individual MRO. The Coast Guard anticipates that small entities will become associated with large companies, or will participate in a consortium of small companies, in order to comply with the MRO requirements, and that the services of an MRO will not result in unreasonable costs to small entities.

Costs of Implementation

Many commenters stated that the Coast Guard has seriously underestimated the cost of implementing these regulations.

Response: The Coast Guard agrees that the certain cost estimates in the NPRM were lower than can be expected (e.g., initial screen and confirmatory testing costs). These have been increased in the development of the final regulatory impact analysis. However, because of changes included in the final rule (e.g., elimination of rehabilitation requirements and reducing the random testing rate to 50 percent), the estimated overall cost of implementing these regulations has dropped from $62.30 million to a maximum of $9.22 million during the third year of implementation to a constantly recurring annual cost of $7.20 million after the fifth year.

Exemption of Seasonal or Temporary Employees

Numerous requests were received from small passenger vessel operators and others to exclude seasonal or temporary employees. They expressed sincere concerns that requiring prospective employees to undergo pre-employment drug testing and to then be subjected to a random testing program would result in many individuals, notably high school or college students, seeking employment elsewhere. This, in turn, would greatly increase the difficulty of obtaining sufficient help to run a seasonal operation.

Response: As stated previously in this preamble, the Coast Guard has modified the scope of these regulations to exclude persons who are not involved as "crewmembers" aboard a vessel. Small passenger vessel operators will not be required to test employees serving as waiters, waitresses, cooks, bartenders, entertainers, etc., provided their duties do not directly affect the safety of the vessel's navigation or operations. Similarly, many seasonal employees on fish processing vessels are exempted. These changes should alleviate the problems associated with temporary employees. The Coast Guard appreciates the concerns expressed by parties employing high school or college age workers on a seasonal basis. However, many of these persons are solely or primarily responsible for the safe operation of the vessel as for example, a yacht club tender, camp boating instructor, or licensed operator of a sport fishing boat carrying six or fewer passengers. Safety concerns are not lessened because these persons are employed on a seasonal or temporary basis. In fact, there is considerable opinion, and some evidence, that the incidence of drug use is higher among the high school and college age group. The final rule does not exempt seasonal or temporary "crewmembers" from the testing requirements.

Alternate Testing Technologies

Testing of Hair: A number of comments addressed the issue of using testing technologies different from those proposed by the Coast Guard. Three comments suggested that Radio Immunoassy of Hair be permitted as an alternative to urinalysis.

Response: Because the suggestion of drug testing using analysis of hair specimens raises an issue within the expertise of DHHS, the Coast Guard does not intend to include testing of hair at this time. If DHHS finds this drug testing method satisfactory in the future, and if the DOT procedures in 49 CFR Part 40 are revised to include this testing method, or any other proven testing technology, the Coast Guard will adopt them in their rules also.

Breath Testing Devices: Many commenters objected to the requirement in the proposed rules that all inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, have on board at all times an evidential breath testing device (EBT) approved by the National Highway Transportation Safety Administration. They objected primarily to the high initial costs of obtaining this equipment and having to train crewmembers to properly calibrate and operate these devices and to perform post-casualty breath testing on fellow crewmembers.

Response: After reviewing the comments on this issue, the Coast Guard has revised the proposed rule to allow carriage of any breath testing device capable of accurately detecting the presence of alcohol in a crewmember's system. Some of these devices have been shown to be very accurate, easy to use, and inexpensive.

Because of the wide variety of breath testing devices available under the revised rule, the Coast Guard will require only that such devices be used in accordance with procedures specified by the manufacturer. This change will provide employers with sufficient flexibility to choose any accurate breath testing device compatible with their operational circumstances. The use of alcohol is not automatically disqualifying. The weight to be given test results in determining whether the standards of 33 CFR Part 95 have been violated is up to the Administrative Law Judge who can consider the type of device and the conditions under which the test was administered.

The Coast Guard appreciates the concerns raised about testing fellow crewmembers, and allows blood or breath samples to be collected by medical personnel or other qualified nonvessel personnel whenever practicable. However, if a vessel is in a location where such personnel are not available to conduct such tests, breath testing would be required to be done by vessel personnel. Blood testing can only be conducted by qualified medical personnel. The alternative, to forego readily available evidence concerning whether alcohol was involved in a casualty, would not be in compliance with the intent of 46 U.S.C. 6101.

Conflict with Foreign, State or Local Laws, or with Existing Agreements

Numerous comments indicated that drug testing of individuals was contrary to existing foreign or state laws prohibiting such testing. Other comments stated that the current programs are the result of collective bargaining agreements with affected unions and that the requirements of the proposed rules will send them back to the bargaining table.

Response: The Coast Guard recognizes that some state or local laws and some foreign laws may prohibit or limit the testing required under the final rule. Because of the predominant role assigned the Coast Guard concerning the safe operation of U.S. vessels in commercial service, it is the Coast Guard view that these rules preempt state laws. The complexity and variable circumstances encountered in the interaction of U.S. and foreign law concerning U.S. flag vessels operating within the jurisdiction of a foreign country requires each such situation to be separately analyzed.

We are aware of concerns expressed by foreign entities and foreign governments concerning the potential of our rule to have effect outside United States territory. There are several kinds of situations in which this concern appears to arise.

The first such situation involves a foreign citizen employed by a U.S. company. To begin with, we believe it is fundamental that a foreign citizen employed in the United States by an American company is fully subject to U.S. law, including the requirements for drug testing. With respect to employees of an American company located in a foreign country, it is not our intention to require an employer to violate local law. The requirement to ensure that employees located in a foreign country are subject to drug testing will not become effective until January 1, 1990. This additional compliance period is intended to minimize disruption for employers and employees while the U.S. government meets with foreign governments to discuss implementation of the requirements of the rule.

The second situation that has generated interest in this context concerns foreign entities that are contractors to U.S. companies. The Coast Guard position is that a marine employer who uses contract personnel to perform the duties of a crewmember has "engaged" those personnel. Therefore, the final rule subjects employees of the contractor to the same drug-testing requirements as direct employees of the marine employer. This requirement is necessary to ensure that U.S. companies do not circumvent the rule by contracting out for services. Some foreign entities and their governments, however, have suggested that this gives the rule extraterritorial effect, since a foreign contractor, like a U.S. contractor, would have to comply with our rule.

However, our rule does not *require* any foreign contractor to conduct drug testing of its employees. The rule imposes requirements only on the operator, i.e., marine employer. It is the responsibility of the marine employer to ensure that crewmembers are drug-free, as enforced by the drug-testing program we are today establishing. In that respect, the drug-testing requirements are not fundamentally different from other testing and training requirements. While it is true that foreign contractors will have to ensure that their employees who service U.S. companies meet our requirements, the same is also true for U.S. contractors.

Nevertheless, we appreciate the seriousness of the concerns expressed on this point. Therefore, the final rule provides that U.S. companies can continue to use foreign contractor employees, whether or not they have instituted drug-testing programs, through December 31, 1989. This short delay in the application of our rule to foreign contractors will provide an opportunity for additional discussion between governments.

The third situation involves a foreign citizen, employed by a foreign company, on a U.S. vessel operating in waters subject to the jurisdiction of the United States. Under agreement between the United States and Canada, Canadian pilots are required on American vessels under certain circumstances in both American and Canadian waters. These pilots, moreover, may, at least in some instances, be employees of the Canadian government. Representatives of the Canadian government have expressed the view that requiring testing of these pilots, even if they are in the United States at the time of the test, might violate the Canadian Human Rights Act. While there is as yet no

definitive understanding about the extent and effect of Canadian law on random drug testing by Canadians operating in the United States, further consultation with the Canadian government seems advisable. Under the circumstances, we have determined to postpone implementation of the final rule, except for post-casualty testing, insofar as it would affect foreign pilots and foreign vessels, until January 1, 1990. This will allow for consultation between governments about implementation of the requirements of the rule.

There are also issues about random tests for employees of U.S. companies where the vessels may not return to the U.S. during the year. The company is required to conduct the tests in international waters, where feasible, or on board the ship within the territorial waters of a foreign country where such testing does not violate the laws of the foreign country. Where foreign law prohibits the testing of an employee regardless of his location, implementation of the final rule, insofar as it would affect such individuals, is postponed until January 1, 1990, to allow consultations between governments.

We have determined not to make the rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department of Transportation and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Commandant may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the **Federal Register**. While we recognize that this may create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Section-by-Section Analysis

This final rule reflects substantial changes to those regulations set forth in the notice of proposed rulemaking. These changes have been made as a result of the comments received, issues raised during the public hearings and further review within the Coast Guard.

Amendments to Part 4

The final rule amends the existing marine casualty and investigation regulations by adding chemical testing requirements to be followed when commercial vessels are involved in serious marine incidents. To accomplish this, it has also been necessary to define additional terms utilized in these new regulations.

Section 4.03–2 defines a serious marine incident. Serious marine incidents differ from marine casualties and accidents. Some occurrences considered reportable marine casualties would not be considered serious marine incidents (e.g., suffering vessel damages of $50,000); other occurrences considered serious marine incidents would not be considered reportable marine casualties (e.g., discharging a reportable quantity of a hazardous substance into the navigable waters of the United States).

Section 4.03–4 defines an individual directly involved in a serious marine incident. This rule requires that these individuals be chemically tested for drug or alcohol use. For an individual to be directly involved in a serious marine incident, that individual's order, action or failure to act must have been a significant causative factor in the events leading to or causing a serious marine incident. This would be indicative of human error. Chemical testing would be required to determine whether or not such an error could be a result of drug or alcohol impairment. It is not intended by these regulations that the master of a vessel, who, by virtue of position, is responsible for the entire vessel, be tested after each serious marine incident in which the vessel may be involved. It is also not the intent of these regulations to necessarily test personnel after each material failure which may lead to a serious marine incident (e.g., the helmsman who happens to be on duty at the time of a steering gear failure).

Section 4.03–5 defines a medical facility.

Section 4.03–6 defines qualified medical personnel.

Section 4.03–7 defines a chemical test. Although these final rules recognize only certain chemical tests of urine, blood and breath to determine evidence of dangerous drug or alcohol use, the definition is written in broad enough terms to allow for the acceptance of other types of tests which may be added in subsequent rulemakings.

Paragraph (e) of § 4.05–1 has been revised to require the reporting of a marine casualty to the Coast Guard when an injury results which requires professional medical treatment beyond first aid and, in cases involving crewmembers, renders an individual unfit to perform routine vessel duties. This varies from the previous requirement which required reporting of injuries which incapacitated a person for a period in excess of 72 hours. This eliminates the need to report such cases as sprained ankles whereby an individual could be incapacitiated for over three days and still not require professional medical attention.

A new Subpart 4.06 is added to address mandatory chemical testing following serious marine incidents involving vessels in commercial service. These regulations extend those contained in 33 CFR Part 95, which require determinations as to whether alcohol or drugs are involved in marine casualties and allow for the chemical testing of individuals involved in marine casualties or suspected of being intoxicated. The regulations in this part require chemical testing of individuals directly involved in serious marine incidents.

Section 4.06–1 outlines the responsibilities of the marine employer following the occurrence of a serious marine incident. A marine employer is first required to make a timely, good faith determination as to whether a marine casualty, discharge of oil, or discharge of a hazardous substance is, or is likely to become, a serious marine incident. If the employer determines that the criteria for a serious marine incident has been, or likely will be, met, the marine employer shall then determine who, if anyone, abroad the vessel was

directly involved in the incident. The marine employer shall then take all practicable steps to assure that all persons directly involved in the serious marine incident are chemically tested for evidence of dangerous drug or alcohol use. A law enforcement officer may determine that individuals other than those designated by the marine employer should also be designated as being directly involved in the serious marine incident. In such cases, the marine employer must take all practicable steps to test those individuals also.

This section is intended to allow the marine employer to balance the chemical testing requirements of this part against the immediate circumstances surrounding a serious marine incident. The need to control a shipboard fire may far outweigh the necessity to promptly take a breath sample to test for alcohol use. It may be physically impossible to transport a crewmember directly ivnolved in a serious marine incident abroad a fishing vessel in the Gulf of Alaska to a medical facility where a blood sample can be taken and shipped for testing. The Coast Guard expects that timely chemical tests will be conducted on every person directly involved in a serious marine incident. It trusts the marine employer to make good faith determinations as to when such testing is required, who is required to be tested, and when it is practicable to do so.

The regulations also require the marine employer to indoctrinate all individuals engaged or employed aboard a vessel of these requirements. Personnel assigned functions to implement these regulations shall be trained to carry out those duties as necessary.

Section 4.06–5 outlines the responsibilities of persons directly involved in serious marine incidents. An individual can be determined to be directly involved in a serious marine incident by a marine employer or a law enforcement officer. When an individual is directed to undergo chemical testing for evidence of drug or alcohol use by the marine employer or the law enforcement officer, the individual is required to comply. However, no individual can be forcibly compelled to comply with these testing requirements. In cases where an individual refuses to submit to chemical testing required by this part, an entry will be made in the official log book, if one is required to be maintained, and on Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident). Such a refusal is considered to be a violation of regulation and will subject individuals holding a license, certificate of registry, or merchant marine's document to suspension and revocation proceedings under 46 CFR Part 5. Individuals, whether or not they hold a license, certificate of registry, or merchant mariner's document, who refuse to submit to testing when directed to do so by their employer or a law enforcement officer will be subject to removal from any duties which directly affect the safety of vessel's navigation or operations. There may be instances where personnel would be unable to submit to such testing in order to perform duties in the aftermath of a serious marine incident which would be necessary for the preservation of life or property or the protection of the environment. In such cases, the testing would have to be delayed or not conducted, as determined necessary by the marine employer.

Section 4.06–10 specifies what types of specimens must be taken to meet the chemical testing requirements of this subpart. Paragraph (a) requires urine specimens to be provided for testing for evidence of dangerous drug use. Urine specimens must be collected and tested in accordance with the requirements of § 4.06–20 and 46 CFR Part 16, "Chemical Testing." Paragraph (b) allows either blood or breath specimens, or both, to be utilized to test for evidence of alcohol use. Because alcohol dissipates quickly from a person's system, it is necessary that the specimens be taken as soon as is practicable following the occurrence of a serious marine incident.

Section 4.06–20 establishes requirements for specimen collection. It is extremely important that specimens be obtained as soon as practicable following the occurrence of a serious marine incident, that they are not altered or tampered with, and that they can be positively tracked from the time the specimens are provided until the time they are tested. To ensure this, designated personnel must supervise the collection process and make certain that the proper procedures are followed. Ideally, specimen collection would be overseen by qualified collection personnel or by a firm offering a specimen collection service, either in a designated shoreside facility or aboard the vessel. Because of the nature of the maritime industry, however, it may be necessary for specimen collections to be carried out in remote locations which would necessitate that trained shipboard personnel collect specimens. This latter option would only be permitted for urine and breath specimen collections: blood specimens are only permitted to be taken by qualified medical personnel.

Paragraph (a) of this section specifies that a vessel certificated for unrestricted ocean routes and a vessel certificated for restricted overseas routes carry on board a breath testing device capable of determining the presence of alcohol in a person's system. The selection of this device is left to the discretion of the marine employer. However, the device must be used in accordance with the procedures specified by its manufacturer. These devices are not required to be carried on other vessels since their routes will, in all likelihood, place them near a medical facility where blood specimens can be taken, near a law enforcement facility where breath testing can be conducted, or in a location where the marine employer or the designated representative can bring testing equipment to the vessel.

Paragraph (b) requires that marine employers have urine specimen collection and shipping kits readily available for use in the collection and shipping of urine specimens following serious marine incidents. These kits need not be maintained aboard vessels if they can be obtained within 24 hours of the occurrence of a serious marine incident. The kits must contain all the items necessary, including written step-by-step procedures to be followed, to ensure that specimens are properly collected and shipped, regardless of the location at which the collection is accomplished. Specimen collection and mailing kit requirements are contained in § 16.330.

Section 4.06–30 requires that body fluid specimens be collected from the remains of crewmembers who die as a result of marine casualties. The marine employer is responsible for notifying the appropriate local authority of this requirement. The marine employer shall make a specimen collection and shipping kit available to the local authority and assist in assuring that the specimen is properly handled and shipped. Recognizing that there may be instances where the local authority or the custodian of the remains may refuse to allow such specimens to be taken, the regulations permit the marine employer to explain why the required specimens were not obtained in such cases.

Section 4.06–40 places the burden of ensuring that blood and urine specimens are properly collected, documented, and shipped upon the marine employer. Paragraph (a) specifies shipping requirements specific to blood specimens, and paragraph (b) specifies

requirements for shipment of urine specimens.

Section 4.06–50 requires testing laboratories to provide prompt analyses of specimens sent to them for testing. The testing laboratories are required to send test reports to the Medical Review Officer designated by the marine employer. The main function of the Medical Review Officer is to ensure that any positive test result is not attributable to a prescribed medication or some other acceptable reason.

Paragraph (c) cautions that a positive test result, by itself, shall not constitute a finding that the use of drugs or alcohol was the probable cause of a serious marine incident. Such a fact may, however, be considered as evidence in the investigation of a serious marine incident and may lead to the conclusion that the use of drugs or alcohol was its probable cause.

Section 4.06–60 details the requirements for submittal of chemical testing information to the Coast Guard. This is accomplished through the use of Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident). Following the occurrence of a serious marine incident, the marine employer is required to submit this form to the Coast Guard. In cases in which a Form CG–2692 (Report of Marine Accident, Injury or Death) is required to be submitted, the Form CG–2692B shall be appended to it. In cases involving discharges of oil or hazardous substances, where a Form CG–2692 may not be required, the Form CG–2692B shall be submitted to the Coast Guard Officer in Charge, Marine Inspection having jurisdiction over the location where the discharge occurred or nearest the port of the vessel's first arrival following the discharge. The Form CG–2692B requires the marine employer to indicate all individuals directly involved in a serious marine incident. These individuals are to provide specimens for chemical testing as required by this subpart. In instances where individuals refuse to provide required specimens, or where for some reason specimens cannot be obtained, this information shall also be included on the form. The marine employer shall submit a copy of the positive or negative test results for each person designated as a person directly involved in the serious marine incident to the same Officer in Charge, Marine Inspection to whom the Form CG–2692B was submitted.

Amendments to Part 5

Table 5.569 is revised in the final rule to include a listing for "Violation of Regulation: Refusal to provide specimens for required chemical test." The suggested range of appropriate order to be used for this violation will be a 12 to 24 month outright suspension of an individual's license, certificate of registry, or merchant mariner's document.

Amendments to Subchapter B

The final rule amends Subchapter B, Merchant Marine Officers and Seamen, by adding a new Part 16, Chemical Testing. Part 16 is divided into four subparts: Subpart A, General; Subpart B, Required Chemical Testing; Subpart C, Standards for Chemical Testing for Dangerous Drugs; and Subpart D, Employee Assistance Programs.

Subpart A of this part contains requirements of a general nature which apply to the chemical testing of commercial vessel personnel.

Section 16.101 informs the reader of the purpose of the regulations contained in this part, i.e., to provide minimum standards, procedures and means to be used to test for the use of dangerous drugs in order to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.

Section 16.101 provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under the rule. That is, an employer must test the sample for the five major drugs listed in the regulation. Only if, in the context of reasonable cause testing, the Coast Guard authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of a DHHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of these regulations. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the Coast Guard regulation as the basis for the request.

Section 16.105 defines several terms utilized in Part 16.

"Chemical test" is defined in broad enough terms to describe virtually any type of chemical test. Although these final rules authorize only certain chemical tests of urine, blood and breath to determine evidence of dangerous drug or alcohol use, the definition is written to allow for the acceptance of other types of tests as they are proven to be satisfactory.

"Commitment of employment" is defined to mean the proof of employment required by 46 CFR 12.25–5.

"Crewmember", as used in this part, is an important term as it defines vessel personnel to whom the regulations of this part apply. The intent of these regulations is to chemically test all individuals engaged or employed aboard a vessel who perform duties which directly affect the safety of the vessel or its operations. This definition states that anyone aboard a vessel who is acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not a member of the vessel's crew, is subject to the requirements of this part. The wording is used to include individuals such as federal pilots who operate aboard a vessel, but are technically not a member of the vessel's crew. While not members of the vessel's crew, they are aboard serving a function, albeit temporary, which can directly affect the safety of the vessel. It is therefore necessary for them to be subject to these chemical testing requirements. The second part of this definition states that anyone engaged or employed to perform duties aboard a United States vessel which is required by law or regulation to be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter which directly affects the safety of the vessel or its operations is similarly subject to the requirements of this part. Thus, state pilots, certain industrial personnel, and undocumented crewmembers would all be subject to the requirements of this part. Certain of these regulations do not apply to individuals employed aboard a small passenger vessel such as waiters, waitresses, bartenders, and musicians who have no duties directly affecting the safety of the vessel. Scientific personnel aboard oceanographic research vessels and individuals primarily employed in the preparation of fish or fish products on fish processing vessels are also excluded from certain testing requirements.

"Dangerous drug" is defined.

"Dangerous drug level" is defined.

"Employer" is defined to include both marine employers and sponsoring organizations, as described below. Many of the regulations in this part refer to employers, vice marine employers. In such cases, marine employers may

utilize sponsoring organizations to fulfill specified regulatory responsibilities.

"Fails a chemical test for dangerous drugs" is defined.

"Intoxicant" is defined to include any form of alcohol, dangerous drug, or combination thereof.

"Marine employer" is broadly defined to mean a vessel's owner, managing operator, charter, agent, master, or person in charge. Many of the regulations in this part pertain specifically to the marine employer. Who specifically executes the regulatory requirement will often depend on the circumstances of a given situation. Where doubt exists as to who will carry out a particular regulatory requirement, written company guidance should be provided.

"Medical Review Officer" is an individual designated by the employer to carry out the duties specified in 46 CFR 16.370. This individual may be employed directly by the employer, or may be provided for as part of a contracted drug testing program.

"Serious marine incident" is defined as in 46 CFR 4.03–2.

"Sponsoring organization" is broadly defined to include companies, consortiums, corporations, associations, unions, or other organizations with which marine employers or their employees are associated. Many of the regulations in this part refer to employers, vice marine employers. In such cases, sponsoring organizations can be used to fulfill the specified regulatory responsibilities.

"Vessel owned in the United States" is defined.

Subpart B of this part delineates the type of required chemical testing.

Section 16.201 emphasizes that chemical testing of personnel must be conducted. Any user who fails a chemical test for dangerous drugs is considered to be a user of dangerous drugs. The employer or prospective employer of an individual who fails to pass a required chemical test must deny that individual employment in, or remove him or her as soon as practicable from duties which directly affect the safety of the vessel's navigation or operations. If an individual holds a license, certificate of registry, or merchant mariner's document and fails to pass a required chemical test, the employer or prospective employer must report the test results to the nearest Officer in Charge, Marine Inspection. The individual will then be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 CFR Part 5.

Paragraph (e) of this section permits individuals who have failed a required chemical test to be rehired, provided requirements outlined elsewhere in the regulations have been fulfilled.

Section 16.205 establishes a graduated implementation scale for employers to come into compliance with the requirements of this part. A graduated scale is provided to allow smaller employers time to form associations or other similar sponsoring organizations, if they so choose, to oversee certain testing aspects required by these regulations and enable them to obtain reduced group testing rates at certified testing laboratories.

Marine employers who employ more than 50 employees subject to the requirements of this part are given six months after the effective date of this rule to implement a pre-employment testing program and one year to implement the remainder of the drug testing program.

Marine employers who employ from 11 to 50 employees subject to the requirements of this part are given one year after the effective date of this rule to implement the pre-employment, periodic, post-accident, reasonable cause, and after return to duty testing programs. They must establish random testing programs within two years after the effective date of this rule.

Marine employers who employ 10 or fewer employees subject to the requirements of this part are given two years after the effective date of this rule to implement a complete anti-drug program which fully complies with these regulations.

Paragraph (d) allows random testing programs to be gradually brought into effect over an extended time period of one year. As discussed earlier in this preamble, it may be a substantial burden for employers to move immediately from no drug testing to a 50-percent random testing rate. This paragraph specifies the graduated steps which will be permitted in the implementation of random testing programs.

Paragraph (f) is written to clarify that foreign pilots aboard U.S. vessels operating in waters not subject to the jurisdiction of the United States do not have to meet the testing requirements of this part.

Section 16.207 addresses conflicts with foreign laws. As discussed previously in this preamble, some foreign laws may prohibit testing of their citizens. This section delays implementation of the testing requirements of this part with respect to foreign citizens aboard U.S. vessels in order that agreements can be pursued with foreign governments to clarify this point.

Section 16.210 requires that no one be engaged, employed or otherwise given a commitment of employment as a crewmember aboard a vessel unless that individual passes a chemical test for dangerous drugs. The burden rests upon the marine employer to ensure that this requirement is met. The pre-employment test may be waived if the individual can prove that he or she has passed a pre-employment or periodic chemical test within the previous six months or if the individual can prove that he or she has been subject to an accepted random testing program for not less than twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests. The wording of this section relieves the employer of the burden of pre-employment testing by allowing the hiring of individuals through sponsoring organizations, e.g., unions, which conduct pre-employment and random tests in accordance with these regulations of their members prior to their being assigned a shipboard billet.

Section 16.220 specifies that a chemical test for dangerous drugs must be conducted whenever a physical examination is required by regulations contained elsewhere in this subchapter. If a physical examination is required for a license or merchant mariner's document, the applicant must provide the results of the chemical test to the Coast Guard Regional Examination Center (REC). When the regulations require a license holder to undergo physical examinations on a periodic basis, the results of each required chemical test must be provided to the REC by the individual at the time of license renewal.

If an individual can prove that he or she has passed a pre-employment chemical test within the previous six months or if the individual can prove that he or she has been subject to an accepted random testing program for not less than twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests, a periodic chemical test need not be conducted.

Section 16.230 requires marine employers to provide for the chemical testing of crewmembers on a random basis. As has been discussed previously, marine employers may form or otherwise use sponsoring organizations to conduct their random chemical testing programs.

Employers must test crewmembers on a random basis at an annual rate of not

less than 50 percent. Every member of a given population must have a substantially equal chance of selection to be tested on a scientifically valid basis. The basis of selection is left to the employer. Employers may choose to test individuals; employers may choose to test entire units. The important consideration is that the testing frequency and process used in such that an individual employee's chances of selection remain constant throughout his or her employment. Employees may not receive a prewarning of when they are to be randomly tested.

It is important to note that the requirements of this section apply to individuals such as independent tankermen, federal pilots, state pilots, and certain industrial personnel. While not members of the vessel's crew, they are aboard serving a function, albeit temporary, which can directly affect the safety of the vessel or its operations. It is therefore necessary for them to be subject to these chemical testing requirements. Because such individuals commonly work for or through "third parties", e.g., pilot's associations or drilling companies, and are not properly employees of the marine employer, it is incumbent upon the marine employer to ensure that these individuals are either tested under programs established by their employer or association, or are tested under the marine employer's established program.

Paragraph (d) forbids anyone from serving as master, operator, or person in charge on a vessel in a position for which a license or merchant mariner's document is required unless all crewmembers are subject to the random testing requirements of this section. Doing so could result in suspension and revocation proceedings being initiated against the individual. This change was made because it is unreasonable to expect that all holders of licenses or merchant mariner's documents aboard a vessel be cognizant of who is and who is not in compliance with the testing procedures of this section. The master, operator, or person in charge, however, should be.

Section 16.240 requires that all individuals directly involved in a serious marine incident be chemically tested for the presence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

Section 16.250 requires an employer to chemically test crewmembers for dangerous drug use when there is reasonable cause to suspect such usage. The decision to test in such circumstances should be based on the observation and concurrence of two persons in supervisory positions, wherever practicable. Whenever such testing is conducted, it shall be logged in the vessel's official log book, if one is required. If an individual refuses to submit or cooperate in the administration of a timely chemical test when directed to do so, this fact shall also be entered in the vessel's official log book. In the case of licensed or documented personnel, this will subject the individual to suspension and revocation proceeding under 46 CFR Part 5.

Section 16.260 requires employers to maintain records of chemical tests performed. These records must be sufficient to provide evidence of the results of chemical tests of crewmembers to satisfy §§ 16.210(b) and 16.220(b). Additionally, the records must be sufficiently detailed so as to permit collection and analysis of the effectiveness of the testing programs. Negative report records must be retained for one year. Positive report records must be maintained for five years. These records must be made available to Coast Guard officials upon request.

Subpart C establishes the standards to be met when chemically testing for dangerous drugs.

Section 16.301 requires that drug testing programs subject to this part be conducted in a manner consistent with 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs. These regulations are based upon "Mandatory Guidelines for Federal Workplace Drug Testing Programs," developed by the Department of Health and Human Services (DHHS Guidelines). These were published in the **Federal Register** on April 11, 1988. This section cautions readers that the regulations in this subpart are summaries of the requirements contained in 49 CFR Part 40. In establishing specific procedures to carry out the requirements of this part, those regulations should be consulted.

Section 16.310 provides the employer with general guidance in the establishment of specimen collection procedures. It stresses principal issues which must be considered during program development (general collection site requirements, security of the collection site, access to the collection site by authorized personnel only, privacy of individuals providing specimens, and maintaining the integrity of specimens after they are given). Specific requirements for these aspects of a testing program are found in 49 CFR Part 40, and these regulations should be consulted to ensure program adequacy.

Section 16.320 requires that a chain of custody be established for each specimen provided for chemical testing. It is extremely important that each specimen can always be accounted for, from the time it is provided through its authorized disposition. A properly established chain of custody ensures that the chances of a specimen being altered, contaminated, switched, or lost are minimized and that test results provided are, in actuality, those of the indicated specimen.

Section 16.330 establishes specimen handling and shipping procedures. The regulations require the employer to obtain a specimen collection and shipping kit to be used to collect specimens and return them to the certified drug testing laboratory. Items required to be provided in the specimen collection and shipping kit are specified. The list is not all-inclusive, and additional items may be included as the employer considers necessary. It is imagined that the employer will work closely with the chosen drug testing laboratory in developing this kit. One important feature of the kit is the set of step-by-step instructions which describe the proper procedures to be followed during specimen collection, handling, and shipping. Because situations are envisioned where specimen collection may be supervised by personnel not overly familiar with these procedures, the specimen collection instructions must be written in a manner which is easily understandable and will result in the specimens being properly provided, stored, handled, and shipped to the testing laboratory.

Section 16.340 requires that laboratories used to conduct the chemical tests required by this part be DHHS certified. The burden is placed upon the employer to ensure that this requirement is met.

Section 16.350 requires that each specimen be analyzed in a manner consistent with 49 CFR 40.24. DHHS certified laboratories will meet this requirement. It also specifies the dangerous drugs for which each specimen must be tested and defines when a specimen is considered to have tested positive. Specimens which indicate the presence of a dangerous drug in excess of the levels established in 49 CFR 40.24 shall be reported to the Medical Review Officer as positive.

Section 16.360 describes the information which must be included on each specimen analysis report. Only specimens tested as positive on the confirmatory test are to be listed as positive on the specimen analysis report. Samples which are negative on the screening test and specimens which are negative on the confirmatory test

shall be reported as negative on the specimen analysis report. All specimen analysis reports shall be sent to the Medical Review Officer designated by the employer, rather than to the employer.

Section 16.370 requires employers to designate or appoint a Medical Review Officer (MRO). The primary function of the MRO is to review and interpret each confirmed positive test in order to detemine if there is an alternative medical explanation for a positive test result. The MRO may be employed directly by the employer, or the provision of MRO services may be contracted as part of the drug testing program. The MRO verifies positive test results through interviews with the crewmember who tested positive, reviews of the crewmember's medical history and biomedical factors, and verification of the laboratory report and assessment. The MRO may, if he or she considers it necessary, request the original specimen be reanalyzed to determine the accuracy of the reported test result.

The MRO provides the final report to the employer or the employer's designated agent. The MRO may determine there is a legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use. In such cases the MRO shall report a test result as negative. The MRO may conclude, based on reviews of laboratory inspection reports, quality assurance and quality control data, and other drug test results, that a particular drug test result is insufficient for further action. In such cases the MRO shall also report a test result as negative. If the MRO determines that there is no legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use, the MRO shall report the positive test result to the employer for further proceedings in accordance with the employer's anti-drug program.

The MRO also determines when an individual who has failed a chemical drug test for dangerous drugs may return to work. The decision is made after the MRO determines that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work.

Section 16.380 mandates that employers shall not release individual test results or other personal information from anti-drug program records except: to the Coast Guard where required by these regulations, to specifically identified persons designated by the individual tested, or personally to the individual tested.

Subpart D specifies the requirements of employee assistance programs.

Section 16.401 requires employers to provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as part of its internal personnel service program or the employer may contract with an entity that will provide EAP to a crewmember. The EAP must contain an education program and a training program for all personnel. At least 60 minutes of EAP training must be provided for each supervisor.

E.O. 12291 and DOT Regulatory Policies and Procedures

These regulations are considered to be non-major under Executive Order 12291. However, they are considered to be significant under the DOT regulatory policies and procedures (44 FR 11304; February 26, 1979) because they initiate a substantial regulatory program.

The Coast Guard has prepared and placed in the rulemaking docket a final regulatory evaluation addressing the economic impact of these rules. It may be inspected or copied at the Marine Safety Council, Room 3600, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001, from 8:00 a.m. to 3:00 p.m.

Regulatory Evaluation

The Coast Guard has developed a final regulatory impact analysis and placed it in the docket. As previously stated, the estimated overall cost of implementing these regulations will be a maximum of $9.22 million during the third year of implementation to a constantly recurring annual cost of $7.20 million after the fifth year. Although revisions to the vessel casualty reporting program have recently been effected, existing data does not readily identify drug-related casualties. Therefore, the Coast Guard has not estimated the total cost benefits of this rulemaking. However, the following must be kept in mind.

In 1984 there were approximately 2300 commercial vessel casualties (excluding fishing vessels), resulting in $237 million in damages and 68 deaths. Of these, 1133 of the accidents were directly attributable to personnel-related causes, i.e. carelessness, misjudgment, etc., resulting in $77 million in damages and 29 deaths. (It should be noted that these statistics do not include personnel deaths or injuries which were not associated with vessel accidents.) According to a 1987 NIDA report on Strategic Planning for Workplace Drug Abuse Programs, abusers of drugs and alcohol have 3.6 times as many accidents in comparison to other workers. There is no reason to believe a similar correlation does not exist in the maritime industry. On that basis, it would be reasonable to assume that detecting 7.5 percent drug users in the employee population would have the potential for preventing up to 27 percent ($3.6 \times 7.5\%$) of the accidents attributable to personnel-related causes. If 27 percent of the $77 million in damages and 29 deaths attributable to personnel-related causes is prevented some $20.8 million in damages and eight deaths could be prevented. (Additional savings would also be achieved as a result of reduced compensation claims, lower medical costs, and less time lost due to sick leave.)

The Coast Guard believes that if drug screening can prevent even a low percentage of accidents through drug testing and rehabilitation, the program will more than pay for itself. Using the minimum accepted value of a human life of one million dollars, the saving of but a few lives annually, along with reduced property damage, will more than match the cost of the program. This goal is believed achievable, given the success of other drug testing programs.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires review of proposed rules to assess their impact on small business. In consideration of the cost information discussion under the regulatory analysis, the Coast Guard concludes that this final rule could have a significant economic impact on a substantial number of small entites. The Coast Guard has provided viable alternatives for small employers to adopt which would reduce the cost of compliance while achieving the levels of protection sought by these rules. Although unit costs for small entities for certain services required under these regulations may be somewhat higher, small operators have the latitude to utilize cooperative services, or form associations, which will result in a reduction of unit costs. A regulatory flexibility analysis discussing this issue in more detail has been placed in the docket.

Paperwork Reduction Act

This rulemaking contains information collection requirements in the following sections: Part 16, subparts B and C, plus section 46 CFR 4.06. These collection requirements are being submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). Under § 4.06–60, the employer is required to submit a Form CG–2692B

(Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident) to the Coast Guard whenever personnel are directed to provide specimens for mandatory chemical testing after the occurrence of a serious marine incident. Employers are also required to maintain records of the results of chemical testing for dangerous drugs under § 16.260.

Federalism Implications

This regulation has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The rules affect the safety of vessels in interstate and foreign commerce and are directly related to the qualifications of personnel licensed by the U.S. Coast Guard and their working conditions on vessels. These are express statutory responsibilities of the U.S. Coast Guard and there are no similar State responsibilities or programs in these areas.

Environmental Assessment

The Coast Guard has considered the environmental impact of these regulations and concluded that, under section 2.B.2.1. of Commandant Instruction M16475.1B, they will have no significant environmental impact and are categorically excluded from further environmental documentation.

List of Subjects

46 CFR Part 4

Administrative practice and procedures, Investigations, Accidents, Marine safety, Reporting and recordkeeping requirements, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 5

Administrative practice and procedures, Investigations, Administrative law judge, Investigating officer, Seamen, License, Certificate, Document, Administrative hearings, Navigation (Water), Suspension and revocation, Marine safety, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 16

Seamen, Marine safety, Navigation (Water), Alcohol and alcoholic beverages, Drugs.

Final Rule

For the reasons set out in the preamble, Title 46, Chapter I, of the Code of Federal Regulations, is amended as follows:

PART 4—[AMENDED]

1. The table of contents of Part 4 is amended by adding the following:

* * * * *

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

* * * * *

2. The authority citation for Part 4 is revised to read as follows:

Authority: 33 U.S.C. 1231, 43 U.S.C. 1333; 46 U.S.C. 2103, 2306, 6101, 6301, 6305, 50 U.S.C. 198; 49 CFR 1.46, except Subpart 4.40 for which the authority is: 49 U.S.C. 1903(a)(1)(E); 49 CFR 1.46.

3. Subpart 4.03 is amended by adding new §§ 4.03–2, 4.03–4, 4.03–5, 4.03–6, and 4.03–7 to read as follows:

Subpart 4.03—Definitions

* * * * *

§ 4.03–2 Serious marine incident.

The term "serious marine incident" includes the following events involving a vessel in commercial service:

(a) Any marine casualty or accident as defined in § 4.03–1 which is required by § 4.05–1 to be reported to the Coast Guard and which results in any of the following:

(1) One or more deaths;

(2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties;

(3) Damage to property, as defined in § 4.05–1(f) of this part, in excess of $100,000;

(4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or

(5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 gross tons or more.

(b) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty.

(c) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

§ 4.03–4 Individual directly involved in a serious marine incident.

The term "individual directly involved in a serious marine incident" is an individual whose order, action or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing a serious marine incident.

§ 4.03–5 Medical facility.

The term "medical facility" means an American hospital, clinic, physician's office, or laboratory, where blood and urine specimens can be collected according to recognized professional standards.

§ 4.03–6 Qualified medical personnel.

The term "qualified medical personnel" means a physician, physician's assistant, nurse, emergency medical technician, or other person authorized under State or Federal law or regulation to collect blood and urine specimens.

§ 4.03–7 Chemical test.

The term "chemical test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

4. Section 4.05–1(e) is revised to read as follows:

§ 4.05–1 Notice of marine casualty.

* * * * *

(e) Injury which requires professional medical treatment beyond first aid and, in the case of a person engaged or employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties.

* * * * *

5. A new Subpart 4.06 is added to read as follows:

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

§ 4.06–1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use.

(c) The determination of which individuals are directly involved in a serious marine incident is to be made by the marine employer. A law enforcement officer may determine that additional individuals are directly involved in the serious marine incident. In such cases, the marine employer shall take all practicable steps to have these individuals tested in accordance with paragraph (b) of this section.

(d) The requirements of this subpart shall not prevent vessel personnel who are required to be tested from performing duties in the aftermath of a serious marine incident when their performance is necessary for the preservation of life or property or the protection of the environment.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

(f) Each marine employer shall implement the testing requirements of this subpart in accordance with the implementation schedule provided in 46 CFR 16.205 and 16.207.

§ 4.06–5 Responsibilities of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath or urine specimens for chemical tests required by § 4.06–10 when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide blood, breath or urine specimens, this refusal shall be noted on Form CG–2692B and in the vessel's official log book, if one is required.

(c) No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, refusal is considered a violation of regulation and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations.

§ 4.06–10 Required specimens.

Each individual required to submit to chemical testing shall, as soon as practicable, provide the following specimens for chemical testing:

(a) Urine specimens, collected in accordance with § 4.06–20 and Part 16 of this Chapter.

(b) Blood or breath specimens, or both, collected in accordance with § 4.06–20.

§ 4.06–20 Specimen collection requirements.

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times a breath testing device capable of determining the presence of alcohol in a person's system. The breath testing device shall be used in accordance with procedures specified by the manufacturer.

(b) The marine employer shall ensure that urine specimen collection and shipping kits meeting the requirements of § 16.330 of this part are readily available for use following serious marine incidents. The specimen collection and shipping kits need not be maintained aboard each vessel if they can otherwise be readily obtained within 24 hours from the time of the occurrence of the serious marine incident.

(c) The marine employer shall ensure that specimens required by § 4.06–10 are collected as soon as practicable following the occurrence of a serious marine incident.

(d) When obtaining blood, breath, and urine specimens, the marine employer shall ensure that the collection process is supervised by either qualified collection personnel, the marine employer, a law enforcement officer, or the marine employer's representative.

(e) Chemical tests of an individual's breath for the presence of alcohol using a breath testing device may be conducted by any individual trained to conduct such tests. Blood specimens shall be taken only by qualified medical personnel.

§ 4.06–30 Specimen collection in incidents involving fatalities.

(a) When an individual engaged or employed on board a vessel dies as a result of a serious marine incident, blood and urine specimens must be obtained from the remains of the individual for chemical testing, if practicable to do so. The marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall provide the specimen collection and shipping kit and request that the local authority assist in obtaining the necessary specimens. When the custodian of the remains is a person other than the local authority, the marine employer shall request the custodian to cooperate in obtaining the specimens required under this part.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the marine employer shall provide an explanation of the circumstances on Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

§ 4.06–40 Specimen handling and shipping.

(a) The marine employer shall ensure that blood specimens collected in accordance with §§ 4.06–20 and 4.06–30 are promptly shipped to a testing laboratory qualified to conduct tests on such specimens. A proper chain of custody must be maintained for each specimen from the time of collection through the authorized disposition of the specimen. Blood specimens must be shipped to the laboratory in a cooled condition by any means adequate to ensure delivery within twenty-four (24) hours of receipt by the carrier.

(b) The marine employer shall ensure that the urine specimen collection procedures of § 16.310 of this part and the chain of custody requirements of § 16.320 are complied with. The marine employer shall ensure that urine specimens required by §§ 4.06–20 and 4.06–03 are promptly shipped to a laboratory complying with the requirements of 49 CFR Part 40. Urine specimens must be shipped by an expeditious means, but need not be shipped in a cooled condition for overnight delivery.

§ 4.06–50 Specimen analysis and follow-up procedures.

(a) Each laboratory will provide prompt analysis of specimens collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report.

(b) Reports shall be sent to the Medical Review Officer meeting the requirements of 40 CFR 40.27, as designated by the marine employer submitting the specimen for testing. Whenever a urinalysis report indicates the presence of a dangerous drug or drug metabolite, the Medical Review Officer shall review the report as required by 49 CFR 40.27 and submit his or her findings to the marine employer. Blood test reports indicating the presence of alcohol shall be similarly reviewed to determine if there is a legitimate medical explanation.

(c) Analysis results which indicate the presence of alcohol, dangerous drugs, or drug metabolites shall not be construed by themselves as constituting a finding that use of drugs or alcohol was the probable cause of a serious marine incident.

§ 4.06–60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serous Marine Incident).

(b) When the serious marine incident requires the submission of Form CG–2692 (Report of Marine Casualty, Injury or Death) to the Coast Guard in accordance with § 4.05–10, the report required by paragraph (a) of this section shall be appended to Form CG–2692.

(c) In incidents involving discharges of oil or hazardous substances as described in § 4.03–2 (b) and (c) of this part, when Form CG–2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG–2692B to the Coast Guard Officer in Charge, Marine Inspection to whom the CG–2692B was submitted.

PART 5—[AMENDED]

6. The authority citation for Part 5 continues to read as follows:

Authority: 46 U.S.C. 7101, 7301, and 7701; 50 U.S.C. 198; 49 CFR 1.46(b).

§ 5.569 [Amended]

7. In § 5.569 add to Table 5.569 the following new offense after Incompetence:

Type of offense	Range of order (in months)
* * * * *	
Violation of Regulation: Refusal to provide specimens for required chemical test..	12–24.
* * * * *	

8. A new Part 16 is added to Subchapter B to read as follows:

PART 16—CHEMICAL TESTING

Subpart A—General

Sec.

Subpart B—Required Chemical Testing

Subpart C—Standards for Chemical Testing for Dangerous Drugs.

Subpart D—Employee Assistance Programs.

Authority: 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; 49 CFR 1.46.

Subpart A—General

§ 16.101 Purpose of regulations.

(a) The regulations in this part provide a means to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.

(b) These regulations prescribe the minimum standards, procedures, and means to be used to test for the use of dangerous drugs.

(c) As part of a reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the Coast Guard under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 16.105 Definitions of terms used in this part.

"Chemical test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

"Commitment of employment" means the proof of employment required by 46 CFR 12.25–5.

"Crewmember" means an individual who is:

(a) On board a vessel acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not the individual is a member of the vessel's crew; or

(b) Engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ, or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter, except the following:

(1) Individuals primarily employed in the preparation of fish or fish products or in a support position not related to navigation on a fish processing vessel;

(2) Scientific personnel on an oceanographic research vessel; and

(3) Individuals not required under Part 15 of this subchapter who have no duties which directly affect the safety of the vessel's navigation or operations.

"Dangerous drug" means a narcotic drug, controlled substance, and marijuana (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802)).

"Dangerous drug level" means the amount of traces of dangerous drugs or drug metabolites in an individual's breath, blood, urine, saliva, or body fluids or tissues.

"Drug test" means a chemical test of an individual's urine for evidence of dangerous drug use.

"Employer" means a marine employer or sponsoring organization.

"Fails a chemical test for dangerous drugs" means the test result is reported as positive for the presence of dangerous drugs or drug metabolites in an individual's system after a Medical Review Officer's review in accordance with 49 CFR 40.27.

"Intoxicant" means any form of alcohol, dangerous drug, or combination thereof.

"Marine employer" means the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than recreational vessel.

"Medical Review Officer" means an individual designated by the employer to carry out the duties specified in § 16.370 of this part.

"Serious marine incident" means an event defined in 46 CFR 4.03–2.

"Sponsoring organization" is any company, consortium, corporation, association, union, or other organization with which individuals serving in the marine industry, or their employers, are associated.

"Vessel owned in the United States" means any vessel documented or numbered under the laws of the United States; and any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

Subpart B—Required Chemical Testing

§ 16.201 Application.

(a) Chemical testing of personnel must be conducted as required by this subpart.

(b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

(c) If an individual holding a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual's employer or prospective employer shall report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual shall be denied employment as a crewmember or removed from duties which directly affect the safety of the vessel's navigation or operations as soon as practicable and shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 CFR Part 5.

(d) If an individual who does not hold a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual shall be denied employment as a crewmember or removed from duties which directly affect the safety of the vessel's navigation or operations as soon as practicable.

(e) An individual who has failed a required chemical test for dangerous drugs may not be reemployed aboard a vessel until the requirements of § 16.370(d) of this part and 46 CFR Part 5, if applicable, have been satisfied.

§ 16.205 Implementation of chemical testing programs.

(a) Each employer who employs more than 50 employees required to be tested under this part shall implement the pre-employment testing program required in § 16.210 not later than June 21, 1989. All other employer testing programs required by this part shall be implemented not later than December 21, 1989.

(b) Each employer who employs from 11 to 50 employees required to be tested under this part shall implement the pre-employment, serious marine incident, and reasonable cause testing programs required by this part not later than December 21, 1989. The random testing programs required by § 16.230 of this part shall be implemented not later than December 21, 1990.

(c) Each employer who employs 10 or fewer employees required to be tested under this part shall implement the employer testing programs required by this part not later than December 21, 1990.

(d) During the first 12 months following the institution of random drug testing pursuant to this section, an employer shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the covered population.

(e) The periodic testing requirements of § 16.220 apply to physical examinations performed after December 21, 1990.

(f) When a vessel owned in the United States is operating in waters that are not subject to the jurisdiction of the United States, the testing requirements of §§ 16.210 and 16.230 do not apply to a citizen of a foreign country engaged or employed as pilot in accordance with the laws or customs of that foreign country.

(g) Upon written request of an employer, Commandant (G–MMI) will review the employer's chemical testing program to determine compliance with the provisions of this part.

§ 16.207 Conflict with foreign laws.

(a) This part shall not apply to any person for whom compliance with this part would violate the domestic laws or policies of another country.

(b) This part is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this part raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Commandant shall issue any necessary amendment resolving the applicability of this part to such person on and after January 1, 1990.

§ 16.210 Pre-employment testing requirements.

(a) No marine employer shall engage, employ, or otherwise give a commitment of employment to, any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer.

(b) The individual is not required to undergo the pre-employment test required by paragraph (a) of this section if the individual provides satisfactory evidence that he or she has:

(1) Passed a pre-employment test for the marine employer or another employer, or a periodic chemical test for dangerous drugs, within the previous six months; or

(2) Been subject to a random testing program meeting the criteria of § 16.230 of this part during the previous twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests.

§ 16.220 Periodic testing requirements.

(a) Whenever a physical examination is required for an individual by this subchapter, a chemical test for dangerous drugs must be included as a part of the physical examination. If a physical examination is required for a license or merchant mariner's document application, the applicant shall provide the results of the chemical test administered as part of the physical examination to the Coast Guard Regional Examination Center (REC). For those individuals required by this subchapter to receive physical examinations on a periodic basis, the individual shall provide the result of each required chemical test to the REC at the time the individual applies for a renewal of his or her license. Only the results of those chemical tests taken since the individual's most recent license renewal need be submitted.

(b) The individual is not required to undergo the periodic chemical test required by paragraph (a) of this section

if the individual provides satisfactory evidence that he or she has:

(1) Passed a pre-employment or a periodic chemical test for dangerous drugs within the previous six months; or

(2) Been subject to a random testing program meeting the criteria of § 16.230 of this part during the previous twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests.

§ 16.230 Random testing requirements.

(a) Marine employers shall provide for the selection of crewmembers for chemical testing for dangerous drugs on a random basis. Random selection of individual crewmembers means that every member of a given population has a substantially equal chance of selection on a scientifically valid basis. The testing frequency and selection process shall be such that an employee's chance of selection continues to exist throughout his or her employment. Random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers aboard, provided each vessel subject to the marine employer's test program remains equally subject to selection.

(b) Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

(c) Each marine employer shall ensure that crewmembers are tested on a random basis at an annual rate of not less than 50 percent.

(d) An individual may not be engaged or employed, including self employment, on a vessel in a position as master, operator, or person in charge for which a license or merchant mariner's document is required by law or regulation unless all crewmembers are subject to the random testing requirements of this section.

§ 16.240 Serious marine incident testing requirements.

The marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

§ 16.250 Reasonable cause testing requirements.

(a) The marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.

(b) The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.

(c) When the marine employer requires testing of an individual under the provisions of this section, the individual must be informed of that fact and directed to provide a urine specimen as soon as practicable. This fact shall be entered in the vessel's official log book, if one is required.

(d) If an individual refuses to provide a urine specimen when directed to do so by the employer under the provisions of this section, this fact shall be entered in the vessel's official log book, if one is required.

§ 16.260 Records.

(a) Employers shall maintain records of chemical tests which the Medical Review Officer reports as "positive" for a period of a least 5 years and shall make these records available to Coast Guard officials upon request. Records of tests reported as "negative" shall be retained for one year.

(b) The records shall be sufficient to:

(1) Satisfy the requirements of §§ 16.210(b) and 16.220(b) of this part.

(2) Identify the total number of individuals chemically tested annually for dangerous drugs in each of the categories of testing required by this part including the annual number of individuals failing chemical tests and the number and types of drugs for which individuals tested positive.

Subpart C—Standards for Chemical Testing for Dangerous Drugs

§ 16.301 Procedures for Transportation Workplace Drug Testing Programs.

Drug testing programs subject to this part shall be conducted in accordance with 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs. This subpart summarizes requirements for drug testing programs contained in those regulations. Those regulations should be consulted to determine the specific procedures which must be established and utilized. Drug testing programs required by this part shall use only drug testing laboratories certified by the Department of Health and Human Services (DHHS).

§ 16.310 General.

(a) *Collection site.* The employer shall ensure that the collection site is adequate to provide for the collection, security, temporary storage, and shipping of specimens to a certified drug testing laboratory.

(b) *Security.* Procedures shall provide for the collection site to be secure. Collection sites dedicated solely for specimen collection must be secure at all times. Collection sites which are not dedicated solely for specimen collection must be secured during specimen collection.

(c) *Access to authorized personnel only.* No unauthorized personnel shall be permitted in any part of a collection site when specimens are collected nor shall unauthorized personnel be allowed access to stored specimens.

(d) *Privacy.* Procedures for collecting urine specimens shall allow for individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(e) *Integrity of specimens.* Collection site personnel shall take precuations to ensure that each specimen is not adulterated or diluted during the collection process.

§ 16.320 Chain of custody.

(a) A chain of custody for each specimen to be chemically tested shall be established and maintained from the time of specimen collection through the testing of the specimen.

(b) If a specimen is not immediately prepared for shipment, it shall be safeguarded during temporary storage.

(c) Every effort shall be made to minimize the number of persons handling specimens.

§ 16.330 Specimen handling and shipping.

(a) The employer shall obtain a specimen collection and shipping kit to be used to collect specimens and ship them to the certified drug testing laboratory.

(b) The specimen collection and shipping kit, as required by 49 CFR Part 40, shall contain:

(1) Plastic urine specimen bottles in a sufficient quantity to accommodate the people to be tested;

(2) Means for sealing and identifying specimen bottles;

(3) Chain of custody forms;

(4) A set of step-by-step instructions which describe the proper procedures to be followed during specimen collection, handling, and shipping; and

(5) Shipping materials.

(c) The marine employer shall ensure that specimens are promptly shipped to a certified testing laboratory meeting the requirements of § 16.340. Chain of custody documents must accompany each specimen from the time of specimen collection through shipment to and testing by the laboratory.

(d) Specimens shall be shipped by an expeditious means.

§ 16.340 Test laboratory requirements.

(a) The employer shall ensure that all chemical testing for dangerous drugs required by this part is conducted by a DHHS certified laboratory.

(b) The laboratory shall meet the requirements of 49 CFR Part 40.

§ 16.350 Specimen analysis.

(a) Each specimen shall be analyzed in accordance with 49 CFR 40.24, which requires testing for:

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Phencyclidine (PCP); and

(5) Amphetimines.

(b) A specimen which indicates the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR 40.24 is reported to the Medical Review Officer as positive.

§ 16.360 Specimen analysis reports.

(a) The laboratory shall report all test results as required by 49 CFR 40.24(g). Reports are made within an average of five days after receipt of a specimen by the laboratory.

(b) The laboratory reports as negative all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive are reported positive to the Medical Review Officer for a specific drug or drug metabolite.

§ 16.370 Medical review officer.

(a) The employer shall designate or appoint a Medical Review Officer (MRO) meeting the qualifications of 49 CFR 40.27. If the employer does not have a qualified individual or staff to serve as MRO, the employer may contract for the provision of MRO services as part of its drug testing program.

(b) The MRO shall review and interpret each confirmed positive test result in accordance with 49 CFR 40.27.

(c) If the MRO verifies a laboratory confirmed positive report, the MRO shall report the positive test result to the employer or the employers's designated agent.

(d) Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO shall determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual shall agree to be subject to increased, unannounced testing for a period as determined by the MRO of up to 60 months.

§ 16.380 Release of information.

(a) Except as provided for in this part and in § 4.06–60 of this chapter, an employer shall not release individual test results or other personal information for anti-drug program records.

(b) Individual results from drug tests required by this part may be released if the individual tested signs a specific authorization for the release of the results to an identified person.

(c) Nothing in this section shall prevent an individual tested under this part from obtaining the results of that test.

Subpart D—Employee Assistance Programs

§ 16.401 Employee Assistance Program (EAP).

The employer shall provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to a crewmember. Each EAP must include education and training on drug use for crewmembers and the employer's supervisory personnel as provided below:

(a) *EAP education program:* Each EAP education program must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for crewmember assistance, and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

(b) *EAP training program:* An EAP training program must be conducted for the employer's crewmembers and supervisory personnel. The training program must include at least the following elements: the effects and consequences of drug and alcohol use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug and alcohol use and abuse; and documentation of training given to crewmembers and the employer's supervisory personnel. Supervisory personnel must receive at least 60 minutes of training.

November 14, 1988.

Clyde T. Lusk, Jr.,

Vice Admiral, U.S. Coast Guard Acting Commandant.

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Part V

Department of Transportation

Research and Special Programs Administration

49 CFR Part 199

Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[RSPA Docket No. PS-102]
RIN 2137-AB54

Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations

AGENCY: Research and Special Programs Administration (RSPA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations to require operators of pipeline facilities, other than master meter systems, used for the transportation of natural gas or hazardous liquids and operators of liquefied natural gas (LNG) facilities to have an anti-drug program for employees who perform certain sensitive safety-related functions covered by the pipeline safety regulations. Testing under these rules will be conducted prior to employment, after an accident, randomly, and on the basis of reasonable cause. In addition, these regulations require that an operator provide an Employee Assistance Program (EAP) for conducting education and training regarding the effects and consequences of drug use. The rules are intended to ensure a drug-free, and hence safer, pipeline operations environment.

DATES: *Effective Date:* This rule will be effective December 21, 1988.

Operators with more than 50 employees subject to drug testing do not have to begin the drug testing required by this final rule until December 21, 1989, and operators with 50 or fewer such employees do not have to begin to conduct the program until April 23, 1990.

FOR FURTHER INFORMATION CONTACT: Cesar De Leon, Assistant Director for Regulation, Office of Pipeline Safety, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366-1640.

SUPPLEMENTARY INFORMATION:

Background

On July 8, 1988, RSPA published a Notice of Proposed Rulemaking (NPRM) (53 FR 25892) entitled "Control of Drug Use in Natural Gas, Liquefied Natural Gas and Hazardous Liquid Pipeline Operations." This NPRM proposed to require operators of pipeline facilities (including LNG facilities but excluding master meter systems) used for the transportation of natural gas or hazardous liquids to have an anti-drug program for employees who perform sensitive safety- and security-related functions. The NPRM invited comments from the public on these proposed rules and 73 written comments were received by the end of the comment period on September 6, 1988. These comments are in the public docket and have been reviewed in the development of the final rule.

The RSPA held public hearings on these proposed regulations on August 17, 1988, in Irving, Texas, and on September 6, 1988, in Washington, DC. Twenty-six persons testified at these hearings and the testimony was recorded by a court reporter. The transcripts of the hearings and any statements or other material submitted at the hearings are in the public docket and have been reviewed in the development of the final rule.

The NPRM proposed that this regulation would be included in Part 192, 193, or 195, as appropriate. In response to a few commenters who suggested that drug testing regulations should not be included with those commodity-specific regulations, the RSPA has adopted a new Part 199 specifically for these regulations.

Drug Testing Program Guidelines. In the NPRM for this rule, RSPA proposed that all drug testing take place in accordance with the "Mandatory Guidelines for Federal Drug Testing Programs" of the Department of Health and Human Services (DHHS) (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the federal government, and they include safeguards for the accuracy and privacy of testing.

The DOT has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free workplace regulations. The result is the DOT *Procedures for Transportation Workplace Drug Testing Programs.* These "DOT Procedures" are intended to preserve, to the greatest extent practicable, the important safeguards provided by the DHHS Guidelines.

The Office of the Secretary of the Department of Transportation is publishing elsewhere in today's **Federal Register** an Interim Final Rule and request for comments entitled, *Procedures for Transportation Workplace Drug Testing Programs.* These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human Services Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and state and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

Some of the modifications to the DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to references to "employers"). Other modifications are intended to take into account differences in the situations of federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities or through use of mobile units, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on the NPRM and anti-drug rules proposed by other operating administrations, comments were received concerning the DHHS Guidelines. These comments will be incorporated in the docket for the OST interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of the comment period on the interim rule.

Discussion of Comments

The RSPA received 73 timely comments in response to the NPRM, including five comments from labor unions, five from state and federal government agencies, eight from pipeline industry associations, a few comments from individuals and others, and the remainder from pipeline operators. The majority of the commenters were opposed to one or more aspects of the proposed rule, while some commenters generally supported the proposed rule. The RSPA considered all timely-filed comments submitted in response to the NPRM as well as the testimony of the 26 individuals who presented statements at the two public hearings. Discussion of the comments received on major issues and RSPA's response follows.

Specific Issues

Constitutionality of Mandatory Drug Testing. Many commenters, raising issues related to the Fourth Amendment and right of privacy, question the constitutionality of drug testing programs for pipeline personnel. The majority of commenters who raised the constitutional issues questioned the wisdom of proceeding with a drug rule while cases involving constitutionality of drug testing are pending in the Supreme Court. The commenters specifically noted that, in *Railway Labor Executives' Association v. Burnley*, the Ninth Circuit has ruled that a mandatory drug testing program of railroad employees violated the Fourth Amendment because the program required testing of entire operation crews involved in accidents without requiring the existence of a reasonable and particularized suspicion of drug use or drug-related impairment on the part of those to be tested. The Fifth Circuit took a contrary view in *National Treasury Employees Union v. Von Raab* by holding that drug testing of Customs Service employees seeking transfer to certain sensitive positions is permissible. Both cases are now pending before the United States Supreme Court. Commenters also point to the recent case of *Mark B. Harmon v. Edwin Meese III.* (No. 88–1766 GHR, U.S. District Court for the District of Columbia, decided July 29, 1988). In that case, the United States District Court for the District of Columbia granted the plaintiffs, Department of Justice employees, a preliminary injunction to enjoin the Department from implementing mandatory random drug testing on grounds that the program constituted an unreasonable search and seizure. The Court subsequently made the injunction permanent.

RSPA Response. The RSPA recognizes that there are legitimate and significant constitutional concerns surrounding drug testing in general and random drug testing as a specific component of drug testing. The RSPA acknowledges the current wide-scale litigation and apparent disparate judicial opinions on drug testing programs. Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the RSPA is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters was the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. The Fourth Amendment applies to "searches" conducted or mandated by the government (i.e., "state action") and protects individuals against "unreasonable searches and seizures." Action by a private party does not constitute state or federal action unless there exists a close nexus between the state and the action in question. *See Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Because drug testing programs required under the final rule are imposed by the government, two collateral issues arise concerning whether the proposed urine tests under these programs constitute a search or a seizure and, if so, is the search or seizure unreasonable within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman v. James*, 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also, Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1553–54 (6th Cir. 1988) (Guy, J., dissenting) *vacated and rehearing en banc granted* (6th Cir. Aug. 3, 1988); *National Treasury Employees Union v. von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). *Cf. Mack v. United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search * * *," the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment (citing *Camera v. Municipal Court*, 387 U.S. 523, 533 (1967). *See e.g., Griffin v. Wisconsin*, 107 S.Ct. 3164, 3167 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. *See e.g., New Jersey v. T.L.O.*, 469 U.S. at 340–342; *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561 (1976) (footnotes omitted) (while "* * * some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion").

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey v. T.L.O.*, 469 U.S. at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation or privacy. *See e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Thus, the courts must "* * * consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. at 559.

Viewed in this light, the clear public interest in assuring that certain sensitive safety-related pipeline personnel perform their duties free of prohibited substances provides justification for testing and its limited intrusion on privacy expectations of covered employees. The drug problem in society in general and probability of drug use in the pipeline industry were discussed in the preamble of the NPRM. The impairing effects of drugs and the substantial risks to public safety posed by sensitive safety-related pipeline personnel who use drugs underlies the compelling governmental interest in the promulgation of this rule.

It is important to note that the drug testing requirements of the final rule are limited in scope and involve a minimal intrusion on privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware v. Prouse*, 440 U.S. at 654–655 (footnote omitted); *New York v. Burger*, 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place significant constraints on an operator's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically-acceptable manner, such as by use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule are narrowly tailored to respect an employee's reasonable expectations of privacy. The DOT Procedures governing collection of urine samples are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging the test results. Other employee drug testing programs incorporating the collection and testing procedures of the DHHS Guidelines have been upheld against constitutional challenge. *See American Federation of Government Employees v. Dole*, 670 F.Supp. 445 (D.D.C. 1987), *appeal filed*, No. 87–5417 (D.C.Cir. Dec. 11, 1987) (upholding the constitutionality of the Department of Transportation program for random drug testing of safety-sensitive agency employees); *National Association of Air Traffic Specialists v. Dole*, 2 Ind.Emp.Rts. Cases (BNA) 68 (D.Alaska 1987) (denying a motion for a preliminary injunction against the FAA's use of urinalysis drug testing as part of an annual physical examination of the agency's air traffic specialists).

Equally significant is the fact that urine drug testing of sensitive safety-related employees is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make *some* employees' expectation of privacy unreasonable." *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987) (emphasis in original). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. 2636 (1987)] and, "in effect consent[] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271]. For these reasons, two federal courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (police officers).

The RSPA recognizes that a number of federal and state courts have rejected government-mandated drug testing programs on Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1553–54 (6th Cir. 1988) (Martin, J.), *vacated and rehearing en banc granted* (6th Cir., August 3, 1988) ("When determining, then whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 672 F.Supp. 779, 792 (D.N.J. 1987), rev'd 850 F.2d 133 (3rd Cir., 1988) ([T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officers.]"); *American Federation of Government Employees v. Meese*, No. C–88–1419–SAW (N.D.Cal. June 17, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The RSPA also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine tests after certain accidents, incidents, or rule violations are unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, 108 S.Ct. 2033 (1988). The Supreme Court has granted a government petition for *writ of certiorari* in this case and has ordered that the case be argued this term "in tandem" with *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the Spring of 1989. Numerous commenters urge that RSPA should delay a decision on a final drug rule until these cases are resolved. The RSPA disagrees.

Although currently not resolved, the RSPA believes that RSPA's anti-drug program and similar drug testing regimens proposed by other administrations within the Department will be ruled constitutional. The critical public safety need for properly administered drug testing to ensure that employees in the transportation industry are free from drugs while performing certain sensitive safety-related functions outweighs the practical considerations which would delay rulemaking so that it could be tailored to any guidance that may be offered by the Supreme Court when the pending cases are ultimately decided. Such a decision would unnecessarily delay the adoption of this important safety rule well beyond that needed to allow reasonable time for implementation. Furthermore, partly in response to the comments that urge delay pending the Supreme Court decisions, RSPA has adjusted the implementation dates provided in this rule. This delayed implementation of the rule will ensure that it can be implemented as soon as practical and will allow time to amend the rule in the unlikely event the Supreme Court provides guidance that makes that necessary or appropriate.

Need for Pipeline Anti-Drug Program. Many commenters who oppose drug testing in general, and random testing in particular, and even commenters who support the comprehensive drug testing proposals, expressed the belief that there is not sufficient evidence of a drug problem in the pipeline industry to warrant mandated drug testing requirements. Many commenters indicated that the proposed rule did not

discuss or recognize the exemplary safety record in the pipeline industry. They also said that neither the pipeline industry nor the RSPA could show any pipeline accident that could be attributable to an employee that had been impaired due to the use of drugs. Many commenters further note that most pipeline accidents are caused by third party excavators over which the pipeline operators have little control.

The American Gas Association (AGA) also pointed out that pipelines are unique forms of transportation which do not carry people, unlike other forms of transportation regulated by DOT. Therefore, there are no passengers that depend upon the physical condition of the pipeline for their safety. Pipeline employees usually work in groups or teams, which make it less likely for an impaired worker to endanger the public. The AGA further argued that pipelines also have built-in safety features that would preclude a drug-impaired employee from causing an accident.

Comments from the Ohio Gas Association state that the presence of drugs in a person is an inadequate gauge of a person's present impairment and a person's performance on complex tasks does not necessarily suffer when under the influence of drugs. That Association cites one study that examined how well 12 daily users of an opiate could perform complex tasks. The results showed that the regular drug users performed as well as a nonuser control group.

The American Petroleum Institute (API) said it believed that any regulatory requirement, regardless of its worthwhile intentions, must demonstrate both a need and a solution that bears a positive relationship between costs and benefits. The API further asserts that a thorough assessment resulting in a demonstrated and compelling need must precede any broad and costly regulatory remedy for such a problem and they recommend that DOT undertake such a study.

The Service Employees International Union (SEIU) representing 10,000 members employed in the gas industry, primarily in gas distribution, is opposed to random and universal drug testing stating that the presence of drugs in a person's system does not indicate impairment on the job. The SEIU says that often tests detect the use of drugs in the past or during off-duty hours, and they object to the control of a worker's actions beyond the time the employee is at work.

On these bases, the commenters assert that the RSPA cannot justify the comprehensive proposals contained in the NPRM. Many of these commenters maintain that the industry should police itself in the area of drug use and abuse.

RSPA Response. RSPA does recognize the excellent safety record of the hazardous liquid and natural gas pipeline industry. However, as stated in the NPRM, RSPA also has in the record evidence of a serious drug problem in our society generally. In fact, one in five Americans used drugs in the last year and one in ten in the last month. RSPA also believes that this societal problem may extend into the pipeline workplace. While many commenters do not believe there is a problem in their industry, no commenter presented any statistically reliable data to prove there is not a drug problem similar to the societal problems. In fact, the reason that neither RSPA nor the commenters have such data is because very little testing has been done.

On the other hand, the large majority of commenters, even those opposing the rule, agree that a drug-impaired employee should not be performing a safety-related function on a pipeline. In fact, the majority of pipeline companies commenting on the rule stated that they had implemented anti-drug programs which generally included pre-employment, post-accident, and reasonable cause testing. The RSPA believes that the safety positions on a pipeline should not be performed by those impaired by drugs and that this rulemaking action to deter drug use is warranted and will promote safety.

The RSPA does not adopt safety regulations only after an "accident" occurs. A safety regulatory agency must anticipate potential problems and act in a rational, reasonable, and practicable way to prevent "accidents" from occurring.

Although pipelines do not transport passengers, this is not a critical determinant in deciding whether an anti-drug abuse rule is needed. Many, if not most, of the transportation employees who are or are proposed to be covered in other of the Department's anti-drug abuse programs are involved in freight rather than passenger transportation. Drug-using transportation employees can endanger not just passengers but other members of the public as well. Pipelines criss-cross the nation with transmission pipeline systems and there are extensive natural gas distribution systems located in the heart of most populated areas. Release of the hazardous commodities transported by these pipelines can endanger both pipeline employees and any member of the public who may happen to live, work, attend school near, or simply pass by the pipeline. Risk is even greater for people living near LNG storage facilities where the sudden release of a large volume of LNG can engulf surrounding areas with a flammable vapor cloud and create the potential for conflagration.

The RSPA also rejects claims that the degree of supervision afforded pipeline employees, the fact that they work in groups, and the existence of numerous built-in safety features on pipelines, renders an anti-drug abuse program unnecessary. In this regard, pipelines are not unlike many other transportation industries. For example, train operators are heavily supervised and work in teams, operating trains which are frequently equipped with safety devices that check the performance of the train operator. Yet in the January 4, 1987, Chase, Maryland, train accident, a Conrail movement passed an absolute restrictive signal and went through a switch into the path of a high-speed Amtrak train. Sixteen persons were killed and 174 were injured. The engineer and conductor of the Conrail train later admitted smoking marijuana in the cab just prior to the collision. The built-in safety devices had been tampered with.

As further example, the nuclear industry is much more extensively supervised with substantial built-in safety devices. Anti-drug programs have been recognized as appropriate under these conditions because of the grave risk to public safety. *Rushton v. Nebraska Public Power Dist.*, cited above. No amount of supervision or peer observation in the pipeline industry will assure that a drug abusing employee does not report for duty with drug use undetected and no built-in safety device is truly fail-safe.

Many reports, some referenced in the NPRM, clearly illustrate that the use of drugs impair employees' performance in the workplace. The effects of drugs have been documented in numerous studies and the RSPA is not persuaded by the few studies, mentioned by some commenters, that drugs do not affect the performance of employees and the safety of the workplace.

Accuracy of Drug Test Results. A few commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters include the issues of false-positive test results, passive inhalation of illicit drugs, and misidentification of licit drugs resulting in a positive drug test result.

The Steelworkers' comments included the testimony of Mr. Lawrence Miike of the Office of Technology Assessment that he gave on April 9, 1987, before the Senate Committee on the Judiciary. That

testimony details the pitfalls and costs of extensive drug testing procedures and methodology where the population tested is small.

RSPA Response: The RSPA is aware of these expressed concerns because each of these issues surfaced in the early 1980's with the first series of drug testing programs introduced in the military and the private sector. In the early years of drug testing and analysis, laboratory security and analytical procedures had not reached today's level of sophistication. False-positive test results occur primarily during analysis of a specimen during an initial screening test, although contemporary screening tests, such as immunoassay tests, have become extremely accurate and approach 99 percent accuracy levels. Despite its accuracy, the initial screening test remains a less expensive test used only to yield a preliminary indication of the possible presence of drugs or drug metabolites. In order to ensure the integrity and accuracy of any final test result, each positive initial screening test result must be confirmed using the gas chromatography/mass spectrometry (GC/MS) test as approved by DHHS. The GC/MS confirmation test is an extremely accurate and sophisticated test and is virtually error-free when used in compliance with the DOT Procedures.

Operators must comply with the DOT Procedures when conducting a testing program pursuant to these rules. The DOT Procedures provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An operator may only use a laboratory that has been certified by DHHS to process and analyze specimens. Since the mid-1980's, laboratories have become increasingly sophisticated in their analytical methods and chain-of-custody procedures. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens.

For example, since 1980, one major drug testing laboratory has analyzed over 500,000 urine samples, conducting discrete testing for nine different drugs which resulted in nearly five million distinct analyses of these specimens. The company also has analyzed approximately 750,000 urine samples for the presence of two different drugs, resulting in nearly 1.5 million analyses of these specimens, pursuant to its contract with the military. None of the over six million analyses performed for DOT, the military, and other private and public entities has resulted in a false-positive test result.

The RSPA does not believe that the issue of "passive inhalation" of marijuana smoke will prove to be a significant issue leading to false-positive test results. First, the threshold levels at which a drug test would yield a positive result for the presence of marijuana or marijuana metabolites are set at a level sufficiently high to preclude the possibility that such result was based on passive inhalation of marijuana smoke. Second, studies conducted to simulate the conditions that result in passive inhalation have been conducted in artificially-devised and extremely confining areas that were poorly ventilated. Also, in order to obtain a positive test result, testing was conducted immediately after this prolonged and intensive exposure to the marijuana smoke. It is unlikely that the identical circumstances would be encountered or accurately reproduced outside a laboratory.

Finally, the RSPA believes that the safeguards that will be provided in the DOT Procedures and by the medical review officer (MRO) review process will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The DOT Procedures provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to evaluate and interview an employee, based on the MRO's knowledge of drug abuse disorders, and to verify that a confirmed positive test result is accurate should preclude misidentification of licit drugs taken in accordance with a valid prescription or food substances. In summary, the RSPA believes that the two-step testing process, coupled with the DOT Procedures and the MRO procedures, provides a process by which an individual is protected from erroneous false-positive drug test results.

Employees Who Must be Tested. Many commenters requested that RSPA broadly identify employees to be tested. They argued that RSPA should not attempt to define each sensitive safety- and security-related function by job category. Some commenters stated that operators should include in their Operations and Maintenance (O&M) Plans a list of job classifications they consider to be sensitive safety- and security-related positions.

A smaller number of commenters were concerned that the term "sensitive safety- and security-related functions" would be subject to varying interpretation by different operators. Those commenters thought that operator decisions on the types and degree of sensitive safety- and security-related functions represented by an individual's job responsibility would be arbitrary and would subject an operator to significant potential liability from employee suits. A few commenters pointed out that more specificity was needed to preclude a court challenge based on state statutes that limit random testing to very specifically identified positions or functions. A few commenters thought all employees of pipeline operators should be tested.

Practically all commenters objected strongly to including employees of contractors in the drug testing program. Some of the commenters based their objections to testing contractor employees on the transient nature of many unskilled contractor employees. Most commenters pointed out that it would be extremely difficult to assure that contractor employees had been drug tested. Transok, Inc., states that because several months pass between jobs conducted by contractors, operators would need to test these contractor employees every time that they were called in for a job.

RSPA Response. Those "sensitive safety- and security-related functions" that were proposed for testing in the NPRM have been more narrowly identified in the definition of "employee" in the final rule. An "employee" has been defined to mean a person who performs duties for an operator in the following three functional areas regulated by Part 192, 193, or 195—operation, maintenance, or emergency-response. This narrower definition of "employee" applies only to persons performing functions directly related to the pipeline safety regulations. This does not include clerical, truck driving, accounting, or any other functions not subject to Part 192, 193, or 195. These regulations do not apply to employees who perform design or construction functions regulated by Part 192, 193, or 195. The RSPA believes that the design function is subject to many varying levels of review and the employees performing those functions need not be tested. The RSPA also believes that it is not necessary to apply these regulations to employees that perform construction functions. Because the pipeline is pressure tested for strength or leakage upon completion of construction, the RSPA believes that the pressure test will ensure detection of any construction defects that may have

been caused by drug impaired employees.

Security-related functions are not covered by the final rule because functions performed by security personnel do not directly impact on the safe operation of the pipeline systems. Instead, security personnel provide secondary security protection from outside parties (primary protection being provided by fences, alarms, lighting, etc.). Given the indirect nature of this potential impact on safety, we have decided not to include such personnel within the anti-drug abuse program at this time. We do, however, encourage operators to voluntarily include such personnel in their programs.

The "employee" definition includes contractors and contractor workers. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who are employed directly for operators. Pipeline operators who choose to use contractors to perform their safety-related work have always been held responsible for compliance with safety regulations just as if the operator's own employees were performing the work. A decision to use a contractor rather than one's own employees should not result in a level of safety lower than intended.

However, two aspects of the final rule should assist operators in compliance when they use contractors: First, operators may require contractors to implement their own drug programs instead of including contractor employees in the operator's own program. So long as the operator is diligent about monitoring the contractor's compliance with such a requirement, the "knowingly" requirement should protect an operator from unfair liability. Second, limiting the employees covered by the drug rule to those who perform regulated operation, maintenance, or emergency-response functions, including welding, radiography and corrosion control on existing pipelines, should minimize the effects of the rule on operators who employ or contract for unskilled transient labor.

Pre-employment Testing. Most of the commenters who addressed pre-employment testing agreed with its use and many stated that they were already conducting pre-employment testing. However, some interpreted the proposal to be broader than intended and thus to apply to all job applicants. It was recommended that pre-employment testing be limited to otherwise successful applicants. A few commenters said that pre-employment drug testing was easily administered because such testing could be conducted as part of the medical examination that is required by most operators for new employees.

RSPA Response. The RSPA believes that pre-employment testing is a necessary component of an effective anti-drug program. Pursuant to the rule, a pre-employment drug test is required only when an applicant has been selected for employment to perform certain regulated functions. In order to clarify the applicability of this requirement, the RSPA has revised the proposed rule. Therefore, the pre-employment testing provision does not require an operator to test each applicant for a position. The rule simply states that an employer may not hire or use anyone to perform certain functions until he or she has passed a drug test. Therefore, the employer need only test a prospective employee who the operator intends to hire and use for a position subject to drug testing. The proposal that operators would be required to notify applicants that pre-employment drug testing would be conducted has been dropped from the final rule because such a notice is not necessary to accomplish the intent of the operator's drug program. The RSPA believes that such notice should be left to the operator's discretion.

The RSPA believes that the frequency of pre-employment testing is mitigated by the continuity of an employee's involvement in a drug testing program under these new regulations in Part 199. So long as an employee is currently subject to an operator's RSPA-required anti-drug program, another operator may use that employee to perform certain functions. If an individual is not currently subject to an operator's or contractor's RSPA-required anti-drug program, whether by termination of a previous contract or previous employment, an operator would be required to conduct a pre-employment drug test before using that individual in a position subject to drug testing.

Under the amendment, it would be permissible for an operator to allow a contractor or contractor's employee to continue in the operator's anti-drug program after termination of a contract. Similarly, a contractor may choose to run its own anti-drug program in conformity with Part 199 requirements to maintain continuity. Particularly in the case of an operator who engages employees pursuant to a series of short-term contracts, both the operator and the employee benefit if the employee is continuously subject to a Part 199 anti-drug program. The operator could "rehire" the employee at any time but would not be required to give the employee another pre-employment drug test. In addition, the employee could provide functions for another operator on a temporary basis but would not be required to participate in the other operator's anti-drug program or to submit to another pre-employment drug test.

Random Testing. A majority of commenters strongly oppose random testing for a variety of reasons. Among these reasons are the lack of evidence of drug use or abuse in the pipeline industry, invasion of individual privacy, violation of constitutionally-protected rights, and the high costs of conducting such testing. Many commenters said that such a testing program would be disruptive of the normal business activities of pipeline operators and would have a detrimental effect upon worker morale. This would result in unnecessary administrative and financial burdens.

The RSPA received many comments regarding the proposed random testing rates. However, of those commenters endorsing random testing, most suggested that a random testing rate of 10 percent to 20 percent is sufficient to deter drug use in the pipeline industry.

Some commenters argued that if the RSPA proceeds in the promulgation of a final rule, the random testing of employees should be delayed until the Supreme Court issues a decision on this issue. Some commenters also indicated that requirements to randomly test employees for the presence of drugs violated state statutes (Ohio and Vermont were among the states mentioned).

The United Steelworkers of America (Steelworkers) oppose government imposition of mandatory drug testing. The Steelworkers stated that while the public supports mandatory drug tests, as cited by the NPRM, that does not mean the public supports random tests.

RSPA Response. The comments opposing random testing on the basis of the constitutionality of and need for the rule have been discussed previously. The costs are discussed below in the Economic Analysis section. The RSPA believes that unannounced testing based on random selection is a fundamental component of an effective drug testing program. Unannounced random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the pipeline industry by reducing or eliminating drug use by pipeline personnel. Unannounced random testing programs initiated by the military, including the Coast Guard, and private industry show declining drug

use, evidenced by a decrease in the number of individuals who test positive for drugs, over the course of the drug testing program.

The NPRM proposed a testing rate of up to 125 percent. No commenters provided any data to support a particular level of testing. The RSPA believes that a 50 percent testing rate is sufficient and necessary to establish a valid confidence level as well as to provide an adequate deterrent to drug use by employees. At the same time, this rate should avoid the imposition of an undue economic or administrative burden on employers and employees subject to the requiremens of the regulation. In addition, the 50 percent random testing rate will produce a sufficient data base for the RSPA to analyze the scope of any drug problem in the pipeline industry generally or within any particular sector of the pipeline industry. Analysis of the random drug testing data will allow the RSPA to determine if the random testing program should be revised, including a revision of the random testing rate.

The 50 percent random testing rate is consistent with the random testing program currently applicable to sensitive safety-related employees of DOT. The DOT random testing program began in September 1987 and the random testing rate has gradually increased and will reach a level of 50 percent by the end of this year.

According to the provisions of the final rule, all operators are required to randomly select a sufficient number of employees to enable the operator to conduct unannounced testing of 50 percent of employees, who perform the applicable sensitive safety-related duties for the operator, during a calendar year. In order to test 50 percent of the employees who perform such functions, an operator may be required to select in excess of 50 percent of the employees who perform these functions for unannounced tesing. Selection of a greater number of employees enables the operator to reach a 50 percent testing level despite absences due to vacations and medical leave or an inability to reach a collection site due to travel or duty requirements.

For some operators, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing directly to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, operators might have to test at rates far above a 50 percent rate toward the end of the year, to make up for lower rates at the beginning. Operators should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively more routine. The RSPA does not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule, therefore, provides an implementation procedure that allows operators to phase in random drug testing during the first 12 months in which tests are conducted. Operators would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the 12-month period to permit the operator to phase in to the 50 percent rate, and the total number of tests conducted would have to be equal to at least 25 percent of the covered population.

Suppose, for example, that an employer has 1,000 sensitive safety-related employees. At a 50 percent annual rate, 500 tests would have to be conducted during each 12-month period. During the phase-in period, however, the operator could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first 12 months, the annualized rate of 50 percent was achieved. Thus, during the phase-in if the operator's anti-drug plan calls for administering random tests on 12 occasions, the operator would need to administer at least 42 tests (500 divided by 12) on the last testing occasion, but could administer fewer tests on earlier occasions. Overall, the operator would have to conduct at least 250 random tests during the phase-in period. In subsequent 12-month periods, the 50 percent rate would be maintained.

Post-accident Testing. Many industry commenters stated that their drug programs provided for conducting post-accident testing and were generally supportive of this part of the proposed regulation. However, industry commenters suggested that such testing should be limited to accidents that reasonably could have resulted from performance by an employee who was drug impaired. The commenters argued that the proposed rule to test employees whose performance is directly related to an accident was overly broad.

The National Transportation Safety Board (NTSB) recommended that a time limit of 4 hours be set for the collection of test specimens because a longer delay seriously limits the ability of tests to detect the parent drug or its psychoactive components in the blood. The NTSB further commented that toxicological samples collected even after 4 hours may provide useful information and therefore samples should be collected even if the 4-hour period has expired. The NTSB also recommended that collection of blood specimens be required in all post-accident testing.

Some commenters objected to post-accident testing as a separate category and suggested that an accident should be one factor in deciding to conduct a "for cause" test.

RSPA Response. The RSPA agrees with the commenters who recommended limiting post-accident testing and has limited such testing to employees whose performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. An exception is also provided when an employee's performance (e.g., maintenance) may have contributed to an accident, but whose performance occurred so far in advance of the accident that drug testing would not be useful in detecting drug use at the time of performance. This limitation in the final rule will ensure that testing is conducted only when the employee's performance may be causally linked to the accident and should allay the concerns of some commenters that a great number of employees would be subject to post-accident testing.

The final rule requires that post-accident testing be conducted as soon as possible but no later than 32 hours after an accident. This will ensure that such testing is not delayed and that the testing be conducted with dispatch. The RSPA strongly encourages employers to promptly determine if an employee is subject to post-accident testing, particularly in cases where there is little or no uncertainty that an employee's performance was a contributing factor in the accident. The RSPA intends to vigorously enforce the regulation where there is unreasonable delay in determining whether an employee should be tested under this provision or where there is unreasonable delay in testing after the determination to test is made.

The NTSB's suggestion that the RSPA require an employer to conduct post-accident testing within 4 hours after an accident is based on the time-sensitive nature of toxicological testing of blood samples. On the other hand, urinalysis testing does not involve the extreme time-critical considerations associated with collection and testing of blood samples. The RSPA believes that post-accident urinalysis testing is sufficient at this time to demonstrate an individual's drug use, evidenced by the

presence of a drug or a drug metabolite in the individual's system. Also, the RSPA proposed only urine testing in the NPRM, specifically excluding blood testing as an option, for all drug tests that would be conducted under the anti-drug program. Further, as noted in the NPRM, the blood test method of checking for the presence of drugs is considered to be a more invasive procedure. Therefore, the RSPA considers NTSB's suggestion to be beyond the scope of the notice and the RSPA has not adopted NTSB's suggestion to require post-accident testing by collecting a blood sample.

Reasonable Cause Testing. The commenters generally supported the concept of testing of an employee based on reasonable cause. However, they recommended that testing be based on reasonable suspicion of drug use, rather than on reasonable cause because the reasonable cause standard is a more restrictive standard. The commenters stated that adopting a "reasonable suspicion standard" rather than a "reasonable cause standard" would reduce the weight of evidence needed to support and invoke that standard and thus increase the frequency of such tests.

Many commenters also thought that the proposal that at least two of the employee's supervisors substantiate and concur in the determination that reasonable cause exists to test an employee is too restrictive. While having two supervisors concur that an employee's behavior warrants drug testing might be desirable in light of the subjectivity of reasonable cause testing, the commenters thought it would not be practical in all circumstances. The particular location of the job site or the time of day might make it impractical for two supervisors to concur, since many job sites may only have one supervisor and the next level of management may be many miles away. The commenters wanted operators to be given flexibility in determining whether reasonable cause exists. The NTSB questions the requirement for two supervisors to concur in the determination that "reasonable cause" exists and recommended that RSPA modify this requirement to require that one supervisor can call for reasonable cause testing, but with appropriate supervisory oversight to discourage abuse.

RSPA Response. The RSPA has not revised the regulation to be based on reasonable suspicion, because there does not appear to be a clear distinction between reasonable cause and reasonable suspicion. Also, reasonable cause is the basis for testing adopted by other DOT agencies in their anti-drug rules. The RSPA is not persuaded that only one supervisor should determine reasonable cause because the seriousness of such a subjective determination should require the concurrence of two persons. The rule requires that at least two of the employee's supervisors, one of whom is trained in detection of possible symptoms of drug use, shall substantiate and concur in the decision to test an employee who is believed to be using a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. The rule does not require that two supervisors observe the behavior of a suspected employee. The rule merely requires the concurence of two supervisors. The RSPA believes that such concurrence between two supervisors can be accomplished by phone, by discussions a few hours later, or by having another supervisor travel to the job site, if only one supervisor is available at that particular job site.

An exception has been made for small operators having 50 or fewer employees subject to the drug testing program because sometimes these operators do not have two supervisors for every employee. For these operators, the substantiation of one supervisor is sufficient to require that an employee be tested for drugs, provided that supervisor has received training as required.

The RSPA has written the description of circumstances that might trigger testing under this provision in performance-type language. In addition to the broad criteria listed in the rule, evidence of repeated errors on the job, regulatory or company rule violations, or unsatisfactory time and attendance patterns, if coupled with a specific, contemporaneous event that indicates probable drug use, could provide additional, cumulative evidence to support a decision to test an employee based on reasonable cause.

Retesting. The final rule requires that confirmed-positive samples be retained for at least 365 days. The rule also creates a right to have the original sample retested if the employee makes a written request within 60 days of receipt of a final test result from the MRO. The employee may designate retesting by the original laboratory or another DHHS certified laboratory. The operator may require the employee to pay the cost of re-analysis in advance, subject to reimbursement if the retest is negative.

Employee Assistance Programs

Rehabilitation. The RSPA sought comment in the NPRM regarding four different EAP rehabilitation options. These options specified the circumstances under which an employee would be given the opportunity to seek rehabilitation. Option 1 would allow all employees to seek an opportunity for rehabilitation regardless of how the employee's drug use was detected. Option 2 would allow employees, except those employees whose drug use was detected as a result of post-accident testing or testing based on reasonable cause, to seek an opportunity for rehabilitation. Option 3 would only allow employees who volunteer to seek rehabilitation and would exclude all employees whose drug use was detected by any other means. Option 4 would permit each operator to determine its policy concerning whether rehabilitation would be offered.

Most commenters indicated that rehabilitation of employees should be left to the operator's determination because federal regulations should not interfere in the management-labor relationship. Most commenters also said that drug rehabilitation was part of union collective bargaining agreements and those issues should not be subject to federal regulations. Some commenters pointed out the significant problems faced by small operators if a position would have to be held open while the employee was rehabilitated. Most labor unions supported Option 1. Most pipeline operators supported Option 4. The NTSB supported Option 3 because the Board believed that employers should be required to remove from service all those employees in safety-sensitive positions when testing confirms drug use.

RSPA Response. RSPA agrees that rehabilitation is a labor-management decision and is not directly relevant to the safe operation and maintenance of the pipeline. Further, there are significant problems in applying rehabilitation regulations to all segments of the pipeline industry. Therefore, an EAP rehabilitation program is not mandated by these regulations. Nonetheless, the RSPA hopes that pipeline operators will provide rehabilitative assistance to the employee, especially those employees with long and significant service, by providing those employees an opportunity to be rehabilitated. With respect to NTSB's comment, the final rule prohibits an operator from using an employee in certain sensitive safety-related functions when drug use has

been confirmed, unless that individual has successfully completed a rehabilitation program.

Education and Training. Most commenters supported the EAP education and training program. Some commenters, however, thought that the type and length of EAP training should be left to the discretion of the operator.

RSPA Response. The education and training proposal in the NPRM has been adopted in the final rule. In response to a few commenters, some minor editorial changes were made to these requirements to distinguish the difference in these two facets of the drug program. The final rule permits an operator to develop and provide education and training as part of an internal program or to contract for these services. Operators may determine the extent of employee training. The 60 minutes of training proposed in the NPRM as a minimum for both employees and supervisors has been limited in the final rule to 60 minutes for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The RSPA believes that operators will not have difficulty in developing education and training programs for employees and supervisory personnel because of the many EAP's that are already being conducted by pipeline operators throughout the country.

Post-rehabilitation Testing. Some commenters stated that the RSPA should not specify the number of post-rehabilitation tests that should be conducted. The commenters recommended that post-rehabilitation testing should be left to the discretion of rehabilitation and medical personnel after taking into consideration the particular circumstances of each case.

RSPA Response. The RSPA has included a provision regarding unannounced testing after an employee's return to duty. This section requires an operator to subject an employee who has returned to duty following rehabilitation to a reasonable program of follow-up drug testing for not more than 60 months after the employee's return to duty. The RSPA believes that this program is required as a minimum to ensure that rehabilitation has been successful.

Confidentiality. Most commenters stated that drug test results should remain a confidential matter between the employer and the employee, as should any rehabilitation information. Several commenters stated that even employers should not have access to test results that would identify employees, but that such information should be available only to medical and EAP personnel. Commenters were concerned that disclosure to anyone other than the employer, without the consent of the individual, could expose the employer to liability, including defamation and slander suits. Several commenters noted that disclosure would violate state privacy laws and compromise legitimate privacy interests of individuals. Most commenters objected to providing test results to prospective or future employers, and several suggested that test results should be destroyed if an applicant was not hired. Commenters differed on whether RSPA or state pipeline safety agencies should have access to records kept on testing and rehabilitation. Most commenters opposed access to records but stated that they would not object to release of general information in the form of statistics. These commenters stated that statistical information, such as the number of persons tested and the number testing positive for certain drugs, could be released to RSPA or state pipeline safety agencies.

RSPA Response. The RSPA Has decided that the legitimate individual privacy rights of an individual warrant strict limitations on the availability of drug testing results and rehabilitation information. With one exception, the final rule provides that, other than in statistical form, an individual's drug test results and information about an individual's rehabilitation program may be released only with the written consent of the individual. The exception is that individual information must be released upon request by RSPA or an appropriate state pipeline safety agency as part of an accident investigation.

Preemption of State and Local Laws. Many commenters stated that state and local laws, especially those prohibiting or limiting an employer's ability to conduct random drug testing of its employees, could conflict with this rule. Several of these commenters recommended that RSPA include a regulatory provision that explicitly preempts state or local law on drug testing in the work place.

RSPA Response. The RSPA agrees with the commenters that conflicting state and local laws would interfere with an effective anti-drug program. Inconsistent state or local laws applicable to the subject matter of this final rule would frustrate the safety purposes of the rule and severely hamper implementation and administration of an anti-drug program. RSPA intends that issuance of the final rule, which mandates the conduct of an anti-drug abuse program that includes random testing, preempt, under the Supremacy Clause of the U.S. Constitution, any state or local law, rule, regulation, order, or standard that covers testing of pipeline employees for the presence of drugs or drug metabolites. This preemption exists to the extent that the state or local law interferes with implementation of the federal law. The rule does not preempt any state law that imposes sanctions for the violation of a provision of a state criminal code related to reckless conduct leading to actual loss of life, injury, or damage to property, whether such provisions apply specifically to pipeline employees or generally to the public. Consistent with RSPA policy that recognizes that a declaration of preemption is a judicial prerogative, no express provision has been included in the rule.

Collective Bargaining. A major issue raised by many commenters concerns the effect of collective bargaining on the ability of operators to implement Federally-imposed regulations fully and in a timely manner.

Those commenters point out that operators who are parties to collective bargaining agreements are required under the National Labor Relations Act to bargain in good faith with labor unions on issues involving wages, hours, and other conditions of employment. Drug testing for industry employees and job applicants is a mandatory subject of bargaining under section 8(b) of the National Labor Relations Act. In *NLRB General Counsel Memorandum GC 87–5,* the General Counsel of the National Labor Relations Board stated that the implementation of a drug testing program would constitute a substantial change in working conditions. Thus, the commenters state that compulsory urinalysis testing is a condition of employment with regard to which employers who are parties to collective bargaining agreements must bargain in good faith.

Operators who are parties to collective bargaining agreements may have a more difficult time in adopting anti-drug programs that satisfy Part 199 criteria than in adopting broad guidelines that allow more flexibility. The commenters urged DOT to address the collective bargaining issue in its final rule in terms of granting operators sufficient time to adopt a drug plan and in allowing operators flexibility in the design and implementation of their drug programs. Commenters stated that employers will be required to bargain on the effects of drug testing, such as which positions would be covered, which drugs would be tested for, chain-of-custody procedures, who will pay, the random selection method to be used, and

whether union representatives should be involved in "for cause" decisions.

Several commenters suggested that RSPA provide additional time to develop and implement drug programs. Suggestions included 120 days after expiration of existing agreements, 12 to 15 months after issuance of the rule, and 12 months to develop and 18 months to implement a drug testing program. Commenters also mentioned grievance and arbitration issues which could delay implementation.

RSPA Response. Based on the comments, the final rule establishes an extended period to prepare for implementation of the anti-drug program. Operators with more than 50 employees subject to drug testing will have 1 year after the general effective date of this final rule to set up testing programs and EAP services. Drug testing does not have to begin until 1 year after the effective date of the rule. Operators with 50 or fewer employees subject to testing will have 16 months beyond the effective date to implement the anti-drug program. These periods should provide sufficient time to revise or adopt collective bargaining agreements.

Economic Analysis. Many commenters disagreed with the economic analysis of costs and benefits conducted in the Draft Regulatory Evaluation.

First, they state that the costs to conduct the anti-drug testing of employees were underestimated. The AGA thought that the cost of the initial urinalysis test and confirmatory test would average $200 per employee. The AGA further indicated that the per employee costs of random testing should include the urinalysis sampling, confirmation tests, transporting workers to test sites, lost productivity of workers being tested, testing contractor employees, operating a test lab facility, maintaining a rehabilitation program, and complying with DOT recordkeeping requirements. They estimated that 240,000 employees were in sensitive safety- and security-related positions and would be subject to testing, instead of the 116,500 employees thought to be subject to testing by the RSPA. The AGA stated that they thought it would cost $60 million dollars per year for random testing alone at the proposed 125 percent sampling rate. The AGA and several other commenters further pointed out that the $33 million in estimated benefits erroneously assumed that all accidents in which human error was involved would have been prevented by drug testing.

RSPA Response. A Final Regulatory Evaluation has been prepared to reflect the changes in the final rule. The cost estimates of conducting testing have been revised to be $25 per initial test, $35 per confirmation test, and $35 for administrative costs. These costs have been verified by DOT based on its own testing program. The DOT program indicates that the $35 administrative costs include specimen collection, recordkeeping, and chain-of-custody procedures. The cost of the program has been significantly reduced by limiting the random testing rate to 50 percent, by deleting the significant costs associated with rehabilitation of employees, by limiting the types of sensitive safety-related employees that must be drug tested, and by eliminating security-related positions. The discounted costs over a 10-year period of these regulations are estimated to be $29.1 million.

The benefits of the program have been revised in the Final Regualtory Evaluation to limit the impact to employees that may have been under the influence of drugs in accidents that were due to human error or other causes. In addition, the evaluation notes the important benefits that would accrue by preventing even one major accident. The estimated discounted benefits of the program over a 10-year period are $41.6 million.

Additional Issues

More Stringent Anti-Drug Programs. Some commenters said that their companies' drug testing programs went beyond the proposed federal rules and suggested changes to the proposed rules to allow more stringent requirements.

The final rule sets forth minimum requirements that must be included in an operator's anti-drug plan. However, the rule generally does not set forth detailed program administration requirements in most areas of the program. As a result, a significant degree of flexibility is retained for an employer's administration of its anti-drug program.

Section 199.11 of this regulation provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. That is, an employer must test the sample for the five major drugs listed in each DOT drug regulation. Only if, in the context of reasonable cause testing, the RSPA authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of the DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request.

Alcohol. Many commenters suggested that the RSPA include alcohol as a tested substance in any required testing program. These commenters pointed out that alcohol is probably the substance most abused by the public. The comments indicated that some operators already include alcohol in their anti-drug program.

The RSPA expressly excluded the issue of alcohol testing from this rulemaking for a variety of reasons stated in the NPRM; therefore, these comments are beyond the scope of the rulemaking. Alcohol testing was not proposed because the two preferred methods of testing an individual for the presence of alcohol are by breath analysis and by drawing blood. If tests were run for alcohol and for drugs, two different types of tests (blood alcohol concentration and urinalysis) would have to be conducted. This would greatly complicate the process as well as increase costs. Also, the blood test method generally is considered to be a more invasive procedure. Finally, it is easier to identify someone who abuses alcohol and reports for work impaired than someone who uses drugs.

Excluding alcohol testing from this rulemaking should not be construed to mean that the RSPA is ignoring the possibility that alcohol may be a substance of widespread abuse in the pipeline industry. The RSPA may consider rulemaking action against alcohol abuse in the future. Additionally, an operator is not prohibited from testing its employees for alcohol if the operator has the independent legal authority to do so.

Prohibited Drugs. The NTSB believes that the list of prohibited drugs is too narrow. The NTSB indicates that it has investigated a number of accidents in other modes of transportation caused by individuals impaired by drugs in Schedules III to V of the Controlled Substances Act.

In the final rule the definition of "prohibited drug" has been limited to the five substances for which drug testing is required: marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP), except that if an

operator wishes to test for other substances during reasonable cause or post-accident testing, it may do so provided it has obtained approval from RSPA, as specified in 49 CFR Part 40. In addition, the rule does not prohibit an operator from testing for other drugs if the operator has the independent legal authority to do so.

Medical Review Officer (MRO). The RSPA has clarified and expanded the role of the MRO which is established in the DHHS guidelines. For example, the MRO also is the final arbiter regarding disputes on anti-drug testing programs and schedules for unannounced testing. The MRO is also responsible to determine a schedule of unannounced testing, and when applicable, in consultation with the rehabilitation committee, for an employee who has returned to duty after rehabilitation.

State Agency Inspectors. Most commenters that commented on the subject thought that state pipeline safety agency inspectors should also be subject to a drug testing program. The RSPA plans to establish standard qualifications for state pipeline safety inspectors. The comments on the need for a drug testing program for state inspectors will be considered in any future rulemaking regarding those standards.

Small Operators. Most commenters thought that small operators should also be subject to these drug testing programs. The American Public Gas Association (APGA) recommended that master meter systems should not be excluded from participation in this program. A few commenters, such as the Iowa Association of Municipal Utilities, thought that operators having 25 or fewer employees should not be included in this rule.

The RSPA believes that the problem of drug abuse is so universal that small operators should be subject to these rules to ensure that all the nation's pipeline transportation system is protected from the hazards of drug impaired pipeline employees. Furthermore, because small operators are typically distribution companies supplying gas to the public in populated areas, the public exposure is greater. Therefore, small operators are subject to these rules, except that a change has been made to the reasonable cause testing for operators with fewer than 50 employees subject to this part. In that case, only one supervisor is necessary to determine that there is reasonable cause for an employee to be drug tested. In addition, small operators are given additional time to begin their testing programs.

The RSPA has not changed the final rule with regard to master meter systems. Those systems are still excluded from the requirements of these regulations because they do not usually perform the functions traditionally considered as operating or maintaining a pipeline. The gas distribution company is responsible for the operational characteristics of the pipeline system. Under the pipeline safety rules, the master meter operator is responsible for maintenance of the pipelines on his property. He normally contracts this out to a local maintenance or plumbing company. If there is a leak, he does not shut off the system or lower the pressure. Instead, the resident of a unit usually calls the gas distribution company, which in turn checks to see if there is a problem and then takes appropriate action. Therefore, the types of incidents that would arise, such as leaks or explosions, would not be prevented by the drug testing of master meter operators.

Action that May be Taken by an Operator. Some commenters objected to the proposal that an operator may not discipline or terminate an employee for drug-related causes if the employee successfully completes rehabilitation. They argued that the proposed rule interjected the federal government into decisions and regulations between management and labor—an untenable situation to both the supervisors and supervised employees.

The RSPA agrees and has deleted this proposal from the final rule.

Suggested Alternative Plan. Transok, Inc., suggests that instead of mandating drug testing, the RSPA should impose a fine on employers of $500 for the first drug or alcohol related accident and $5,000 for subsequent accidents occurring within 5 years of the initial accident. This, according to Transok, Inc., would ensure a drug-free transportation system by penalizing employers who do not adequately supervise employees.

The RSPA believes that this approach would not ensure the prevention of drug use by pipeline industry employees. First, without a drug testing program, the RSPA would not be able to identify the accidents caused by drug-impaired employees. Secondly, such an approach would not be preventative since the accidents would already have occurred.

Conflict with Foreign Laws. We have determined not to make the final rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching a permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Administrator may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the Federal Register. While we recognize that any decision not to apply our rule to foreign citizens has the potential to create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Advisory Committee Review

Section 4(b) of the NGPSA, as amended (49 App. U.S.C. 1673(b)), requires that each proposed gas pipeline safety standard be submitted to the Technical Pipeline Safety Standards Committee (TPSSC) for its consideration. Similarly, under section 204(b) of the HLPSA (49 App. U.S.C. 2003(b)), proposed hazardous liquid pipeline safety standards must be submitted to the Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC). These Committees discussed the proposed rule at a joint meeting held on September 14, 1988, in Washington, DC. The official report of each Committee and the

transcript of the meeting is in the docket.

The following sets forth the recommendations of each of the advisory committees regarding the feasibility, reasonableness, and practicability on the proposed rule and disposition of these recommendations by RSPA.

TPSSC. The TPSSC voted nine to four that the proposed rule is feasible, reasonable, and practicable with the following recommended changes:

• Section VI. Adopt Option 4, which leaves rehabilitation to an operator's discretion.

RSPA Response. RSPA agrees and the requirement for a mandatory rehabilitation program has been deleted in this final rule.

• Section VI.C. Eliminate random testing.

RSPA Response. As noted previously, the RSPA believes that random testing is a critical component of an anti-drug program and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. The RSPA believes that the 50 percent rate will not impose an undue economic or administrative burden on operators and employees.

• Section VII. Eliminate this section regarding restrictions on employee discipline.

RSPA Response. RSPA concurs, and this section has been eliminated since rehabilitation is discretionary in the final rule.

• Section VIII.A. Change time for preparing anti-drug plan from 120 days to 1 year.

RSPA Response. The RSPA agrees more time is needed and has adjusted the compliance date of the final rule.

• Section I. Eliminate applicability to contractor employees in definition of "employee."

RSPA Response. As noted previously, the RSPA believes that contractor employees should be included in the group of employees that must undergo drug testing. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who work directly for operators. The RSPA has limited the employees covered by the drug rule to those who perform regulated operation, maintenance, or emergency-response functions, which should minimize the effects of the rule on operators who contract for unskilled transient laborers.

• Section IV.C. Use more performance language in training.

RSPA Response. The RSPA believes that the requirements proposed for training generally were already in performance language. However, the proposal to require at least 60 minutes of training annually has been deleted as too specific. The final rule requires that operators provide 1 hour of training for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The training should include the effects and consequences of drug use and the manifestations and behavioral cues that may indicate drug use and abuse. The RSPA believes the rule provides sufficient flexibility and performance language to permit the tailoring of a training program to fit the operations of each particular operator. If an operator wishes to provide training in excess of the minimum requirements of this rule, the operator has the option to do so.

• Section IX. Limit access to records to circumstances following accidents.

RSPA Response. The RSPA has limited access to the drug testing records of a particular employee to when RSPA or a state pipeline safety agency are conducting an accident investigation.

THLPSSC. The THLPSSC voted 11 to 0 not to support the NPRM on drug testing because the need for such a rule has not been demonstrated. However, that advisory committee recommended that if the RSPA issues a final rule, the RSPA should consider the following recommendations:

• Section IV.C. Eliminate random testing.

RSPA Response. As noted previously, the RSPA believes that random testing is a critical component of an anti-drug program, and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. The RSPA believes that the 50 percent testing rate will not impose an undue economic or administrative burden on operators and employees.

• Section IV.D. Eliminate reasonable cause of testing.

RSPA Response. The RSPA has not eliminated this section. The RSPA believes that testing for "reasonable cause" is a necessary element and one of the cornerstones of the testing program. If an employee is believed to be taking prohibited drugs or under the influence of a prohibited drug while on duty, it is incumbent on the operator to determine if that employee is using prohibited drugs. More over, the comments indicate that most large operators are already conducting drug testing when their employees are believed to be using prohibited drugs.

• Section VI. Adopt Option 4, which leaves rehabilitation to an operator's discretion.

RSPA Response. The requirement for a rehabilitation program has been deleted in the final rule.

• Eliminate the applicability of the proposed rule to contractor employees.

RSPA Response. This has not been done for the reasons stated previously

• Section I. "DHHS Guidelines" should be a minimum requirement.

RSPA Response. The DOT has modified the DHHS Guidelines and adopted them as the DOT Procedures. As in all pipeline safety regulations, the operator may exceed the requirements as set forth in the federal regulations.

• Section IX. The RSPA should be given access to statistical information only.

RSPA Response. As mentioned before, the RSPA has limited access to the drug testing records of a particular employee to when RSPA or a state pipeline safety agency are conducting an accident investigation.

• Section 195.401(d)(3). Eliminate the absolute prohibition against an employee having any amount of a prohibited drug in his system.

RSPA Response. The RSPA has eliminated this requirement to be consistent with the "DOT Procedures" covering the amount of drug in an employee's physiological system that constitutes failure of an initial or confirmatory drug test.

• Section VII. Eliminate the restrictions on employee discipline. However, don't eliminate the employee discipline restrictions if random testing and testing based on reasonable cause are included in final rule.

RSPA Response. The proposed employee discipline restrictions are not in the final rule. The RSPA does not believe that any restriction on employee discipline is needed because the final rule does not mandate rehabilitation. Absent mandatory rehabilitation, any restriction on disciplinary action would unnecessarily interject RSPA into the management-employee relationship.

• Section VIII. Change time for preparing anti-drug plan from 120 days to 1 year.

RSPA Response. The RSPA agrees more time is needed and has adjusted the compliance date of the final rule.

Regulatory Flexibility Determination

These final rules apply to all entities subject to RSPA's jurisdiction under Part 192, 193, or 195, other than operators of master meter systems. Operators of master meter systems constitute the bulk of small businesses or other small

entities that operate gas pipeline systems. There are few, if any, small entities that operate hazardous liquid pipelines subject to Part 195 or LNG facilities that are subject to Part 193. The final rule provides additional time for small operators to prepare their anti-drug plans and begin drug testing. In addition, the rule provides small operators flexibility in testing for reasonable cause by allowing one supervisor trained in detection to substantiate the decision to test. Therefore, I certify that pursuant to section 605 of the Regulatory Flexibility Act, this final rule will not have a "significant economic impact on a substantial number of small entities."

Paperwork Reduction Act

The final rule requires that the operator develop a written program and maintain records on drug testing and training. In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), these information collection requirements have been submitted to the Office of Management and Budget for approval. Information need not be collected under this rule until OMB clearance is received and the OMB clearance number is published in the **Federal Register.**

Federalism Implications

The RSPA has reviewed the final rule in light of the Federalism considerations set forth in Executive Order 12612. Although the final rule will have to be adopted by states participating in the federal-state relationships prescribed in the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979, the impact of such adoption based upon currently available information would not be substantial. In addition, RSPA does not expect that such adoption would have a substantial direct effect on the relationship between the federal government and the states or on the distribution of power and responsibilities among the various levels of government. This expectation takes into account the preemption of inconsistent state or local laws governing drug testing as discussed supra. Accordingly, preparation of a Federalism Assessment under Executive Order 12612 is not warranted.

Significance

This final rule has been reviewed under Executive Order 12291 and determined not to be a major rule because it would not have an impact on the economy in excess of $100 million annually, would not result in a major change in costs or prices for consumers, individual industries, government, or any geographic region, and would not significantly affect competition. However, it is significant under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) because it concerns a matter on which there is substantial public interest and because it involves important Departmental policy. The Draft Regulatory Evaluation has been revised to reflect the changes in the final rule. The total discounted cost of these regulations over a 10-year period is now estimated to be $29.1 million. The discounted benefits of the program have been revised and are now estimated to be $41.6 million over a 10-year period. A copy of the Final Regulatory Evaluation has been placed in the docket.

List of Subjects in 49 CFR Part 199

Pipeline safety, Drug testing.

In view of the foregoing, RSPA amends Title 49 of the Code of Federal Regulations by adding a new Part 199 as follows:

PART 199—DRUG TESTING

Sec.

Authority: 49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, 2002, and 2040; 49 CFR 1.53

§ 199.1 Scope and compliance.

(a) This part requires operators of pipeline facilities subject to Part 192, 193, or 195 of this chapter to test employees for the presence of prohibited drugs and provide an employee assistance program. However, this part does not apply to operators of "master meter systems" defined in § 191.3 of this chapter.

(b) Operators with more than 50 employees subject to drug testing under this part need not comply with this part until December 21, 1989. Operators with 50 or fewer employees subject to drug testing under this part need not comply with this part until April 23, 1990.

(c) This part shall not apply to any person for whom compliance with this part would violate the domestic laws or policies of another country.

(d) This part is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this part raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of this part to such person on and after January 1, 1990.

§ 199.3 Definitions.

As used in this part—

"Accident" means an incident reportable under Part 191 of this chapter involving gas pipeline facilities or LNG facilities, or an accident reportable under Part 195 of this chapter involving hazardous liquid 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.

"DOT Procedures" means the "Procedures for Transportation Workplace Drug Testing Programs" published by the Office of the Secretary of Transportation in Part 40 of this title.

"Employee" means a person who performs on a pipeline or LNG facility an operating, maintenance, or emergency-response function regulated by Part 192, 193, or 195 of this chapter. This does not include clerical, truck driving, accounting, or other functions not subject to Part 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.

"Fail a drug test" means that the confirmation test result shows positive evidence of the presence under DOT Procedures of a prohibited drug in an employee's system.

"Operator" means a person who owns or operates pipeline facilities subject to Part 192, 193, or 195 of this chapter.

"Pass a drug test" means that initial testing or confirmation testing under DOT Procedures does not show evidence of the presence of a prohibited drug in a person's system.

"Prohibited drug" means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act, 21 U.S.C. 801.812 (1981 & 1987 Cum.P.P.): marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). In addition, for the purposes of reasonable cause testing, "prohibited drug" includes any substance in Schedule I or II if an operator has obtained prior approval from RSPA, pursuant to the "DOT Procedures" in 49 CFR Part 40, to test for such substance, and if the Department of Health and Human Services has established an

approved testing protocol and positive threshold for such substance.

"Rehabilitation committee" means the individuals who develop and determine an employee's rehabilitation plan and a schedule for the employee's return to work. The committee consists of the operator or the operator's designated representative, the medical review officer, and the individual in charge of the employee's rehabilitation.

"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 the Hazardous Liquid Pipeline Safety Act of 1979 (49 App. U.S.C. 2009).

§ 199.5 DOT procedures.

The anti-drug program required by this part must be conducted according to the requirements of this part and the DOT Procedures. In the event of conflict, the provisions of this part prevail. Terms and concepts used in this part have the same meaning as in the DOT Procedures.

§ 199.7 Anti-drug plan.

(a) Each operator shall maintain and follow a written anti-drug plan that conforms to the requirements of this part and the DOT Procedures. The plan must contain—

(1) Methods and procedures for compliance with all the requirements of this part, including the employee assistance program;

(2) The name and address of each laboratory that analyzes the specimens collected for drug testing; and

(3) The name and address of the operator's medical review officer.

§ 199.9 Use of persons who fail or refuse a drug test.

(a) An operator may not knowingly use as an employee any person who—

(1) Fails a drug test required by this part and the medical review officer makes a determination under § 199.15(d)(2); or

(2) Refuses to take a drug test required by this part.

(b) Paragraph (a)(1) of this section does not apply to a person who has—

(1) Successfully completed a rehabilitation program and passed a drug test under DOT Procedures;

(2) Been recommended by the medical review officer for return to duty as a result of the rehabilitation program; and

(3) Not failed a drug test required by this part after the successful completion of a rehabilitation program.

§ 199.11 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(a) *Pre-employment testing.* No operator may hire or contract for the use of any person as an employee unless that person passes a drug test or is covered by an anti-drug program that conforms to the requirements of this part.

(b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, a drug test is useless to determine whether the performance was affected by drug use.

(c) *Random testing.* Each operator shall drug test at least 50 percent of its employees every 12 months. Each operator shall select employees for testing by using a random number table or a computer-based random number generator that is matched with an employee's social security number, payroll identification number, or other appropriate identification number. However, during the first 12 months following the institution of random drug testing under this part, each operator shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the covered population.

(d) *Testing based on reasonable cause.* Each operator shall drug test each employee when there is reasonable cause to believe the employee is using a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test an employee. However, in the case of operators with 50 or fewer employees subject to testing under this part, only one supervisor of the employee trained in detecting possible drug use symptoms shall substantiate the decision to test.

(e) *Testing after rehabilitation.* A person who returns to duty as an employee after rehabilitation shall be subject to a reasonable program of follow-up drug testing without prior notice for not more than 60 months after his return to duty.

§ 199.13 Drug testing laboratory.

(a) Each operator shall use for the drug testing required by this part only drug testing laboratories certified by the Department of Health and Human Services under the DOT Procedures.

(b) The drug testing laboratory must permit—

(1) Inspections by the operator before the laboratory is awarded a testing contract; and

(2) Unannounced inspections, including examination of records, at any time, by the operator, the Administrator, and if the operator is subject to state agency jurisdiction, a representative of that state agency.

§ 199.15 Review of drug testing results.

(a) *MRO appointment.* Each operator shall designate or appoint a medical review officer (MRO). If an operator does not have a qualified individual on staff to serve as MRO, the operator may contract for the provision of MRO services as part of its anti-drug program.

(b) *MRO qualifications.* The MRO must be a licensed physician with knowledge of drug abuse disorders.

(c) *MRO duties.* The MRO shall perform the following functions for the operator:

(1) Review the results of drug testing before they are reported to the operator.

(2) Review and interpret each confirmed positive test result as follows to determine if there is an alternative medical explanation for the confirmed positive test result:

(i) Conduct a medical interview with the individual tested.

(ii) Review the individual's medical history and any relevant biomedical factors.

(iii) Review all medical records made available by the individual tested to determine if a confirmed positive test resulted from legally prescribed medication.

(iv) If necessary, require that the original specimen be reanalyzed to determine the accuracy of the reported test result.

(v) Verify that the laboratory report and assessment are correct.

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(3) Determine whether and when an employee involved in a rehabilitation program may be returned to duty.

(4) Determine a schedule of unannounced testing, in consultation with the rehabilitation committee, for an employee who has returned to duty after rehabilitation.

(5) Ensure that an employee has been drug tested in accordance with the DOT Procedures before the employee returns to duty after rehabilitation.

(d) *MRO determinations.* The following rules govern MRO determinations:

(1) If the MRO determines, after appropriate review, that there is a legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO is not required to take further action.

(2) If the MRO determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO shall refer the individual tested to an employee assistance program, or to a personnel or administrative officer for further proceedings in accordance with the operator's anti-drug program.

(3) Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the MRO may conclude that a particular drug test result is scientifically insufficient for further action. Under these circumstances, the MRO should conclude that the test is negative for the presence of a prohibited drug or drug metabolite in an individual's system.

§ 199.17 Retention of samples and retesting.

(a) Samples that yield positive results on confirmation must be retained by the laboratory in properly secured, long-term, frozen storage for at least 365 days as required by the DOT Procedures. Within this 365-day period, the employee or his representative, the operator, the Administrator, or, if the operator is subject to the jurisdiction of a state agency, the state agency may request that the laboratory retain the sample for an additional period. If, within the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be discarded following the end of the 365-period.

(b) If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, the original sample must be retested if the employee makes a written request for retesting within 60 days of receipt of the final test result from the MRO. The employee may specify retesting by the Department of Health and Human Services. The operator may require the employee to pay in advance the cost of shipment (if any) and reanalysis of the sample, but the employee must be reimbursed for such expense if the retest is negative.

(c) If the employee specifies retesting by a second laboratory, the original laboratory must follow approved chain-of-custody procedures in transferring a portion of the sample.

(d) Since some analytes may deteriorate during storage, detected levels of the drug below the detection limits established in the DOT Procedures, but equal to or greater than the established sensitivity of the assay, must, as technically appropriate, be reported and considered corroborative of the original positive results.

§ 199.19 Employee assistance program.

(a) Each operator shall provide an employee assistance program (EAP) for its employees and supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The operator may establish the EAP as a part of its internal personnel services or the operator may contract with an entity that provides EAP services. Each EAP must include education and training on drug use. At the discretion of the operator, the EPA may include an opportunity for employee rehabilitation.

(b) Education under each EAP must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding the use of prohibited drugs.

(c) Training under each EAP for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause must include one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.

§ 199.21 Contractor employees.

With respect to those employees who are contractors or employed by a contractor, an operator may provide by contract that the drug testing, education, and training required by this part be carried out by the contractor provided:

(a) The operator remains responsible for ensuring that the requirements of this part are complied with; and

(b) The contractor allows access to property and records by the operator, the Administrator, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purpose of monitoring the operator's compliance with the requirements of this part.

§ 199.23 Recordkeeping.

(a) Each operator shall keep the following records for the periods specified and permit access to the records as provided by paragraph (b) of this section:

(1) Records that demonstrate the collection process conforms to this part must be kept for at least 3 years.

(2) Records of employee drug test results that show employees failed a drug test, and the type of test failed (e.g., post-accident), and records that demonstrate rehabilitation, if any, must be kept for at least 5 years, and include the following information:

(i) The functions performed by employees who failed a drug test.

(ii) The prohibited drugs which were used by employees who failed a drug test.

(iii) The disposition of employees who failed a drug test (e.g., termination, rehabilitation, leave without pay).

(iv) The age of each employee who failed a drug test.

(3) Records of employee drug test results that show employees passed a drug test must be kept for at least 1 year.

(4) A record of the number of employees tested, by type of test (e.g., post-accident), must be kept for at least 5 years.

(5) Records confirming that supervisors and employees have been trained as required by this part must be kept for at least 3 years.

(b) Information regarding an individual's drug testing results or rehabilitation may be released only upon the written consent of the individual, except that such information must be released regardless of consent to the Administrator or the representative of a state agency upon request as part of an accident investigation. Statistical data related to drug testing and rehabilitation that is not name-specific and training records must be made available to the Administrator or the representative of a state agency upon request.

Issued in Washington, DC, on November 14, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

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Part VI

Department of Transportation

Federal Railroad Administration

49 CFR Parts 217 and 219

Random Drug Testing; Amendments to Alcohol/Drug Regulations; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 217 and 219

[FRA Docket No. RSOR-6, Notice No. 20]

Random Drug Testing; Amendments to Alcohol/Drug Regulations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

SUMMARY: FRA issues a final rule prohibiting use of controlled substances without medical authorization by certain safety-sensitive railroad employees, requiring random drug testing of those employees, and amending existing regulations regarding control of alcohol and drug use in railroad operations to provide further safeguards with respect to body fluid tests for controlled substances. These measures are intended to facilitate the control of drug use in railroad operations and thereby prevent accidents, injuries, and property damage.

DATES: This final rule will be effective December 21, 1988. Pursuant to 49 CFR Part 211, FRA Rules of Practice, any petition for reconsideration must be submitted not later than 10 days prior to the effective date of the rule, or December 12, 1988. Railroad random testing programs must be submitted not later than June 19, 1989. The new Procedures for Transportation Workplace Drug Testing Programs must be implemented by the railroads by July 19, 1989, and on that date a prohibition on non-medical drug use will also become effective. Random testing programs must be implemented not later than November 20, 1989.

ADDRESSES: Any petition for reconsideration shall be submitted to the Docket Clerk (RCC-30), Office of Chief Counsel, Federal Railroad Administration, Room 8201, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Walter Rockey, Executive Assistant to the Associate Administrator for Safety (RRS-3), FRA, Washington, DC 20590 (Telephone: (202) 366-0897) or Grady Cothen, Special Counsel (Telephone: (202) 366-9416).

SUPPLEMENTARY INFORMATION:

Introduction

The Rulemaking

On May 10, 1988, FRA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to (1) prohibit the use of controlled substances by safety-sensitive railroad employees at any time, except with medical authorization, and (2) require that railroads implement random drug urine testing programs approved by the FRA (53 FR 16640). That notice also proposed to make certain incidental and conforming amendments to existing regulations regarding post-accident, reasonable cause, and pre-employment drug testing (49 CFR Part 219, Subparts C, D, and F).

On May 24, 1988, FRA published in the **Federal Register** an announcement of public hearings on the NPRM (54 FR 18589). Hearings were held in Chicago, Illinois, on June 14, 1988, in Atlanta, Georgia, on June 15, 1988, in Los Angeles, California, on June 23, 1988, and in Washington, DC, on June 28 and 29, 1988. The docket remained open for public comments through August 8, 1988. In keeping with FRA's announced policy to consider late-filed comments to the extent practicable, FRA has considered all comments submitted through August 22, 1988.

On July 28, 1988, FRA published in the **Federal Register** an Interim Rule and Interim Statements of Policy (53 FR 28594) implementing Pub. L. 100-342, the Rail Safety Improvement Act of 1988. This document amended the responsibility for compliance section of the present regulations (49 CFR 219.9) by making applicable to individuals the civil penalty sanctions of section 209 of the Federal Railroad Safety Act of 1970, as amended.

Industry and Regulatory Background

FRA has previously described at great length the historic efforts of the railroad industry to deal with safety hazards caused by alcohol and drugs and the very severe consequences to public and employee safety when those efforts have not been successful. (See documents pertinent to promulgation of the existing regulations at 48 FR 30723, July 5, 1983 (ANPRM); 49 FR 24252, June 12, 1984 (NPRM); 50 FR 31508, August 2, 1985 (Final Rule)).

The existing regulations regarding control of alcohol and drug use in railroad operations became effective beginning on February 10, 1986. Those regulations (49 CFR Part 219), which apply to employees performing functions subject to the Hours of Service Act (45 U.S.C. 61 et seq.)—

- Prohibit any employee from going or remaining on duty while using, possessing or being under the influence of alcohol or a controlled substance;
- Mandate post-accident toxicological testing following certain significant train accidents and employee fatalities;
- Require improved reporting of alcohol/drug involvement in accident/incidents (49 CFR 225.17(d));
- Provide for pre-employment drug screens;
- Authorize testing for reasonable cause (i.e., on reasonable suspicion, after an accident or injury involving human failure, or following an enumerated safety rule violation); and
- Require railroads to implement policies designed to identify employees troubled by substance abuse problems through voluntary referrals and co-worker reporting.

Over three years after issuance, elements of the rule remain under challenge in litigation now pending before the United States Supreme Court (*Burnley v. Railway Labor Executives' Association*, No. 87-1555).

This regulatory program builds on an extensive history on the part of the rail unions, the railroads and FRA in development of employee assistance programs and encouragement of education and awareness activities. Rail unions have included sobriety and mutual assistance in their organizational objectives since their formation in the last century. The railroads have, since their inception, enforced Rule G, the standard operating rule forbidding employees to go or remain on duty while using, possessing or being under the influence of alcohol. In recent years, mind-altering drugs have been added to this prohibition. Beginning in the 1950's, and on a broad front during the 1970's, the railroads developed and put in place some of the best employee assistance programs in all of American industry, serving extremely large client loads, and often including family members of employees. Employee assistance services have been made available to employees discharged for alcohol and drug-related violations, and voluntary referrals on a confidential basis have been actively encouraged.

Concurrent with the development and implementation of the existing regulatory program, FRA has actively promoted the design and implementation of peer prevention programs led by employees and supported by rail management. These efforts, known within the industry as Operation Red Block or Operation Stop (hereafter collectively "Operation Red Block"), provide a means for rank-and-file workers to protect their own safety while assisting fellow employees with substance abuse problems through education, awareness campaigns, intervention and, if necessary, confrontation of workers who come to

work impaired. In exchange for this active employee involvement, railroad managements on a number of properties have agreed to withhold discipline in first-offense cases under the companies' substance abuse policy or Rule G (the standard operating rule prohibiting alcohol and drug use, possession and impairment), even when the offense is detected through incident-driven alcohol/drug testing and/or observations of railroad supervisors. In the next month, FRA will release a case study detailing the functioning of Operation Red Block on two railroads.

In addition to regulatory and voluntary activities, the railroad companies themselves have taken a variety of initiatives to address substance abuse among their employees. For instance, of the seven large rail systems that provide roughly 85 percent of rail transportation services in the United States (Burlington Northern, Conrail, CSX Rail Transportation, Norfolk Southern, Santa Fe, Southern Pacific and Union Pacific) (hereinafter "major rail systems") five have implemented drug screens in connection with physical examinations as a part of their medical qualifications programs. These examinations are typically conducted on a periodic basis and when employees return to service or transfer from one type of job position to another. Most of these programs have been challenged in litigation under the Railway Labor Act, even though it is the uniform practice of the railroads to use the results of drug screens for medical qualifications purposes and to return the employee to service upon presentation of a negative specimen (and completion of any substance abuse treatment that the employee, or the medical officer, deem necessary). See *Railway Labor Executives Association Consolidated Rail Corporation*, 845 F.2d 1187 (3rd Cir. 1988) (barring medical testing), cert. granted __ U.S. __; *Railway Labor Executives Association v. Norfolk and Western Ry.*, 833 F.2d 700 (7th Cir. 1987) (medical testing creates only minor dispute subject to arbitration); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Company*, 802 F.2d 1016 (8th Cir. 1986) (post-furlough testing held minor dispute).

All of the major rail systems have in place some form of training program for supervisors in drug abuse detection, and some of the programs provide for inclusion of employees and their representatives. Union organizations have also included substance abuse prevention information in their meetings and widely disseminated publications, and thousands of prevention committee members have received training through their railroads.

During the past three years, several thousand managers, supervisors and employee representatives have participated in conferences sponsored (or jointly sponsored) by FRA to provide information concerning FRA's regulatory program or to promote Operation Red Block. The most recent of these meetings, a working conference to share the field experience of the Operation Red Block prevention teams and expose nonparticipants to program concepts, was held in Fort Worth, Texas, in May of this year. At this conference the Federal Railroad Administrator once again strongly urged nonparticipating railroads and unions to join together in supporting Operation Red Block, and some additional Operation Red Block agreements have been signed since that time.

In short, the railroad industry approaches the 1990's having attempted every major strategy conceivable to control alcohol and drug use, with the exception of random testing. Despite these efforts and the progress they have brought, however, the public and railroad employees remain at risk.

Drug Abuse Prevalence

Tools of Measurement

Drug abuse prevalence is a changing reality that responds to many variables, including temporary or permanent effects of countermeasures implemented by employers or the government. The prevalence of drug abuse in any population is also difficult to measure directly due to a variety of reasons, including the following:

- Survey techniques using self and peer reporting are not necessarily well suited to determination of conduct that involves illegal acts. (FRA attempted to obtain reliable survey data on drug abuse in one railroad region, following the general model used for the 1978 alcohol survey conducted under the Railroad Employee Assistance Project. This effort was not successful, since drug users would not report their own use and co-workers often said there was a problem in the workplace while denying having seen incidents of drug use (which they would have been responsible for reporting had they been witnesses.))
- Supervisor/management estimates of drug abuse undertaken prior to institution of testing programs consistently understate prevalence rates as measured by other, more objective means.
- Testing programs relying on body fluids reflect only immediate past use (within the period necessary to reduce the concentration of drug or metabolite below the cut-off for the test) and thus understate the percent of population who may use drugs within a longer time period, such as a week, month or a year.
- For-cause testing programs generally produce positive rates higher than random or periodic testing, since drug abusers are overrepresented in events giving rise to the tests by virtue of their more frequent contribution to their occurrence.
- Reasonable suspicion testing, which is often aggregated with for-cause testing for reporting purposes, obviously produces high rates of detection because the individuals are selected based on signs and symptoms consistent with drug use.
- Scheduled testing with advance notice (e.g., periodic physical) produces positive rates much lower than actual incidence in the population, since all nondependent users and even some dependent users can abstain for the period necessary to avoid detection. Such testing of employed populations also results in apparent precipitous declines in prevalence as measured through the testing process. These declines may be partially illusory, since they may reflect increased effort by drug abusers to avoid detection by abstaining prior to the tests.
- Testing programs may not be directly comparable for a variety of reasons, including scope of substances tested, cut-offs on screening and confirmation, rigor with which collection is supervised, laboratory diligence in identifying diluted and adulterated samples, and varying rates of refusal.

Prevalence may also vary as the population changes through turnover (entry and exit) and passage of time (as some persons put aside habits learned in their youths and others develop habits, e.g., as a result of life crises or exposure to addicting substances in the course of medical treatment).

Individual Railroad Data and Industry Estimates

In the course of this rulemaking and program administration FRA has gathered a variety of statistical indicators from the railroads that verify the presence of a substance abuse problem in the industry and permit inferences to be drawn with respect to its size and significance.

A major western rail system employing 27,000 employees reports having performed over 23,000 urinalysis tests for alcohol and drugs of abuse

since 1985, some 5,000 of which were for cause, with the remainder conducted in the medical program. In 1985, medical testing yielded a positive rate of 13.7 percent, but this indicator had dropped to 2.3 percent during the first four months of 1988. For-cause testing (including of FRA post-accident) yielded 24.1 percent positives in 1985, but had declined to 8.3 percent in 1988. This railroad's statistics for non-Hours of Service employees showed similar or slightly higher rates of detection for those groups despite broad corporate policies reaching all crafts.

Another major western railroad has pursued what it characterizes as a very aggressive for-cause testing program since August of 1984. From an initial positive rate in excess of 20 percent, the railroad reported an incidence rate of about 2 percent in early 1988. Transportation department employees on this railroad tested positive at a 5.6 percent rate in 1987. Maintenance-of-way and maintenance-of-equipment personnel tested positive at a similar or slightly lower rate. However, applicants for maintenance-of-way employment tested positive at a 38.6 percent rate as late as 1986 (the last year for which data was provided).

A major eastern rail system experiences positive rates during periodic physical examinations of under 1 percent. The railroad's reasonable cause positive rate was 4 percent in 1987, but dropped to 2 percent in the first 5 months of 1988. Return-from-furlough testing, which tends to focus on younger employees, yielded an 8.4 percent positive rate in 1987 but only 3.2 percent in 1988 (6 months).

Another major western rail system that performs most of its testing in the medical context, but also requires reasonable cause testing, experienced an overall 2.8 percent positive rate in 1987, falling to 1.6 percent in the first 5 months of 1988. This railroad's reasonable cause statistics reported under 49 CFR Part 217 showed a considerably higher positive rate for drugs in for-cause testing (15 percent), but with very few tests conducted (27), some of which may have been reasonable suspicion tests.

The major rail system on which Operation Red Block had its genesis reports the following alcohol/drug positive rates for mandatory post-accident and FRA reasonable cause testing: 8.3 percent in 1986, 10.6 percent in 1987, and 9.7 percent in 1988.

A northeastern commuter authority reports an overall positive rate of 11.4 percent for alcohol and drugs in for-cause, mandatory post-accident, and return-to-work testing since 1985.

A large midwest regional railroad has been administering mandatory post-accident and reasonable cause tests to its employees since 1986. In the first six months of that year, the railroad experienced a 13 percent positive rate (combined for both types of testing), declining to 5.3 percent in the most recent six-month period.

Railroads view alcohol and drug use as a unitary problem and so generally did not break down the two categories in presenting information in this rulemaking, so certain of the data presented above included both alcohol and drugs (where urine testing programs included alcohol). FRA has noted in the past, and through review of for-cause data submitted under 49 CFR Part 217, that the ratio of drug to alcohol positives in urine testing programs is typically about four or five to one.

As reflected by testimony in this proceeding, national and system union leaders generally estimate that use of drugs or alcohol affecting performance is a problem for approximately ten percent, or just under ten percent, of railroad employees.

National Railroad Prevalence Data

FRA administers two systems that collect prevalence data for the railroad industry. The first is a system of annual reporting regarding reasonable cause tests and Rule G dispositions (49 CFR 217.13(d)). In 1986, 5.8 percent of 2,953 reasonable cause urine tests were positive for alcohol or other drugs, with the rate for drugs other than alcohol running at 4.4% percent. In 1987, 6.8% of 5,439 reasonable cause urine tests were positive for alcohol or drugs, and the rate for drugs other than alcohol was 5.5% percent. In both years, marijuana and illegal stimulants (cocaine, amphetamines) dominated the "other drug" category, but central nervous system depressants (barbiturates, benzodiazepines) and narcotics (morphine and codeine) were well represented.

FRA also centrally administers a program for analysis of blood and urine specimens collected at independent medical facilities following significant railroad accidents. The categories of events are defined in such a way that roughly two-thirds of the testing events will be caused by human factors. (The remainder are selected solely based on severity and the public need to investigate causation and may, after investigation, be determined to have been caused exclusively by track, equipment or other factors.) Although the purposes of this program focus on investigation of individual accidents and targeting of resources for remediation, data are also aggregated to reflect incidence rates among the population tested. Pertinent information from this program is displayed below:

	2/10/86-12/31/86	1987 (12 mos.)	1/1/88-6/30/88
Qualifying events	170	179	85
Employees sampled	738	770	336
Positive for alcohol (percent)	.9	.4	1.2
Positive for controlled substance (unauthorized use) (percent)	3.7	5.1	6.5

Of particular concern is the fact that 14.9 percent of commuter railroad employees tested after qualifying accidents in the past two and one-half years were positive for unauthorized use of controlled substances.

Significance

FRA remains concerned that aggregate reasonable cause and post-accident statistics remain at relatively high levels, notwithstanding material changes in certain indicators on individual railroads. The aggregate reasonable cause statistics likely reflect the commencement in 1987 of reasonable cause programs on many railroads that previously had not adopted aggressive testing strategies. As noted above, railroads that maintain testing programs at reasonable levels of effort do show significant declines in positive rates, even for short-notice testing. FRA would therefore expect the long-term trend to show declines in positive rates on a national basis.

However, the rate of positive test results in postaccident testing, an appreciable portion of which involve recent or very heavy use (based on review of blood and urine levels), continues to be alarming. Although the detection of drug use among employees involved in an accident does not invariably mean that accident was caused by drugs, it does indicate the presence of a risk factor. And the nation's railroads continue to experience accidents for which strong indications point to alcohol or drug use as a casual or contributing factor.

Accident History

When FRA published the current regulations, we stated as follows:

If we have not yet experienced a serious passenger train accident for which alcohol or drug involvement has been documented, it

must nevertheless be remembered that the potential exists.

(50 FR 31508, 31525; August 2, 1985). Despite all efforts to prevent this type of event from occurring, 16 persons were killed and 174 were injured when a Conrail movement passed an absolute restrictive signal and went through a switch into the path of a high-speed Amtrak train at Chase, Maryland, on January 4, 1987. The engineer and conductor of the Conrail engines later admitted smoking marijuana in the cab just prior to the collision. Aggregation of all costs from this accident, including property damage and settlement of wrongful death and personal injury claims, may approach $100 million. With every hope that history will not repeat itself, we note again today that for so long as a significant number of railroad employees continue their misuse of alcohol and drugs the railroads, railroad employees and the public remain exposed to an unacceptable risk. This risk includes danger to passenger operations, the possibility of release of toxic or volatile hazardous materials, and the ever-present exposure of crewmembers from collisions and high-speed derailments.

The experience of 1987, which began so tragically with the Chase, Maryland, accident, is illustrative of the human and material consequences that drug and alcohol abuse can cause. According to a Safety Study by the National Transportation Safety Board entitled "Alcohol/Drug Use and its Impact on Railroad Safety" (NTSB/SS–88/04; June 1, 1988) (hereafter NTSB Alcohol/Drug Study), the Board found alcohol or drug involvement was a probable cause of eight rail transportation accidents in 1987, including one rail transit accident. The Board said that alcohol/drug involvement was listed as a contributing factor in the case of two additional accidents, one of them a transit accident. The 1987 railroad accidents listed in the NTSB study included, in addition to the Chase, Maryland, accident—

• New York, New York, April 10: Employee fatality during switching movement; deceased tested positive for marijuana metabolite and conductor directing movement trested positive for cocaine metabolite.

• Pittsburgh, Pennsylvania, April 11: Sideswipe/derailment of freight train overspeed on curve; 22,000 residents evacuated due to hazardous material release; engineer at fault tested positive for non-authorized use of butalbital, a barbiturate widely available in prescription medications.

• New York, New York, April 27: Rear end collision of commuter trains due to motorman failing to observe signal; 17 injured; motorman tested positive for marijuana.

• North Platte, Nebraska, September 19: Hostler left locomotives unattended without brakes, causing them to run into standing train; damage $271,000; hostler positive for marijuana.

• Kemmerer, Wyoming, November 8: Head-on collision of freight trains resulting in fatality, 8 injuries and $900,000 in damage; front brakeman of train not operated in accordance with signal indications positive for cocaine.

Including the above-listed, FRA has identified 13 accidents during 1987 involving alcohol or drug positives where employees may have been impaired and contributed to the cause or severity of those accidents.

FRA continues to detect at least one positive for alcohol or drugs in an average of one out of five accidents for which testing is conducted. For 1988, several accidents still under investigation or review illustrate the potential impacts of impaired employees:

• Chester, Pennsylvania, January 29: High-speed passenger train routed onto track occupied by maintenance-of-way equipment, 19 injured; $3,380,000 in property damage; block operator fled post after accident, but his urine specimen collected three and one-half days later tested positive for marijuana metabolite, and traces of the cocaine metabolite and amphetamines.

• Dixon, Illinois, March 21: Freight trains collided head-on; 3 injuries; $195,000 in damage; dispatcher positive for alcohol (.15 percent) and one brakeman on each train tested positive for marijuana.

• Mount Vernon, New York, April 6: Rear-end collision of empty commuter trains; 1 fatality; damage $1 million; engineer of striking train positive for marijuana metabolite (trace); dispatcher positive for opiates; block operator and assistant block operator positive for butalbital; leverman positive for marijuana.

• Fairlawn, New Jersey, May 21: Head-on collision of freight trains; 1 fatality; damage $39,000; dispatcher positive for marijuana.

• Long Beach, California, June 9: Switching collision of freight trains; 4 injuries; $51,000 damage; conductor of crew under investigation was positive for marijuana.

Overall, in the period January 1, 1987, through August 15, 1988, there have been 54 qualifying accidents in which one or more employees tested positive for unauthorized use of controlled substances. Thirty-two people died in those accidents, 357 were injured, and more than $33 million in railroad property was destroyed.

In summary, FRA remains concerned that all of the necessary and quite useful measures implemented to date have not been sufficient to bring an end to the threat to rail safety posed by misuse of alcohol and drugs.

The Proposed Rule

The NPRM proposed to prohibit use by safety-sensitive railroad employees of a controlled substance at any time, except with medical authorization, and to require implementation of random drug testing programs for those employees. The preamble and proposed rule text set out a number of issues to be resolved with respect to the design and implementation of these provisions and options for disposition of employees testing positive. The NPRM also proposed to amend the penalty schedule to Part 219 and make amendments to Part 217 to collect adequate data on the random testing program.

Discussion of Comments and Conclusions

General Overview of the Major Issues

In response to the NPRM, the FRA received comments from seventy-six persons, including written submissions and oral testimony at five public hearings. June hearings were held in Chicago, Atlanta, Los Angeles and Washington and all written comments received by August 22, 1988 were considered. Comments were received from thirty-six railroads, two organizations representing railroads, ten employee organizations, thirteen individuals, nine persons or organizations with some expertise in analysis of urine for drugs of abuse, and six public interest organizations.

All commenters supported the goal of a drug-free railroad operating enviornment. In general terms, the use of random testing as a means of achieving this goal received broad support from rail operators and members of the drug and alcohol testing industry. Labor organizations, however, opposed the imposition of mandatory random drug testing.

Evidence of a problem. Railroads noted that present testing programs reveal current drug use by employees (see discussion of data culled from railroad drug testing experience to date, above). All Class I carriers expressed concern at the level of drug usage being detected, stating that such usage has a

detrimental effect on the safety of operations. A number of commenters, including Safe Travel America, pointed to the Chase, Maryland accident as evidence of the grave consequences of drug use.

Support for random testing. Rail carriers were joined in their support of random testing by a number of public interest groups, individuals, and members of the drug testing industry. These commenters are alarmed by the evidence of drug use among railroad employees and they believe that a random drug testing program is necessary to confront the problem. They believe that random testing is the most effective deterrent to drug use available. During oral testimony it was frequently stated that the interests of public safety justify the slight intrusion upon employee privacy.

Random testing as a deterrent. FRA heard from several railroads and experts who believe that random testing is justified because it provides a deterrent to on-duty and off-duty drug use. Commenters were nearly unanimous in their appraisal of the deterrent effect of random testing. Peter Bensinger of Bensinger, DuPont and Associates stated that, based upon his own considerable experience in the field, he believes that random testing is the most effective deterrent yet devised. Only the RLEA doubted the power of random testing's deterrent effect, stating that employee fear of discipline for a rule violation presents a deterrent of at least equal weight.

Opposition to random testing. Random testing was opposed by labor groups, CSX Transportation, eight inidividuals, and the Epilepsy Foundation of America. These commenters believe that random testing is an unacceptably intrusive and unnecessary method of curbing drug use by railroad employees. Random testing was opposed on constitutional grounds, and a number of alternatives were suggested. Many feared that railroads would use this new form of testing to harass union locals and employees. Others object to what they perceive to be an underlying bias—that an employee is guilty of misconduct until he can prove his innocence. The Railway Labor Executives Association (RLEA) contended that random testing would encourage drug users to switch to more dangerous drugs for which testing is not conducted.

The National Transportation Safety Board (NTSB) believed that other measures should be implemented before it is decided that random testing should be implemented. (See discussion below.)

Alternative Strategies. Labor, CSX Transportation, and the NTSB also believe that the implementation of testing is unnecessary and may undermine other efforts at controlling drug use. Several alternatives were suggested:

1. FRA should encourage carriers to establish Operation Red Block programs. These programs are supported because they instill trust between management and employees while being more effective in removing impaired employees from service. CSX Transportation submitted information which was said to indicate that their own Red Block program has helped to improve their safety record and to drastically reduce instances of Rule G violations.

2. FRA should only mandate that carriers develop their own testing programs through collective bargaining with unions. This was opposed by testing proponents because it would delay the imposition of testing and possibly require employers to administer numerous different programs for the various crafts. Safe Travel America disfavored this approach because it would prevent public input into the process. Some commenters also believed that a uniform nationwide program is superior to a piecemeal approach.

3. FRA should encourage training of supervisors in the detection of troubled employees.

4. FRA should do more to promote safety equipment such as automatic train control devices.

5. FRA should regulate carrier practices which create an environment conducive to drug and alcohol abuse. Among the factors thought to encourage abuse are long hours, long layovers and overnight stays at away from home terminals.

Labor unions and the NTSB stated that these efforts coupled with existing programs (post-accident testing, reasonable cause testing, pre-employment testing, medical testing, Rule G and employee assistance programs (EAP's)) should provide the necessary remedy for employee drug use. (NTSB's comments are more fully discussed below.)

CSX proposed that FRA support these programs and help establish acceptable levels of positive test results for the various non-selective testing methods. CSX suggested that random testing be mandated only for those carriers or regions that fail to meet the established target rate.

Constitutional Issues Regarding Random Drug Testing

Comments: The FRA received few detailed comments on the constitutionality of the proposed rule. A number of railroads, individuals and public interest groups indicated that they believe the FRA proposal to be constitutional because the public right to safety overrides an employee's less significant claim to privacy. Labor groups, CSX Transportation, and the Epilepsy Foundation of America, however, either questioned or affirmatively challenged the constitutionality of the rule.

A commenter also submitted the views of Senator Daniel Inouye (prepared for a legislative committee report), who viewed random testing of transportation employees as constitutionally defective by virtue of its impact on all employees, including the majority who do not misuse drugs. *See* Senate Rept. 100–43 at 39–42 (additional views on S. 1041).

Conclusions: Commenters in this rulemaking have not contended that a drug-free policy such as contained in section 219.102 of the proposed rule infringes protected constitutional interests, and we believe it is clear that it would not. *See New York Transit Authority v. Beazer*, 440 U.S. 568 (1979).

FRA is keenly aware of the constitutional issues posed by random drug testing. Those issues, and logically antecedent issues, are being litigated in a variety of forums already, and will likely be substantially resolved by the Supreme Court in pending litigation and cases already in the courts of appeals before the instant rule could wind its way through the judicial process. The Federal Aviation Administration addresses the constitutional issues in its preamble elsewhere in today's **Federal Register**. A very similar analysis applies to the issues in the instant rule applicable to railroad employees.

FRA has endeavored to craft the final rule in a manner ensuring that random testing programs meet objective criteria that protect against any exercise of discretion by the railroad in selecting a particular employee for testing. Urine collections will occur in private, except where carefully delineated conditions provide reason to believe that the employee may alter or substitute the specimen. The final rule carefully protects medical information necessarily developed incident to the testing process (i.e., provided by the employee at the time of sample collection or revealed through testing for controlled substances that have therapeutic uses).

Confidentiality protections for test results involving even illicit drug use will limit the perceived intrusiveness of the program from the point of view of the abuser, and non-abusers will obviously have nothing to fear. The final rule also affirms due process rights through careful control of the testing process itself, including review of test results by an expert fact-finder (the medical review officer), opportunity for the employee to make further explanations prior to any action on a laboratory report, access to underlying records and right to have the sample analyzed by another certified laboratory. Existing procedural rights with respect to employment remain unabridged (e.g., investigation, grievance and adjustment under the collective bargaining agreement and section 3 of the Railway Labor Act, 45 U.S.C. 153).

FRA has, in short, adopted the full range of protections useful to ensure fairness and confidentiality and to check abuse of discretion. The sanctions against individuals now available under amendments made by the Rail Safety Improvement Act of 1988 will further strengthen FRA's ability to enforce these important protections. Further, FRA is making the enhanced testing safeguards applicable to our existing rule.

Extent of the Drug Problem in Rail Transportation

Comments: Comments regarding the prevalence of the drug problem in rail transportation are discussed above. Virtually all commenters agreed that drug use remains at unacceptable levels and that it poses a safety risk that must be addressed. Commenters differed in the means deemed appropriate to address the problem.

Conclusions: Like the commenters, FRA remains concerned that misuse of controlled substances by railroad employees engaged in safety-sensitive duties is a significant problem that threatens the safety of railroad employees and the public for so long as it continues.

Accuracy of Drug Test Results

Comments: The FRA received comments from labor groups and individuals questioning the accuracy of drug testing. Experts testified, however, that use of GS/MS by the Coast Guard and U.S. Navy has turned up no false positives after thousands of proficiency tests. PharmChem, Inc. related that their own experience has shown that with proper confirmation techniques, drug testing is essentially errorless if chain of custody is properly maintained.

Conclusions: The accuracy of properly administered urine testing for drugs of abuse is not a matter of speculation. The scientific tools are available to make positive identification of specific compounds in human body fluids. *See,* e.g., *Urine Testing for Drugs of Abuse,* Research Monograph Series No. 73 (National Institute on Drug Abuse 1986); *GC/MS Assays for Abused Drugs in Body Fluids,* Research Monograph Series No. 32 (National Institute on Drug Abuse 1980). Commercial testing laboratories have extensive experience in the use of relevant technologies. The College of American Pathologists has for many years administered an open proficiency testing program for clinical laboratories performing drug testing. The United States armed services have conclusively demonstrated the value of blind proficiency testing as a means of ensuring reliable identification of positive specimens and documentation that no false positive tests are being reported, and two major railroads are already utilizing this technique. Finally, the Department of Health and Human Services is now administering a laboratory certification program that will identify a number of major laboratories capable of providing first-rate forensic control and documentation of testing, as well as first-rate analytical toxicology. Certification of additional laboratories is expected in the next few weeks, as the carefully-planned process of initial proficiency testing and laboratory inspection is completed.

As adapted for private sector application, the HHS Guidelines provide a workable and forensically sound approach to determination of the presence of drugs and their metabolites in urine. Care must be taken, of course, to prevent, detect and correct any error in application of the safeguards provided by the Guidelines and sound laboratory practice. FRA believes such errors, if any, will be extremely rare and readily susceptible to correction.

Coverage of Employees

Comments: Four railroads and one substance abuse expert testified in support of the current provision mandating testing only for employees covered by the Hours of Service Act. But a majority of commenters favored extending the degree of coverage to some extent. Labor, several railroads, and the NTSB all favored testing of first line supervisors. Testing of these individuals was supported because they make frequent safety critical decisions and because the testing of managers promotes employee faith in the fairness of the program.

There was also broad support, especially among carriers, for extending testing to maintenance of way employees. It was stated that these employees operate machinery over tracks while normal operations are in progress. They therefore pose as much of a threat to safety as employees who are covered by the Hours of Service Act.

To a lesser extent, extension of coverage to the following groups was supported: car inspectors, shop mechanics, railroad officers who carry firearms, and clerks who prepare paperwork for the transportation of hazardous materials.

Conclusions: FRA is persuaded that regulations for the control of alcohol and drug use should, from the point of view of ideal or optimum safety objectives, extend to all employees engaged in functions bearing directly on the safety of rail operations. Railroad policies generally reflect this point of view, as well. Given this objective, a Federal rule would extend to those actually involved in moving freight and passengers, those responsible for inspection or maintenance of rail track and structures, employees who work on rolling stock or inspect it for compliance with Federal standards, those who prepare shipping papers for hazardous materials, on-board service personnel on passenger trains, and a variety of other employees who are few in number but whose responsibilities can affect safety.

Nevertheless, to date FRA has limited the coverage of its regulations to employees directly involved in moving passengers and freight and maintaining signal systems that govern train operations, i.e., employees covered by the Hours of Service Act. FRA has maintained this distinction for a variety of reasons, including the frequency with which these employees perform safety-sensitive tasks, the devastation that they can produce by act or omission, and the demonstrable impacts that occur when any single employee is impaired by alcohol or drugs. Congressional attention to these functions through the Hours of Service Act has also established a strong precedent for focusing the alcohol/drug control program on persons performing these functions. Further, FRA has sought to focus its enforcement efforts on areas of most immediate need.

There is a growing body of opinion within the railroad industry, as expressed in the comments submitted in response to the NPRM, the additional employees, salaried and wage-earning, should be included within the coverage of measures such as the drug-free rule and random drug testing. FRA agrees

that broader coverage may be warranted, based on known safety exposure and prevalence of drug use among other railroad employees. However, FRA is not willing to effectively delegate the task of defining the classes of employees covered by use of a vague definitional formula; nor can FRA overlook the issues of degree that are particularly critical when one is considering a random testing proposal. Further, FRA is cognizant of the burdens imposed on employees and railroads by any random testing program and seeks to limit those burdens to the extent possible consistent with safety.

FRA believes that the appropriate approach to this issue is to put in place the remaining elements necessary to comprise a comprehensive alcohol/drug regulatory program for employees performing functions subject to the Hours of Service Act. Both this rulemaking and successful completion of pending litigation will be necessary to achieve this objective. The issue of broader coverage can then be considered at an appropriate later date with respect to all or a portion of the elements of the comprehensive basic program.

Drug-Free Rule

Comments: The great majority of commenters support FRA efforts to prohibit off-duty as well as on-duty use. These commenters offered several compelling reasons for proscribing off-duty use. Most significantly, a number of experts and railroads pointed to the recent scientific studies which indicate that off-duty use has a lingering effect and can cause impairment even while the user is not subject to noticeable acute effects. It is argued that this compromise of fitness is not permissible in an employee who performs safety critical functions.

Commenters offered several other reasons for a drug-free rule. Any employee found to have drugs in his system is more likely to use drugs on-duty. Two commenters also noted that drug use is infectious—a casual off-duty user may be reluctant to turn in a fellow employee who is impaired on the job. An employee who uses drugs off-duty may be distracted while on the job by concerns over how he will obtain and pay for his next supply. One carrier expressed its view that a person willing to break laws (as evidence by illicit drug use) should not be entrusted with the responsibilities of a safety sensitive position. A few commenters contended that testing for off-duty use is necessary because present testing techniques can only determine the presence of drugs, and not whether the subject is impaired.

Only a few commenters objected to use of testing technologies that necessarily discover off-duty use. The RLEA based its objection on the contention that present studies are inconclusive as to the lingering effects of drug use. The RLEA argued that an intrusion upon employee privacy should not be based upon an unproven premise. Dr. John P. Morgan and Dr. Arthur J. McBay also question the reliability of studies tending to indicate that drug use can have lingering effects. Dr. McBay takes the position, in effect, that the safety risk associated with marijuana use is not documented, particularly after the acute effects of the drug are no longer apparent to the user, and that FRA overestimated drug abuse prevalence in rail transportation. (Dr. McBay further took a skeptical approach to virtually every additional major tenet of the rulemaking, even going so far as to question whether marijuana use is a public health program. (Cf., e.g., Institute of Medicine, *Marijuana and Health* (National Academy Press 1982).)

Conclusions: The fundamental premise of this rulemaking is that public and employee safety can be adequately protected only if employees engaged in safety-sensitive functions are free from the effects of drugs used without proper medical supervision. As described in the NPRM, the effects of drugs may include after-effects, chronic effects and withdrawal effects, as well as acute drug intoxication. The great weight of the comments in response to the NPRM supported FRA's judgment that it is not reasonable to allow the public to remain at risk from the consequences of drug abuse by attempting to address the problem only when overt manifestations present themselves in an unambiguous manner in the workplace.

Certain of the labor organizations continue to refer to the employee's right to do what he pleases "on his own time." However, employee representatives expressed differing viewpoints on this issue during the rulemaking. Employees, like transportation companies and government regulators, are gradually coming to the realization that society pays a substantial price for unauthorized use of controlled substances and that it is not possible to conveniently separate drug abuse off duty from fitness on duty. This realization is dramatically evidenced by the CSX Rail agreements for reasonable cause (post-accident or casualty) and return-to-service drug urine testing. The agreements implicitly recognize that any employee bringing residues of drug use to a fitness-for-duty examination is a matter of legitimate safety concern, whether or not on-duty use or impairment can be demonstrated. The consequences of detection in this context is removal from service until successful completion of rehabilitation, and it is a consequence fully endorsed by the labor organizations in a collectively bargained agreement. A similar recognition is embodied in the recent agreement between the Brotherhood of Railroad Signalmen and the Southeastern Pennsylvania Transportation Authority.

In the final analysis FRA's judgment that safety-sensitive employees should be free of drugs and their lingering effects is not one based on a handful of scientific studies or opinions of individual experts. Scientific studies can be cited for virtually any proposition, and there are as many opinions on issues of this breadth as there are experts. FRA's judgment is informed by the collective experience of the railroad industry, drug abuse clinicians, and those who have participated in this and prior rulemakings on control of alcohol and drug use. It is not possible to detail the full extent of that experience in any reasonable number of pages, but the following considerations are illustrative:

1. FRA has noted the prominence of cocaine abusers in serious accidents where evidence of heavy use was present, but recency of use was in question. FRA has also noted the clinical data associated with cocaine use that indicates a variety of adverse after-effects which could negatively impact employee fitness.

2. Misuse of controlled substances may be of concern even where prompted by the most innocent of motivations, such as self-medication for an illness. The Pittsburgh, Pennsylvania, accident of April 11, 1987, was caused by the inattention of a locomotive engineer who failed to control the speed of his train. The NTSB determined that the engineer's use of a medication containing butalbital contributed to probable cause. The engineer had obtained the medication from a family member and used it for flu symptoms with the last dose having been taken a full 24 hours prior to the accident. The engineer likely did not realize that the plasma half-life of the drug is in excess of 24 hours, permitting successive doses to build up in the body, so that a therapeutic level of the drug remained in his blood at the time of the accident with potentially sedating effects. The accident resulted in release of hazardous materials and evacuation of 22,000 residents of nearby neighborhoods and 122 minor injuries;

and any accident of this kind has the potential for much more serious harm to the public.

3. PCP and other hallucinogens may cause personality disorders and delayed effects long after they cease to be detectable in body fluids.

4. Like those addicted to alcohol, persons addicted to certain central nervous system depressants and narcotics may suffer severe withdrawal effects including seizures if they fail to use the drug at a maintenance level.

5. Railroad medical officers and employee assistance directors participating in this rulemaking are uniform in their judgments that unauthorized use of controlled substances is a fitness concern for the employer for a variety of reasons, including the fact that the employee using drugs may be unable to judge the full extent or duration of drug effects. FRA judges these representations to be consistent with the notable commitment of these professionals to rehabilitation of those willing to accept help.

Common sense, clinical experience and the experience of the FRA and its regulated industry offer persuasive reasons for implementing a drug-free policy, as does endorsement of this rulemaking by the National Institute on Drug Abuse.

FRA has noted that this conclusion is also supported in sworn declarations of a number of experts that have been introduced in evidence in pending litigation regarding other drug testing programs. For instance, George W. Woody, M.D., Chief of the Substance Abuse Treatment Unit at the Philadelphia Veterans Administration Medical Center and Professor of Clinical Psychiatry at the University of Pennsylvania described the mental disorders produced by prolonged use of stimulants and hallucinogens, and depression caused by sedative users, both of which were observed "long after the acute effects of the drug had ended." Dr. Woody noted that a drug use pattern that appears casual and controlled may change in complexion with great rapidity:

> [A]lthough a person might initially use a substance of abuse in off-duty hours and demonstrate little or no impairment on the job, the mere fact that the person uses the drug carries a significant danger that this controlled, sporadic pattern will change to an uncontrolled, abusive pattern in which he or she is unable to check their impulses to use the drug. The result is more frequent use and a greater likelihood of becoming impaired while at work.

Declaration of George D. Woody, M.D., April 9, 1987, at 4. Dr. Marian Fischman of Johns Hopkins University School of Medicine indicated that residual "next day" effects from marijuana use appear to be supported by recent studies and may be of particular concern if the subject does not expect such effects. Dr. Fischman also noted the deleterious residual effects of chronic use of stimulants. Both Drs. Woody and Fischman defend the study of pilot performance cited in the NPRM (Yesavage et al., 1985) as soundly designed and suggestive of residual effects from marijuana. These declarations and others of a similar nature were entered in the docket of this rulemaking.

It should not require repeating that there can be no surveillance of employees during their off-duty time. The final rule neither authorizes nor requires any such surveillance. A railroad employee's off-duty time is certainly his or her own. But this rule does accomplish two objectives: First, the employee may not engage in non-authorized use of controlled substances. This merely requires that prescription medication be used as prescribed, that physicians be informed of the safety-sensitive nature of the employee's duties before prescribing the manner in which the drug may be used (sec. 219.103), and that employees not use substances that it would be unlawful to possess in any event. With respect to conduct during off-duty periods, voluntary compliance is the means of enforcement. Second, the rule provides notice that an employee who appears on the job with unauthorized controlled substances or their metabolites in the employee's system is subject to detection. This prospect, enforced through urine testing, will provide incentives for changed behavior.

Random Testing: Detection and Deterrence

Comments. Commenters generally agreed that detection of drug abuse problems by employed persons seeking to hide their habits is ordinarily not possible until very advanced stages of dependency, and even then indicators do not point unambiguously to drug abuse, as opposed to other medical or pyschological problems. As Dr. J. Michael Walsh of NIDA stated:

> Very often the signs and symptoms of impairment for abused drugs are subtle to both the user and to those around him, especially in the early stages of abuse, making it almost impossible for friends or co-workers to detect the problem * * *. By the time it is readily detectable it is far too late normally.

Dr. Walsh noted supervisors may wish to ignore the indications that they do receive, because of the great difficulty of dealing with the problem in most employment contexts.

A physician/consultant who has served as the Federal Air Surgeon put it this way:

> For illegal drugs there are significant impairments beyond the period of the "high." These may last for hours and even days. The impairments are insideous, subtle and unpredictable, making it almost impossible for friends or co-workers to detect the problem.

A large regional railroad stated that in its experience only about one of four drug positives detected has been through reasonable suspicion testing, since it is very difficult for supervisors to pick up indicators.

Conclusions. FRA found portions of its existing rule provisions on the premise that drug use—even current drug use accompanied by acute effects—is not reliably detectable in a clear majority of cases, even by supervisors who have received a reasonable amount of pertinent training. Experience under FRA's post-accident testing rule and elements of the reasonable cause testing program that do not rely upon individualized reasonable suspicion was verified and underscored the correctness of this judgment. Several thousand railroad supervisors have been trained in recognizing the signs and symptoms of drug abuse, and thousands of railroad employees continue to use drugs. Even the drug abuser who may show symptoms will be inclined to deny to himself that that is the case, thus undercutting the deterrent effect of a reasonable suspicion testing policy. Quite apart from the difficulty of detecting drug abuse through observations, it is clear that supervisory observation could not be an exclusive tool of detection in the railroad industry because of the long periods during which supervisors are not present. Even where pre-departure supervisory observation is possible, employees can simply bring drugs into the workplace and use those drugs when they have departed their initial terminal (as happened in the Chase, Maryland, accident).

Clearly, some drug use is detectable. Gross intoxication might be noticeable by virtually any supervisor (though the supervisor would need to know what action to take); supervisors trained in signs and symptoms will be capable of making reasonable suspicion determinations in additional cases; and advanced dependency is often discernible through supervisory alertness or careful personnel practices. However, it is a sad fact that the

concerted efforts of railroad companies and others to employ these important tools have shown their limitations. This conclusion is amply supported by testimony in this proceeding and in the proceeding for review of the current alcohol/drug rule (52 FR 2118; January 20, 1987).

FRA has also noted the consistency of this judgment with expert testimony by witnesses in district court litigation regarding similar testing programs. For instance Robert L. DuPont, M.D., explained, in a detailed review of diagnostic criteria for marijuana and cocaine use, why those criteria are either not subject to observation by a supervisor or are non-specific (i.e., occur as symptoms of allergies or illnesses) and thus easily explained away by the drug user:

> [W]hat is primarily affected are the higher brain functions of judgment, decision making, reaction time, and other abilities needed to perform work safely. Motivation—the process of making a commitment to achieving a goal—is often profoundly affected by [the type of intoxication caused by] marijuana or stimulants such as cocaine. The problem is often particularly severe with a heavy or frequent user.

Declaration of Robert L. DuPont, Jr., June 10, 1987, at 2. Dr. Sidney Cohen of the University of California at Los Angeles also affirmed that traditional diagnostic criteria are not readily susceptible to reliable application by supervisors. (These declarations were entered in the docket of this rulemaking.)

The difficulty involved in detecting drug use is vividly illustrated by the experience of the U.S. Navy. Prior to incidents that resulted in disclosure of a major drug problem, Naval officers judged drug abuse to be a problem capable of being controlled through careful monitoring of performance. But drug testing instituted in 1981 showed a positive rate of 48 percent for enlisted personnel under the age of 25. Random testing brought the positive rate for Navy personnel down to the low single-digit range. *See*, e.g., Robert E. Willette, Ph.D., in *Urine Testing for Drugs of Abuse*, Research Monograph No. 73, at 6 (National Institute on Drug Abuse, 1986).

Employee representatives contend that other workers know who uses drugs, and after four years of concerted effort prevention teams are doing important work to address those who are known to use on the job. However, as the Union Pacific Railroad, whose employees pioneered Operation Red Block, has noted, voluntary action alone is not enough. It is not enough for at least two reasons, and it is not possible to say with mathematical certainty which of these factors preponderates:

First, Operation Red Block has not yet been extended to all railroads, nor have all union leaders of all crafts accepted the program on any railroad. Indeed, on a national basis coverage remains spotty, with only about half of railroad employees touched in any way by the program. "Holdouts" include both railroads and rail unions. This is a program founded on mutual trust and a keen perception of self-interest, as well as a healthy concern for the fellow employee. Clearly, these are conditions that cannot be mandated by any statute or regulation.

Second, even where Operation Red Block is in place it cannot succeed by itself. Where tolerance of substance abuse does not exist, some users will stop, but others will take special care to conceal their use, thereby denying co-workers the leverage necessary to bring about a change in behavior or get the abuser into treatment. In some cases, co-workers may even be unaware of the problem until they witness an unsafe act in the workplace. Further, some drug users simply will not respond in a positive way to expressions of concern from co-workers.

FRA continues to detect unauthorized use of drugs in mandatory post-accident tests on railroads that have active Operation Red Block programs, as well as those that do not. The major western rail system on which Operation Red Block got its start stressed in its testimony in this proceeding its dissatisfaction with a continuing reasonable cause positive rate of over 9 percent. The major eastern rail system that signed the first system-wide testing agreements with its organizations in August of 1987 has 2 post-accident alcohol/drug positives in the 12 months prior to the agreements and 4 positives (all for illicit drugs) in the subsequent 12 months.

It should be no surprise that Operation Red Block cannot be a complete answer to the problem, since different people respond to different stimuli. Some will respond to the carrot, some to the stick, some to peer concern and others only to a strong deterrent. This point is best illustrated by one Operation Red Block railroad's call for random testing and institution by another of a testing agreement.

Random Testing and Voluntary Programs

Comments. CSX and employee representatives also expressed the belief that the imposition of mandatory random testing would undermine trust and cooperation between railway labor and management. This trust is held to be critical to the success of EAP's and Operation Red Block. Thus, it was feared that random testing would undermine the success of these programs. Labor also feared that unless these preventive programs are mandated, carriers will tend to rely on random testing to weed out drug use instead of investing in prevention-oriented programs. Employee representatives postulated a wide range of negative impacts on voluntary programs from institution of random testing.

Other commenters, however, contend that random testing would more likely increase the importance of EAP's and Red Block. First, the fear of detection would drive many users to seek assistance. Second, with the stakes raised, there is no reason to believe that the commitment to these programs from counselors, unions or employees would decrease. Finally, the resulting increase in rehabiliation would give these programs an even more important role in combatting drug use. Two carriers indicated that voluntary admissions to EAP's on their lines increased after testing programs were implemented. Further, all operators who addressed the question stated that the implementation of random testing would not diminish their commitment to or financial support of preventive programs.

Conclusions. There is no doubt that implementation of regulatory options subtly influences a variety of initiatives in the private sector. FRA withheld regulatory action on the issue of alcohol and drugs for over a decade in order to promote and provide the opportunity for the development of non-regulatory solutions. During this period, employee assistance programs became firmly established and contributed to the well-being of thousands of railroad employees, the the REAP Report showed that, with respect to alcohol abuse, at least, much remained to be done (Mannello & Seaman, University Research Corp., 1979). FRA began its search for a sound regulatory design in 1983, and in the same year the first bypass agreement was signed (protecting Rule G violators who are reported by co-workers). Operation Red Block was implemented on portions of two railroads in 1984, the same year FRA proposed the most comprehensive testing program for employees of a regulated industry that had ever been suggested as of that time. FRA implemented its final rule in early 1986 despite a major law suit by the rail unions, and by 1987 employees of CSX had signed an agreement approving testing very similar to that contained in the FRA rule. This history illustrates

that the "threat" of regulation can stimulate interest in voluntary action, but it does not establish that regulatory action stifles voluntary action. Indeed, the railroad industry today is involved in more aggressive private sector programs to address alcohol and drug use than at any previous time in its history.

One can speculate that even more might have been done had regulation been withheld, but FRA doubts that would have been the case. Alcohol and drug testing programs in aid of Federal prohibitions have brought to light the extent of this problem. They have reminded employees that they are the principal victims of job-related substance abuse. They have focused public attention and encouraged responsive measures by management and labor alike.

Similarly, one can speculate that requiring random testing may slow the future spread of Operation Red Block and similar initiatives by dampening the interest of the institutional players (e.g., railroads and employee organizations). It can be argued that resources will be diverted, even though the railroads uniformly testified that this would not occur. It can be argued that employee organizations will lose interest, even though they steadfastly denied that such would be the case. FRA finds none of this broad speculation useful for decisional purposes, because it is founded neither in history nor clear logic. Discussion among the parties at the hearings in this proceeding discounted such effects.

Employee spokesmen also raised the question as to whether co-workers involved in peer prevention activities (and others who might have been induced to participate in the future) may no longer view their role as necessary or appropriate. Some prevention committee members, for instance, may take the point of view that "someone else" is now responsible. Others may view random testing as so personally objectionable as to drive a wedge between them and any effort to address the substance abuse problem. FRA understands that these arguments are offered in good faith and cannot discount the possibility that some of the predicted effects may come to pass with respect to certain employees. Statutory jurisdiction over railroad safety confers no crystal balls through which the future may be foreseen, particularly when the motivations of complex human beings are in question. However, FRA views the risk of harm to voluntary programs as a minimal risk that must be taken. This judgment is reached with the following points in mind:

- Prior predictions of harm from regulatory action have proven unfounded.
- Random testing may actually strengthen voluntary efforts by heightening the risk of detection and thus the susceptibility of the drug user to persuasion by concerned co-worker (while also heightening the concern of the co-worker who wants to reach his fellow employee before that employee is detected through random testing).
- Where Operation Red Block is not in place because of employee disinterest and management decides to sanction positive results with severe discipline, random testing will provide renewed incentives for employees to bargain for Red Block agreements and, in the interim, to utilize the co-worker report provision of the existing rule.
- Operation Red Block and other voluntary efforts will always be important to safeguard continued abstinence among those who have been detected through various means and have been provided an opportunity for treatment and return-to-service. Concerned co-workers who have once affirmed their role in prevention will not shrink from the responsibility to assist the recovering employee.

In short, FRA is persuaded that the existing strong regulatory program has strengthened voluntary action and that there is nothing qualitative different about random drug testing that should necessarily result in a different outcome. Much depends, of course, on the approach taken by opinion leaders among railroad employees. To a certain extent, they have the power to make their worst predictions come true; at the same time, they recognize it is not in the interest of those they serve for this to occur. FRA believes that employee representatives will continue to recognize the value of voluntary action and will communicate that need down through the ranks.

Random Testing: Structure of Testing Programs

Comments: Comments uniformly supported the exclusion of subjective factors from the random selection process. However, the railroads requested two types of flexibility. First, they wished to utilize a multi-stage selection process in which geographic units would first be selected on a random basis for any testing period (e.g., day, week or month). Then employees would be selected randomly within the geographic units. Second, certain of the railroads urged FRA to permit carriers to test different portions of the workforce at different selection rates, so long as the actual selection within each category is purely random. Geographic variations in drug use prevalence were cited in favor of this distinction, and there was some interest expressed in targeting a higher level of effort by craft, as well. These alternatives are further described below.

The Association of American Railroads (AAR) proposed that the FRA allow railroads flexibility in setting up random testing programs. As proposed in the NPRM, carriers would submit their proposals to the FRA for approval. FRA would then review the plan to be certain that the carrier program does not provide the railroad with an opportunity to discriminate or to harass employees or union locals. The AAR further believed that all testing programs should guarantee that each covered employee have a known and non-zero chance of selection on any given day, but that each employee need not have the exact same chance of selection.

As noted above, support for the multi-stage selection process was particularly strong. A carrier would divide its pool of employees into geographic clusters. On a given day of testing a number of these geographic clusters would be randomly selected. Then, employees within each selected cluster would be selected for testing at random. The carrier would then only have to conduct testing at few locations, rather than having to track down employees all across an extensive operating system. NIDA agreed that this method is cost efficient, pointing to the unit sweeps conducted by the military services as an example. (The Department of Transportation uses a similar method to administer its own random drug testing program.)

Some carriers also requested permission to use experience-rating techniques to target segments of the workforce where drug use is more prevalent. These segments would then be tested at a higher level than others. Targeting on the basis of location, age and craft was suggested. Two commuter lines and organized labor oppose group targeting, however. Labor expressed concern that geographic targeting could be used to harass an active union local. Employee representatives stated that the mere threat of increased testing could also have a chilling effect on local union activities. Proponents of targeting, however, stated that there would be no chance of harassment because all testing plans would have to be approved by the FRA, and all targeting should be based upon objective statistics which indicate that a particular segment is more prone to drug use.

One commenter stated that regardless of whether a multi-stage or experience rating system is employed, the FRA should do the selection for the carrier in order to assure fairness.

Additional flexibility was requested by the Norfolk Southern, which offered testimony regarding the permissible period of time during which an employer may test the employee following selection. Norfolk Southern recommends that a carrier be permitted to administer the test at its convenience up to six months after the employee has been selected for random testing.

Most carriers also indicated an unwillingness to call employees to report for solely for testing (even if rested and available), in part out of fear that drug users among those selected would evade testing by marking off sick or by other means. Many railroads suggested that they be permitted to test an empoyee upon reporting for duty, while on duty, and at the end of a run before marking off duty. While one labor organization is not opposed to testing employees who are merely subject to call, three carrier representatives opposed the use of the extra board for the purpose of calling an employee in to submit to a drug test. They objected to the burdens of having to tract the employee down and then pay the employee for the time spent administering the test.

Few comments were received regarding whether to limit the chance that an employee will be tested more than once in a testing cycle. The AAR and a major freight railroad stated that an employee should remain in the pool, subject to testing at the same rate as every other employee. One other railroad believed that the probability of reselection should remain greater than zero, but less than that of unselected employees. Such a scheme would help to ensure that a greater number of employees is tested during each cycle, while the threat of testing remains palpable as regarding each individual.

The RLEA urged the FRA to recognize that time taken to provide a sample is not off-duty time. FRA also received comments from four carriers recommending that time lost in order to give a drug test should be considered neither time on-duty nor time-off duty for purposes of the Hours of Service Act. A number of commenters urged FRA to permit on-property collection of samples (*i.e.*, collection at railroad terminals and other railroad facilities). On-property collection would limit the amount of time an employee would be out of service for testing, and could help carriers avoid violations of the Hours of Service Act. Railroads stated that large amounts of time can be consumed not only in transporting an employee to the remote facility but in waiting for services after arriving at the facility. Limiting the loss of an employee's services would also lower the cost of the program to the carrier. Additionally, it was argued that the chain of custody may be more secure if testing is done at a carrier facility—i.e., there is a greater chance of mislabeling at a busy emergency room or medical facility where a number of technicians and clerks may handle the sample. In response to expressed concerns that on-site collection could afford managers an opportunity to harass employees, it was pointed out that all on-site procedures and facilities would have to meet the requirements of the HHS guidelines.

Conclusions: It is critical that the railroads have ample flexibility to implement random testing programs on a basis that will be cost effective to the railroad and will not cause undue inconvenience to employees. Programs should be structred to a maximum extent so that testing can be accomplished within normal duty hours, within legislated Hours of Service Act restrictions, and without delaying the transportation of passengers and freight that is the railroad's business purpose.

Flexibility in time. The railroads must first have flexibility to test at any time during the normal work day, including any period of allowed overtime. In this regard, it will be noted that the normal work day for through freight service may be any 12-hour portion of any 24-hour period. Time spent in deadheading to and from work assignments may further constrain availability. Similarly, yard service and dispatching "tricks" may be broken into three 8- or 9-hour periods that run around the clock. It will be important for railroads to randomly test employees working at all hours of the day and night. Computer railroads will have different requirements, as they endeavor to ensure crew availability for rush hour periods in the morning and afternoon.

The rule allows railroads to develop and submit plans providing for testing at any time an employee is lawfully on duty. Two restrictions apply. First, an employee may not be assigned for testing without first reporting for duty. Only on-duty employees may receive notice that testing is required. This restriction is consistent with concerns raised by employees that their off-duty periods could be disturbed and by concerns of the railroads that attempting to "call" employees for testing would risk loss of control as employees using drugs marked off sick or evaded testing through other strategies. Obviously, the final rule does not affect the determination of when employees are subject to the requirement that they report for duty. That matter is controlled by the collective bargaining agreements and the Railway Labor Act.

The second restriction on time availability is the Hours of Service Act. FRA does not enjoy the authority to repeal or modify requirements of that Act. FRA noted the request of several railroads that time spent in testing and incident to transportation be considered "limbo time" (neither on-duty nor off-duty). Legislation passed by the House of Representatives would have made possible such treatment, but FRA is not presently at liberty to take this action administratively. As a consequence, the railroads should plan their random testing programs on the assumption that time devoted to random testing (like other forms of testing) is time on duty commingled with covered service for purposes of the statutory maximums. This would not preclude the railroad's asserting a section 5(d) Hours of Service Act defense where testing was not completed within prescribed duty limits. However, to succeed with such a defense the railroad would have to prove that the delay was due to an unforeseeable combination of events, and that it used due diligence to minimize the excess service. Given the preplanned nature of random testing, such a showing is far less likely to be made in that context than in the post-accident or reasonable cause context.

Flexibility in space. Reasonable flexibility in determining the site of collection wil be crucial to the success of the program. If employees' personal schedules and train operations are not to be routinely disrupted, railroads will have to have the ability to collect samples at sites nearby to major terminals, crew change points, and other work sites. For this reason, FRA is authorizing collection at any suitable site, including a location on railroad property. Railroads are also free to utilize independent medical facilities and mobile units. For the time being, the requirement that reasonable cause collections be conducted at independent medical facilities will continue. FRA will review this issue along with a number of others in a future rulemaking.

For random testing, collection personnel may include any individual who is qualified by virtue of training or professional/technical experience. Non-medical collectors would be required to have received training in compliance with the Procedures for Transportation Workplace Drug Testing Programs (further described below), and the

training program shall be included in the random testing program submitted for approval. FRA will make available a model training program setting forth the elements required to be included. Medical professionals and technicians will be deemed qualified to perform collections if, at a minimum, they are provided appropriate instructions for collection and certify in each case that they have conducted the collection as required in the instructions.

FRA is keenly aware that collection on the property by employees or contractors of the railroad may raise issues of neutrality and perceived integrity in the minds of some railroad employees. However, properly conducted collection will, by itself, provide reassurance. The testing procedures provide that specimen bottles will be filled, identified and secured with a tamper-proof seal in the presence of the employee. The employee then affirms the identity of the specimen by initialling the label/seal. In reporting any test result, the laboratory must certify that the seal was intact upon receipt. Recognizing the sensitivity involved in collection of the sample, FRA has also provided that the collector may not be a person in the chain of command above the employee or a co-worker. Railroads are encouraged to take additional actions to provide reassurance to employees that the testing process is being conducted in a fair and impartial manner, and, of course, to include these steps in their proposed programs submitted to FRA for approval. Moreover, the DOT Procedures for testing (more fully described below prohibit observed collection except under very limited circumstances, and railroad supervision would not be permitted to participate in such observation.

Random Testing Programs: Level of Effort

Comments: FRA received varying recommendations concerning the optimum level of testing. Commenters generally appeared to agree that no consistent incidence of unauthorized drug use was acceptable at any statistical level, but there was wide variance of opinion with respect to the rate of testing that would be appropriate given current drug prevalence information. Several commenters acknowledged that there is no evidence from civilian experience indicating what percentage of a population should annually be tested under a random testing program.

However, it was also noted that the testing rates of certain of the military services (125 percent to 240 percent) would not be appropriate for the railroad employee population, which is older and more stable (lower turnover) and has a lower drug use incidence rate than that experienced by the military services when their programs began. Some suggested that the FRA only establish minimum and maximum permissible levels, allowing the carrier to choose a level meeting its own needs and philosophy.

The AAR and a number of railroads stated that an adequate deterrent would be posed if fifteen percent of the workforce is subjected to short notice testing during the course of a year. Within that fifteen percent at least five percent would have to based on random selection. Other railroads generally recommended testing levels between ten and thirty-one percent. The only union to address the subject suggested a target rate of twelve and one-half percent.

A significant portion of commenters suggested somewhat higher levels, however. A major commuter authority considered fifty percent to be optimum, while the NTSB, Safe Travel America, a commuter authority and a major freight railroad believed that a level as high as 125 percent may be needed to effect a credible deterrent (though not all would mandate this level as minimum).

Another commenter suggested that a rate under 100 percent would create a perception of "the finite possibility of detection" and thus should be sufficient to deter, but indicated that it would be wise to vary the rate on an annual basis to determine the yield of various rates. While strongly supporting random testing, the AAR stated:

> Setting an unrealistically high level of effort as a mandatory minimum, with no scientific investigation of the relationship between the sampling fraction and the deterrent effect, would impose a burden the railroads would be forced to live with for a considerable length of time. Once requirements such as this are written into federal regulations it is extremely difficult and time consuming to change them.

Finally, a major freight railroad states:

> [W]e wish to emphasize * * * that the deterrence value of any random testing program, even one requiring a high level of effort, e.g., testing 100 percent of employees annually, would decline dramatically if employees who test positive for illegal drugs or alcohol were assured freedom from discipline as little as one time only.

Conclusions: Random drug testing will have two complementary objectives; detection and deterrence. Reliable detection is critical not only to removing the addicted substance abuser from the workplace but also to establishing an atmosphere of deterrence. However, random testing will work in concert with other means of detection and deterrence and thus should be viewed as one element in an overall program of countermeasures.

Commenters agreed that current drug testing programs that involve short-notice testing, such as post-accident testing and reasonable cause testing, do produce an important deterrent effect and have obviously led to the identification of many employees with drug abuse problems. Medically-based testing programs also provide a means of detection, although the advance notice customarily associated with this form of testing makes its direct deterrent value minimal (since drug users, knowing they will be tested at a scheduled appointment, may be able to abstain for the short period necessary to avoid detection).

The overall target level of deterrent effect that would be most cost effective and reasonable from the point of view of burdens on employees and transportation is not possible to determine at the outset of a random testing program. However, the record of this rulemaking has provided FRA with a sense of confidence that a moderate but substantial level of testing at the outset should address the drug deterrence need on most railroads while avoiding unnecessary burdens. As a consequence, the final rule will require that the railroads actually collect and analyze specimens from a number of randomly selected employees sufficient to equal in number 50 percent of the relevant employee population. The rule provides flexibility to allow for gradual start-up of the program.

In a supplemental notice, FRA will propose procedures to allow eventual adjustment of the testing level, by railroad, as a uniform experience base is established and differing needs are documented. That notice will also propose to allow the railroads to credit other short-notice testing (reasonable cause and post-accident) to the required level of effort for random testing. FRA believes that the railroad industry will remain unique with respect to the significant number of for-cause tests conducted. FRA is further concerned that failure to allow for this credit would discourage railroads from continuing aggressive reasonable cause testing programs, which inquire into fitness following unsafe practices. However, these are issues developed during the current rulemaking that deserve prompt but separate consideration to complete the program design.

Drugs Tested

Comments: The HHS Guidelines require Federal agencies to test for marijuana and cocaine and authorize random testing for opiates, amphetamines, and PCP. Agencies may test for other Schedule I and II drugs in post-accident, unsafe practice and reasonable suspicion situations, if HHS has approved the analytical methods. On the face of the Guidelines, it appears that HHS will also accept agency applications to add additional Schedule I/II drugs to the five specified for random testing. The NPRM proposed to require random testing for the five HHS drugs and to authorize testing for additional substances under certain circumstances.

Comments were received requesting that the FRA allow carriers to test for drugs other than the five specified by the HHS guidelines. It was argued that there are many drugs not covered by the guidelines whose use will have a detrimental effect on the safety of rail operations. Only one drug testing expert testified that extending the list of tested drugs is not necessary at this time, the present five being by far the most prevalent. There was strong support among other experts and a number of carriers for the addition of barbiturates and benzodiazepines, in particular. It was stated that the use of these drugs is sufficiently prevalent to cause concern, and that a shift toward use of these drugs can be anticipated if they are not tested for.

An employee assistance manager of a regional railroad stated:

> [Barbiturates and benzodiazepines] have addictive properties and are widely available from a variety of sources. They affect reaction times and attention spans detrimentally, and pose as real a threat as other substances when used in an operating environment.

Several railroad medical officers participating in the proceeding were also strongly supportive of testing for central nervous system depressants. The NTSB supported testing for these drugs and lower-scheduled narcotics, as well.

An official of the National Institute on Drug Abuse testified that post-accident testing should continue for the broadest range of drugs feasible, regardless of any limitations that might be placed on more routine testing.

The Epilepsy Foundation opposed testing for barbiturates, since it could disclose to employers therapeutic drug use among epileptics whose seizure disorders are fully controlled, potentially leading to job discrimination.

Conclusions: The current alcohol/drug rule authorizes reasonable cause testing for any controlled substance, regardless of schedule or treatment for criminal law purposes. In the prior rulemaking, the American Medical Association and other commenters had agreed that the controlled substance list adequately defines those compounds of greatest concern with respect to the fitness of employees responsible for safe movement of transportation vehicles. Railroads are presently required to conduct pre-employment testing for drugs other than those mandated for random testing by this final rule.

FRA believes that the random testing rule, and testing procedures applicable to pre-employment and reasonable cause testing, must be sufficiently flexible to address known substance abuse problems and to address changing substance abuse patterns. FRA is already aware that abuse of barbiturates is a small but significant problem on the railroads. There is every reason to believe that misuse of benzodiazepines (sedative-hypnotics) may also be a problem (*see*, e.g., *Data from the Drug Abuse Warning Network*, Series G, Number 21 at 70 (National Institute on Drug Abuse, Statistical Series, July–December 1987)), though drug testing technology is struggling to keep up with detection requirements for low-dosage tranquilizers that have recently come to dominate the market. Drugs that impair vigilance are a particular problem on a railroad, since employees are required to maintain alertness at all hours of the day and night under circumstances sometimes involving minimal external stimuli.

Random testing itself has the potential to alter the mix of substance abuse to some extent, as some abusers elect to use compounds other than those included in random testing. New drugs will be introduced into licit and illicit markets that may become new drugs of choice for some railroad employees. It is crucial that the testing system be sufficiently flexible to permit detection of additional drugs without the additional delays involved in rulemaking.

Although experience under the current rule has not revealed any analytical deficiencies among the laboratories currently providing services to the railroads, FRA nevertheless agrees that more highly structured and intensive quality control measures can provide an important measure of reassurance to employees while also verifying that true positives are reliably identified and confirmed. The HHS laboratory certification program provides a logical framework for this effort. However, HHS approval of testing for other drugs will not be available to private sector employers (who are simply not within the scope of the Guidelines).

With respect to testing for barbiturates, FRA is not persuaded that railroad employers would discriminate against persons with epileptic conditions based on barbiturate use detected in testing authorized under this final rule. The Epilepsy Foundation cited no instances of job discrimination by rail employers, who already test for barbiturates in their medical programs and reasonable cause testing programs, as well as under FRA's mandate for pre-employment drug screens. Railroad medical review officers would, of course, maintain in confidentiality any information concerning documented prescription use of these drugs.

Therefore, FRA will propose in a supplemental notice a revised procedure under which railroads may request approval for testing of other controlled substances, with appropriate safeguards to ensure the quality of laboratory analysis.

HHS Guidelines and Testing Safeguards

Comments: Commenters expressed widespread approval of the HHS Guidelines as an adequate means of assuring integrity in the administration of random testing programs. Labor organizations tended to accept the Guidelines in their entirety, while a few railroads proposed some minor changes.

The Equal Employment Advisory Council (EEAC) recommends that the FRA allow carriers the option of testing under the HHS Guidelines or under a plan of their own which is at least as effective in protecting employees from inaccurate results.

Four commenters believe that the HHS Guideline threshold level of 100 nanograms per milliliter (ng/ml) for marijuana should be lowered. They stated that 100 ng/ml is far higher than the level one might reasonably expect to find in a passive smoker. It was argued that maintaining a high level would only serve to lower the detection rate for casual users of marijuana. Levels in the 10 to 50 ng/ml range were recommended. PharmChem, Inc., however, stated that the 100 ng/ml threshold is adequate to protect passive smokers while assuring that very few actual users escape detection.

Dr. Arthur J. McBay suggested that the FRA go a step beyond the Guidelines and require specimen splitting. Dr. McBay suggested that one portion be sent forward to the laboratory for testing and the other be retained in frozen storage. In the case of a contested positive, the retained portion could be divided, with one part being made

available to the employer and the other to the employee for retesting. This procedure was said to address "chain of custody, mislabelling, specimen switching, contamination, carryover, instrumental, technician and reporting errors." Amtrak indicated that it uses a similar system for its corporate testing program.

All commenters agreed that GC/MS methods are highly accurate. One commenter, however, stated that GC/MS should not be mandated because it is expensive, and that the GC/MS requirement should be changed if a more accurate form of testing becomes available. Dr. Arthur J. McBay stated that the rule should specify that full mass spectra analysis is required.

The Syva Co., fearing that the HHS may be slow in certifying laboratories, suggested that FRA recognize state certification of labs.

Two carriers and three members of the drug testing industry urged FRA to allow screening of urine samples at the testing location. All samples which initially tested positive would then be sent to a competent lab for confirmation. This procedure would allow operators to immediately remove from service those employees who have tested positive in the initial screen. Those whose positive results are not confirmed would be reinstated with back pay. Lab costs would be lowered since only samples with an initial positive would be sent to testing laboratories. Additionally, it was argued, most employees would be spared the fear and uncertainty which was said to accompany the wait for lab results. Proponents of on-site screening acknowledged that the initial screen is not as accurate as a GC/MS confirmation. However, they contended that false positives would actually inflict harm only in a minute number of cases, since not more than 5 percent of those testing positive (a minority in itself) would have the outcome reversed on confirmation.

All commenters addressing the subject believed that there are sufficient qualified testing facilities nationwide to handle the increase in testing which would result from implementation of the FRA rule. NIDA indicated that its certification program is reviewing 100 laboratories, one of which could handle all Federal employee specimens, with more than ample capacity in remaining laboratories to competently analyze additional samples from transportation operators.

Conclusions: The HHS Guidelines offer state-of-the-art procedures for collection of specimens, chain-of-custody, laboratory analysis and review and handling of test results. The Guidelines draw on extensive experience in the perfection and validation of military drug testing programs and were adopted for the Federal workplace program after notice and opportunity for comment. FRA agrees that the Guidelines should set the standard for urine drug testing in transportation. However, based on comments received and experience under the current rule, it is clear that the Guidelines require modest modification to fit the demands of a geographically dispersed transportation industry and non-Federal workplaces.

Proposals to loosen the Guidelines' requirements. Various parties found the Guidelines excessively burdensome or inflexible in some respect affecting their interests. FRA has carefully considered each of these suggestions and responds to the more substantive ones in the discussion which follows.

FRA respectfully disagrees with those commenters who would modify the Guidelines to permit on-site screening of urine samples. FRA recognizes the obvious advantages provided by this method, which have been intelligently advanced by several commenters, including two major railroads that use this technique in their present company plans. However, FRA agrees with the rationale expressed in the preamble to the Guidelines for requiring "same-site" screening and confirmation (53 FR 11970, 11972; April 11, 1988); and FRA disfavors on-site screening for the following additional reasons:

1. There is no effective way to quality-control, on-site screening to ensure positives are being detected at the prescribed cut-off. "Blind" proficiency testing samples would be readily identified in such a setting.

2. "New" technologies advocated by vendors for on-site screening have inherent limitations. One such system, for instance, is cross-reactive for four different drugs to a 300 ng/ml cut-off. Apart from yielding some unconfirmed positives, the system would apparently be largely ineffective for PCP, for which the Guidelines set a 25 ng/ml detection limit, while detecting amphetamines below the uniform HHS level. Data submitted by this vendor was limited to two reviews of a single set of tests that covered only two drugs based on tests under laboratory conditions. Although this system may have many very valuable applications, FRA is not prepared to structure a national program around a proprietary product still undergoing refinement.

3. Based on experience with its post-accident testing program, which has utilized the two principal immunoassay systems as well as other screening techniques, FRA believes that a small but not insignificant rate of false or unconfirmed positives will continue to occur in screening tests regardless of whether analysis is performed on site or at a laboratory. Although there is merit in providing immediate feedback to employees who screen negative, there is also a hazard that in a locally administered system the person with a presumptive positive will be singled out. Certainly any system that held the individual out of service would do so, and advocates of on-site screening contend that the ability to remove the presumed drug user from the workplace is a major advantage of this approach. With no disrespect intended to those railroads and others advocating on-site screening, FRA is not willing to incur the threat to the reputations and peace of mind of the great majority of employees who do not use drugs that such an approach would entail. Despite education efforts by FRA, the railroads and the labor organizations, the technical aspects of drug testing are still poorly understood by many railroad officers and employees. The risk that a presumptive positive could be viewed as a badge of dishonor is simply too great to entertain in a program mandated by Federal regulation. Random testing will produce the desired safety impacts if it deters use among non-dependent users, increases incentives for early referral among dependent users, and gradually, over a period of months or years, supplements other means of identifying those who persist in their abuse. Early removal of a single employee identified as presumptively positive is not, therefore, as critical to the accident prevention program as suggested by some of the commenters.

FRA also disagrees with a railroad that blind proficiency testing requirements of Guidelines should not be extended to the rail random testing program. Blind proficiency testing is one of the critical means of ensuring that laboratories are delivering high quality services. Blind proficiency testing is also critical to employee acceptance, as evidenced by the strong employee support for the CSX testing agreements, which embody this safeguard. FRA includes both open and blind proficiency testing in its quality control program for mandatory post-accident testing (which involves both blood and urine specimens) and believes that there is no impediment from the point of view of feasibility to including this element in the random testing program.

FRA disagrees with the suggestion that it would be sufficient for the railroads to utilize certified laboratories,

since those laboratories will be routinely proficiency tested by Federal agencies. Some HHS-certified labs may never seek or win contracts to test Federal employee specimens and thus may never be subject to blind testing. While others will have such contracts, this is no better indication of capability than actual performance. Given the large volumes of railroad employee samples this program will generate, it is important to know that true positives are being detected and to document that negatives are being so reported.

Blind proficiency testing will involve some cost and logistical preparation, but any large employer should be capable of obtaining and utilizing this service from an expert contractor. FRA is persuaded that smaller railroads may find it costly on a per unit and overhead basis to participate in blind proficiency testing. Thus, under the Procedures for Transportation Workplace Drug Testing Programs (further described elsewhere in today's **Federal Register**), the blind testing requirement is limited to employers submitting 1,000 or more samples per year for analysis. Smaller employers are not required to submit blind samples if they are utilizing a laboratory that is subject to blind testing by a Federal agency or another transportation employer.

Cut-offs. The HHS Guidelines provide uniform administrative detection limits or cut-offs for each of the 5 drug groups for which testing is authorized. FRA appreciates the concerns of those commenters who believe a 100 ng/ml screening cut-off for marijuana metabolites is excessively high. However, FRA believes that this cut-off will permit identification of the great majority of regular or recent marijuana users, since the available assays detect "total cannabinoids", rather than being specific to the target metabolite (normally the 9-carboxy acid of THC). Data from FRA post-accident testing suggests that most confirmed positives at a 20 ng/ml level for confirmation screen over 100 ng/ml (for total metabolites). (FRA's post-accident protocol currently detects at 20 ng/ml on both screening and confirmation in order to identify the casual user who may have used just prior to an accident and whose specimen is collected early in the process of metabolism and elimination.) Further, the high cut-off virtually eliminates any possibility of a positive result from (claimed) passive inhalation.

Confirmation method. FRA disagrees with one commenter who would allow methods of confirmation other than gas chromatography/mass spectrometry. The commenter is correct in indicating that scientific advances may allow for better analytical methods of equal or greater specificity, but FRA believes that currently requiring the best available method on the face of the rule (rather than by implication, as with the current regulation) will provide reassurance to employees and avoid dispute and confusion. If better methods are validated and are available at reasonable cost, FRA can revise the rule to recognize the scientific or technological advance.

FRA likewise does not agree that full spectrum GC/MS analysis should be specified by the rule, since sophisticated single and multiple-ion protocols are available, most utilizing a deuterated internal standard, that are specific for the target compounds while offering good sensitivity and excellent quantitation at the cut-off. Expert inspection teams are reviewing each laboratory's GC/MS method to ensure specificity, accuracy and reliability for the 5 drug groups, and similar reviews would be required before additional drugs are added.

Laboratory certification. FRA does not agree with the comment that state licensure of laboratories should be recognized in the rule, nor is FRA prepared to accept accreditation by voluntary bodies absent HHS recognition. Laboratories conducting testing under FRA's existing rule typically hold one or more Federal or state licenses for various purposes. However, the HHS certification program is the first highly rigorous certification program specifically targeted at urine drug testing at the Federal level. The HHS Guidelines provide national standards for recognition and periodic review. By contrast, only a handful of states have aggressive licensure programs for drug testing laboratories. FRA believes that the uniform baseline provided by the HHS Guidelines is important to consistent and effective implementation of safeguards. Uniformity is particularly important given the interstate nature of the railroads' business and the variety of jurisdictions on which railroad employees work.

Split specimen. HHS considered a split sample requirement but rejected it for reasons FRA adopts. HHS stated, in part, as follows:

> [S]uch a system could increase the risk of administrative error by doubling the labeling, initialing, storage, and accountability requirements.

53 FR 11971; April 11, 1988. The railroad context presents a stark example of the problems with this approach. Employees' principal concern with respect to the testing process is often actions of the railroad company itself. In this regard, it would hardly add credibility to the system to have the railroad retain spliy samples in its possession.

Some of the other reasons often given for use of split samples often turn out not to bear scrutiny. Chain-of-custody and labeling problems, for instance, typically relate to handling prior to delivery to the laboratory. It is likely that any problem relating to a single sample would infect both (e.g., improper identification, broken chain-of-custody at site of collection). If there is an error at the laboratory, retention of the original (single) sample will allow for retesting.

Lab capacity. FRA believes that more than adequate certified laboratory capacity will exist to provide for quality analysis. Implementation of this program is, of course, contingent upon timely certifications being issued by HHS.

Adoption of Testing Procedures. In the NPRM for this rule, FRA proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs of the Department of Health and Human Services (53 FR 11970; April 11, 1988). Those guidelines describe the collection and testing procedures applicable to all drug testing of Federal employees, and they include safeguards for the accuracy and privacy of testing. FRA also specifically solicited comment on adaptation of the Guidelines to meet the special circumstances of the regulated industry.

Based upon comments submitted in this docket and other information, the Department of Transportation has determined that certain modifications to the procedures of the Guidelines are appropriate in the context of this and other DOT operating administration drug testing regulations. Accordingly, the Department's Office of the Secretary is publishing elsewhere in today's **Federal Register** an Interim Final Rule with Request for Comments entitled "Procedures for Transportation Workplace Drug Testing Programs," that codifies the Department of Health and Human Services Guidelines for drug testing at 49 CFR Part 40. These DOT Procedures are intended to implement the important safeguards provided by the HHS Guidelines and set forth requirements for specimen collection, laboratory certification, and quality assurance.

As previously noted, during the comment period on the NPRM in this

proceeding, comments were received concerning the HHS Guidelines, as summarized above. These comments will be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. The OST will further respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

Hair Analysis

Comments: Two companies supported an alternative to urinalysis. The commenters advocated analysis of hair by radio immunoassay (RIA). The hair is subjected to a proprietary extraction process and then analyzed in a manner similar to any other specimen, with presumptive positives confirmed by GC/MS. The commenters urge that this approach will produce an accurate test result without the inconvenience and intrusion of urine collection. A major advantage of this approach is the enlarged "window of detection". According to the commenters, since hair analysis can track drug use which occurred months in the past, there would be no need to test randomly.

Conclusions: Analysis of hair for drugs of abuse may offer promising possibilities for the future, and the commenters pointed out that many useful applications are already being made. However, as with any new proprietary technology being developed for commercial use, a number of issues of practicality remain to be settled. There seems to be little dispute that drugs, when eliminated through hair growth, can be detected for an extended period. However, issues such as detection limits, sampling methods, quality control of the extraction process, interpretation of opiate results, etc., should be thoroughly reviewed by the Department of Health and Human Services before large scale applications can be mandated or authorized. Further, it must be clear that an adequate laboratory capability exists to apply the technology.

Rehabilitation and Discipline

Comments: The FRA received numerous comments on what the consequences of a positive drug test should be. Two carriers, the labor organizations and certain other commenters believe that the regulation should require carriers to give an employee an opportunity for rehabilitation. It was suggested that drug use be treated like any other medical condition. It was pointed out that the employee could still be disciplined if drug use resulted in a violation of a carrier operating rule. These commenters also indicated that if rehabilitation is required, it should be a one time opportunity—i.e., recidivists should not be extended a second opportunity at rehabilitation.

Opponents of mandatory rehabilitation included railroads, members of the drug testing industry, and public interest groups. Numerous commenters stated that the deterrent effect of random testing would be completely undermined if drug users are not disciplined after a positive result. Without the threat of discipline, there would be little incentive for an employee to discontinue use until detected. Safe Travel America stated its belief that a policy of mandatory rehabilitation would undermine Operation Red Block programs by discouraging early referrals. Short lines stated that they could not afford to rehabilitate an employee and could not find a temporary replacement to perform the employee's duties during a period of rehabilitation.

A number of railroads uged the FRA to leave decisions regarding discipline and rehabilitation entirely up to the carrier. Some contended that each case is different, and therefore management should have the flexibility to act in a manner appropriate to each case.

Conclusions: In general, the policy of FRA under current regulations is to allow flexibility for handling under corporate policies and collective bargaining agreements when an employee's drug use is disclosed by body fluid testing or other means of detection available to management. FRA has extensively dealt with this issue in prior rulemaking proceedings.

With respect to the consequences of random testing, FRA believes that the public safety can best be advanced by continuing to provide the private sector parties with flexibility to fashion reasonable responses. Where labor and management are able to establish a relationship of trust, they will put in place Operation Red Block agreements allowing those whose drug use has been detected to return to service after treatment in probationary status (or withholding discipline entirely on a first offense) in exchange for active employee involvement in prevention, referral and (where no alternative exists) identification under the co-worker report rule. Where labor-management cooperation cannot be effected, the threat of disciplinary sanctions flowing from detection will provide a powerful deterrent to volitional use of drugs while creating a strong incentive for the dependent user to step forward and ask for help before detection in a random test.

Mandating discipline or disqualification in every case would bar railroads from participating in Operation Red Block agreements, which aid safety to the extent that they encourage employee participation in substance abuse prevention and enforcement. Mandating the opportunity for rehabilitation in every case would greatly reduce the incentives for early self-referrals and co-worker referrals. On either extreme, Federal intervention would eliminate the mutuality of consideration inherent in the Operation Red Block concept.

The final rule does require that an employee determined to have used drugs without appropriate medical authorization be removed from covered service. The employee may not be returned to covered service. The employee may not be returned to covered service unless the employee has submitted a negative urine sample and has completed any appropriate program of rehabilitation. Nothing in the rule requires that an employee determined to have violated the drug use prohibition be retained in the employ of the railroad.

Post-Rehabilitation Testing and After-care Monitoring

Comments: The FRA received various recommendations concerning follow-up testing of employees who have completed rehabilitation after testing positive in a random test. Commenters generally agree that FRA should give carriers wide latitude in post-rehabilitation testing, permitting the carrier to vary the frequency and duration of such testing on a case by case basis. Recommendations on an adequate period of follow-up testing varied from one to three years. Comments were received indicating that three to four tests per year may be sufficient.

Conclusions: Continuing treatment and follow-up testing of employees returned to service are important measures from the point of view of the recovering substance abuser and the public safety. Although this rule does not require that persons testing positive be afforded the opportunity for rehabilitation, it is inevitable that many will be offered that opportunity, particularly many testing positive for the first time. The knowledge that a follow-up test may be required can assist the recovering employee and offer important assurance from the point of view of the public safety.

As a consequence, the final rule provides that, after returning to work, a recovering employee must continue in any program of aftercare required by the EAP counselor (as defined in the current rule to include medical or employee assistance professional personnel) and be subject to follow-up testing for not longer than 60 months after return to service. Professionals designated by the railroad are free to work out a reasonable program of follow-up testing based on the nature and severity of the use or dependency problem identified through clinical evaluation.

Confidentiality of Test Results

Comments: Commenters are in general agreement that the HHS Guidelines offer adequate protection to employees. The Epilepsy Foundation of America is satisfied that the HHS Guidelines prohibit MRO's from divulging to management the existence of an epileptic condition in an employee.

Carriers believe they must be free to divulge test results in at least two circumstances: pursuant to a bona fide government inquiry or discovery request, and when necessary to protect the railroad during legal proceedings. In addition to these instances, FRA received comment on the propriety of permitting operators to divulge an employee's testing history to a subsequent employer engaged in transportation. A handful of commenters stated that in the interests of safety a carrier should be permitted to inform a subsequent employer of an employee's past drug habits. Others believed that an employee should not be permanently encumbered by a single positive test result. Strong opposition to dissemination was expressed by the Epilepsy Foundation of America and the EEAC, while one carrier commented that at the very least the period during which the information can be divulged should be limited to no more than one year following completion of rehabilitation. Another commenter suggested that dissemination be permitted only if the employee failed to be rehabilitated.

Railroads and their representatives took the position that disclosure of test results in the context of a disciplinary proceeding would be the responsibility of the employee demanding the investigation or asserting the grievance (i.e., the employee would have waived confidentiality).

Conclusions: The purpose of random testing and other forms of testing authorized by the current rule is to detect and deter drug use in violation of stated prohibitions in order to ensure safety of the public and railroad employees. Test results that reveal medical use of controlled substances are subject to the individual's personal privacy interest in medical information, as is drug use information provided by the employee in order to permit informed interpretation of the test result. However, revealing such use to the railroad's medical review officer, who is under a duty not to republish the information, is not a material intrusion on the employee's privacy interest, since railroad employees have historically been subject to medical qualifications standards of the railroads. FRA agrees that this information need go no further than the medical review officer, and the final rule so provides. (The final rule prescribes a similar restriction on medical use disclosed through post-accident testing, subject to the need of Federal agencies investigating serious railroad accidents to have all information relevant to accident/incident causation.)

Test results indicating non-medical use of controlled substances are not subject to any recognized privacy interest. In most cases, such results will indicate ingestion of drugs that it is illegal to possess. However, requiring that this information be handled confidentially will tend to reduce the perceived intrusiveness of the testing process, and no legitimate safety purpose would be served by excessively broad publication of this information.

As a consequence, the final rule and the DOT Procedures require confidential handling of test results and medical information provided by the employee to aid interpretation of the results. In the case of test results, dissemination is limited to those persons necessarily involved in administrative action related to the drug use indicated by the test. Disclosure of test results by the railroad is permitted only with the written consent of the employee. The rule does not bar FRA or NTSB use of post-accident test results for accident investigation purposes (and disclosure incident to that process), carrier disclosure of aggregate statistics where such disclosure would not identify an individual, or FRA access to test records for regulatory compliance purposes.

Subsequent employers may obtain information concerning past drug testing under the rule only if the employee or applicant consents to disclosure. Obviously, nothing in the rule prohibits railroads entertaining applications from persons with railroad experience from requiring such consents as a condition of the hiring action.

Alternative Strategies—The NTSB Alcohol/Drug Study

The National Transportation Safety Board (NTSB) weighed in with brief comments and the 159-page Safety Study noted above. The NTSB Alcohol/Drug Study surveyed the 1987 accident experience for railroads and rail transit, reviewed railroad activities to address alcohol/drug problems, and proposed a lengthy list of further initiatives.

This document is a useful compendium of recent accident/incident data reflecting the consequences of alcohol and drug use by railroad and rail transit employees. However, FRA disagrees in material respects with many of the Study's conclusions and recommendations.

While offering a variety of recommendations on program implementation, NTSB stated as follows:

> Conceptually, the Safety Board views the FRA rule (with modifications that are addressed in this study) as the model approach for Federal regulation to reduce alcohol and/or drug use in the transportation industry.

The Board went on to make a long list of recommendations which FRA will carefully consider on their individual merits. They are reviewed here in the context of the current regulatory proposal, which was issued prior to the NTSB report, since they were characterized by the Board as alternatives to random testing.

Post-accident testing recommendations. The first group of NTSB recommendations relate to mandatory post-accident toxicological testing (49 CFR Part 219, Subpart C). This program involves collection of blood and urine samples from employees involved in serious railroad accidents. The multifaceted rationale for this program was described in the preamble to the current rule (50 FR 31508, 31541–31542; Aug. 2, 1985), but a major objective of the program is to provide data pertinent to accident/incident causation. FRA has strictly limited its scope, because the taking of blood samples is physically invasive and should be required only where there is a reasonably compelling public interest. Testing is currently required after any train accident involving a fatality, hazardous material evacuation or railroad property damage in excess of $500,000. Testing is also required after employee fatalities and "impact" train accidents that involve personal injuries or at least $50,000 in damage. With the experience gained through mandatory post-accident testing to date and the deployment of additional

countermeasures through regulatory and voluntary action, FRA looks forward to modest further reductions in the scope of this program. NTSB, by contrast, would dramatically expand mandatory post-accident testing by—

- Lowering the damage threshold for nonimpact accidents to $150,000, using replacement cost as the basis for computation, and including loss of lading;
- Expanding the scope of those tested beyond employees covered by the Hours of Service Act;
- Requiring testing after impact accidents even if the dollar threshold for reportability (currently $5,200) is not exceeded; and
- Requiring collection of post-accident specimens within 4 hours.

The NTSB estimated that adoption of these recommendations would lead to testing after 600 accidents annually (currently less than 200) and lead to blood/urine sampling of over 6,000 employees (currently about 800). In support of these changes the NTSB cited several derailments in 1987 for which testing was not done because of differences between railroad damage estimates at the accident scene and later computations either by the railroad or by the NTSB.

FRA believes that major expansion of the current postaccident testing program is not warranted. The program is already the most extensive program providing full toxicology for fatalities and survivors that is in place for any mode of transportation. In order to be effective and check the exercise of discretion by administering personnel, testing must be done under a relatively rigid mandate. The NTSB recommendation would result in testing after a large number of derailments, the vast majority of which are caused by track or equipment or an interaction between the two (in contrast to collision-type events for which human factors predominate). The current program design excludes testing in this setting except with respect to the most serious accidents. Indeed, of the 4 accidents cited by the Board as examples of the need for more inclusive standards for testing, none appears to have involved human factors.

Further, the Board's suggestion that a 4-hour outside limit be put on post-accident testing—a limit which the Board would allow to be exceeded where necessity required—amounts to tinkering with a requirement that already requires that collection be given first priority after immediate safety response and medical care for those injured. FRA does not disagree that prompt collection is the objective, but sees little gain in a complicated formula that says, in effect, test as soon as possible, but not later than 4 hours, but after 4 hours if necessary.

FRA does not mean to imply that changes in the program may not be appropriate. FRA understands the view of the Board, for instance, that additional safety-sensitive employees could be included in post-accident testing. However, inclusion should be tightly justified, and suggestions that "all" "safety sensitive" personnel be tested continue to beg the question of whom and under what circumstances. This is an issue FRA intends to revisit in a subsequent rulemaking. Marginal changes in post-accident testing coverage, however, can hardly be expected to have direct and immediate impacts on overall deterrence of drug use.

Medical certification program. The Board devotes less than a page of discussion to its recommendation that FRA institute a medical certification program for railroad employees. The apparent purpose and justification for having the railroads issue medical certificates to thousands of employees would be to have a certificate to revoke should alcohol or drug use be detected. FRA cannot imagine a more indirect and costly means of accomplishing an objective that may be accomplished directly, particularly in light of FRA's recent acquisition of statutory authority to apply sanctions to individuals.

The Board recognizes that major railroads already have medical certification programs. It cites no systemic deficiencies in those program, documents no pattern of rail accidents caused by medical conditions other than misuse of alcohol or drugs, and gives no consideration to the effect of enforcing such a program on effective use of FRA's limited budget and personnel. Without prejudice to further consideration of the concept, FRA finds nothing in this proposal that should delay implementation of random testing.

Medical testing. The Board also recommends that FRA require periodic medical examinations ("return-to-work, return-from-furlough, and others as appropriate") for all employees in safety-sensitive functions and that FRA require inclusion of alcohol and drug screening in those exams.

Here the Board echos the sense of FRA's 1984 recommendation to the railroads (49 FR 24252, 24297; June 12, 1984) that drug tests be included with physical examinations. All major railroads have medical examination programs and there is considerable merit to inclusion of drug screens, particularly in a return-to-work context. FRA reserves the issue of whether these screens should be required for a later date. Of the seven rail systems that dominate rail transportation in this country (Conrail, CSX, Norfolk Southern, Union Pacific, Burlington Northern, Southern Pacific, Santa Fe), five already conduct drug or drug/alcohol screens with their physical examinations, although one or more of these railroads may be barred from continuing its program as a result of union-brought litigation. The National Railroad Passenger Corporation (Amtrak) also conducts such testing. The uniform experience of the railroads that have implemented medical testing is that it is important and useful, but not by any means dispositive of the problem, since abusers are often able to abstain for the time necessary to avoid detection. In short, it is not an alternative to random testing or other forms of short-notice testing.

Monitor performance. The NTSB also recommends that FRA "require railroads to monitor relevant behavior and performance, such as work attendance, work habits, and motor vehicle driving records, of all employees in safety-sensitive positions and to recommend to counseling those employees whose [records] are consistent with possible substance abuse." FRA, of course, already requires programs of training and testing in operating rules compliance (49 CFR Part 217) which monitor the most critical facets of performance on the job. FRA recommended that the railroads implement measures to review personnel records in 1984 (49 FR 24297; June 12, 1984). The Board itself quoted in the Alcohol/Drug Study from the FRA Alcohol/Drug Field Manual unit addressed at indentification of drug abuse patterns. Further, the Department of Transportation proposed legislation, which was signed into law during the comment period, to permit efficient access to the National Driver Register. There is no difference in objectives, therefore, between the Board and FRA.

However, FRA is concerned that the recommendation, in effect, asks that FRA mandate and enforce good personnel management. Although certain concrete steps can be required and compliance monitored (e.g., periodic checking of driving records), efficient and effective personnel management is much too broad and diverse a topic to cover in any set of regulatory requirements; and neither the Board nor FRA can point to a single approach that is validated as a definitive response to substance abuse in the workplace.

Railroads already have significant incentives to manage their personnel wisely, and it is not clear that a new layer of Federal regulations would advance the process. This is an issue appropriate for inclusion in system assessments of railroad performance. However, one should not proceed with the illusion that better management by itself can bring an end to substance abuse in the workplace, since, absent direct and effective countermeasures, it is likely to persist at unacceptable levels in the face of the best personnel practices currently available.

Training. The Board would require annual drug and alcohol detection training for all employees who are required to monitor fitness for duty of other railroad employees, including working supervisors such as conductors and yardmasters. The existing FRA rule already requires that supervisors empowered to order reasonable cause drug tests receive detection training, and the Board documents in its report the delivery of such training to broad categories of line supervision under the current FRA rule and railroad programs, as well as inclusion of education/awareness components in Operation Red Block and similar voluntary programs that FRA has sponsored and supported. It is very clear, however, that detection training is not a substitute for random testing. Testimony offered at the field hearings supported the conclusion that many drugs in vogue in the railroad workplace can impair the fitness of a crewmember without inducing symptoms recognizable to even an educated layman. The fact that testing is keyed to an imperfect ability to recognize symptoms is one of the fundamental limitations of reasonable suspicion testing. While the considerable detection training conducted in this industry since 1985 has moderated that limitation to some extent, it cannot diminish it to an acceptable degree.

Reasonable cause testing. The Board's proposals for reasonable cause testing are as follows:

- Require that railroads adopt mandatory reasonable cause testing programs for all employees in safety-sensitive positions;
- Expand the circumstances which will trigger reasonable cause testing to include any violation of any safety or operating rule which can compromise the safety of operations or the welfare of other employees;
- Add testing requirements related to "work attendance, work habits, and poor motor vehicle driving records."
- Require alcohol breath testing in addition to urine testing when any reasonable cause condition is met.

FRA appreciates that these recommendations involve matters of serious relevance to the current rulemaking. However, FRA does not find them a suitable alternative to random drug testing for the following reasons:

Certain of the recommendations are more clearly sound in concept than in practical application. For instance, broadening the type of operating rule violations that would warrant testing would have to be done incrementally. It is not possible to allow discretion to the railroad officer in the field to determine when a particular event is sufficiently serious as a safety matter to require testing; nor, clearly, would violation of many operating rules warrant such action. For example, operating rules typically include such general provisions as prohibiting "reading of other than Company instructions while performing service." No doubt inattention caused by reading the morning paper could be a safety problem, but perusing it while stopped on a siding for a half hour waiting for another train to approach and pass might be less than a critical matter. The point is that allowing discretion in application of literally hundreds of pages of rules and instructions incorporated therein by reference would simply provide a license for exercise of unchecked discretion. FRA notes that since implementation of the current rule in February of 1986 no party including the Board has proposed any specific operating rules that should be added to the current enumerated list. Similarly, consideration of a long term declines in job performance is obviously relevant to safety, but it is critical to establish linkage between those indicators and drug use before ordering drug testing or other measures. This is a task well suited to medical or employee assistance personnel under existing referral policies of the railroads.

FRA notes that the formal NTSB recommendation for mandatory reasonable cause testing comes at a time when all but one of the major rail systems in the United States have in place reasonably aggressive or very aggressive for-cause urine testing programs, either under the FRA rule or their own corporate policies. It is doubtful that railroad managements need further encouragement to do what it is clearly in their interest to undertake.

Further, a mandate for reasonable cause testing would be largely unenforceable, particularly where no documented accident or injury occurred. In the railroad environment, there are normally two parties to any observed situation of reasonable cause. One is the employee, the other is the railroad officer. If the railroad officer fails to test, the employee who gave reasonable cause certainly has no incentive to report himself. Experience suggests that fellow workers who might witness the incident are equally unlikely to report it. Random testing, by contrast, is fully enforceable.

The NTSB and random testing. The Board's comments for the docket of this rulemaking reflect its conclusions and recommendations in the Alcohol/Drug Study. The Board recommends—

- "Aggressive reasonable cause testing, triggered by a wide range of potentially safety-related errors or work behavior patterns;
- "Post-accident/incident testing (with the definitions of "accident" and "incident" broadened as described in the enclosed Safety Study);
- "Periodic (medical) testing;
- "Effective supervision of employees, provided by supervisors and management better trained to detect and deal effectively with drug and alcohol use; [and]
- "Competent drug/alcohol education and treatment for employees."

The Board advocates implementation of these measures prior to consideration of random testing. Whether the Board supports or opposes random testing remains unclear.

FRA believes that some of the Board's recommendations duplicate existing measures already implemented on a voluntary basis, while others are impractical or unwise when cast as Federal regulatory mandates. FRA notes that the Alcohol/Drug Study deals with random testing in a very summary fashion, concluding without significant analysis that other recommended measures, taken together, would be more effective. FRA simply disagrees with this conclusion, and the testimony of those who chose to appear at the hearings failed to support it. This not the time to exhaust the resources of the rail industry or the oversight capacity of the FRA chipping away at the periphery of the problem. This is not the occasion, after over a decade of experimentation, to attempt methods that are unnecessarily intrusive, untried, or uncertain of administration. What is required is a clear and effective deterrent, utilizing means that will detect those incapable of changing their behaviors. Random testing will provide that deterrent and detection capability.

Small Railroad Issues

Comments: FRA received numerous comments on the issue of whether small railroads should be excluded from the requirements of the rule. The American Short Line Railroad Association (ASLRA) and a good number of its members stated that the unique nature of the small carrier warrants exclusion, while many of the Class I carriers stated that because some small carriers operate on the same tracks as larger roads they should be equally drug free.

The ASLRA proposed that carriers with fifteen or fewer covered employees be exempted. One carrier suggested that the cut-off point be carriers with 31,200 or fewer manhours by covered employees annually. Another suggested that the FRA exempt carriers based upon operating speed.

Many comments were received on the special nature of the small short line railroad:

1. Small railroads generally operate on special, dedicated trackage which is not part of the national trunk line system. They do not share this trackage with other carriers.

2. In nearly three years of FRA post-accident testing, there has not been a single drug or alcohol positive on a carrier in this classification.

3. Typically only one train operates on the line at any time, eliminating the possibility of a collision-type accident, the type of occurrence which correlates to many of the human performance decrements produced by drug impairment.

4. Managers often perform covered service, and therefore the regulation would create an anomaly whereby the manager would be administering testing on himself or herself.

5. Employees of small railroads are closely supervised and do not stay overnight at remote locations. Thus, two important root causes of drug use among rail employees are not present.

6. Small roads operate at low speed (typically no more than 25 mph) in rural locations and do not transport passengers. Hazardous materials traffic volumes are low.

7. The cost of a program to the small operator is disproportionately high. The economic burden of a sophisticated program could bankrupt unstable fledgling companies or force tradeoffs against safety investments that would be more effective in their unique circumstances.

However, commenters distinguished the cases in which a small road operates concurrently with a large carrier on shared track. All commenters agreed that the potential for a serious accident exists in that situation and that carriers operating on shared trackage should be subject to the same testing requirements as all other carriers operating on the national trunk line system.

Comments were also received discussing how the FRA should tailor the requirement of random testing to meet the concerns of the small carrier. It was suggested by large and small carriers alike that the FRA establish a hardship exclusion, whereby the FRA could excuse a carrier from compliance pursuant to the determination that a testing program is not necessary, or would be overly burdensome. Three small carriers proposed that the FRA itself conduct testing of short lines. This would save the railroads from having to bear the cost of drafting and implementing a program of their own. One commenter suggested that if testing is required, the FRA should excuse the small road from reporting requirements in order to preserve anonymity.

Due to the economic burden which random testing may place on small roads, much comment was received on ways to help small operators defray the cost of testing. One approach is for small railroads to "piggyback" onto the program of a Class I carrier. The large operator would in effect administer the program on a compensated basis for the small carrier. Some small carriers gave qualified assent to such arrangements, while several Class I carriers expressed strong opposition. Larger railroads fear possible liability consequences. They are also reluctant to be strapped with responsibility for tracking down short line employees or administering their programs. Some small railroads also feared the loss of control over personnel that would result if larger railroads administered the selection process.

The FRA received comments on the feasibility of lowering costs through the use of multi-carrier agreements. Under this approach, short lines could join together and establish a single program which would do the testing for several railroads. The ASLRA stated, however, that past attempts at collective arrangements indicate that short lines are reluctant to relinquish control of their operations and that therefore programs of this sort would most likely enjoy very limited support.

Conclusions: As FRA has explained in previous rulemakings, very small railroads present a unique regulatory problem. They are fundamentally different from small entities in other modes for several reasons. Most of these entities operate over track that is devoted exclusively to their service. It is not part of the national trunk line system. Because they are involved in the "retail" service of picking up or setting out cars at points of origin or destination, they move smaller trains, often with lower-horsepower locomotives. Operating speeds are generally in the 10 mile per hour range. Because most small railroads operate only a single train, collision-type accidents are impossible. Hazardous materials traffic is light, and operating speeds ordinarily do not produce the kinetic energy necessary to cause a major hazardous materials release. Small railroads do not provide scheduled passenger service, and their total employment constitutes less than 1 percent of the industry.

The special problems of small railroads with 15 or fewer Hours of Service employees, and the reduced safety exposure they represent, have compelled the Congress to allow exemptions to the traditional restrictions on Hours of Service applicable to all other railroads. Their problems are recognized in other ways in Federal safety standards, including exclusion from certain reporting requirements and exclusion of certain low-speed track (in common with other railroads) from the Track Safety Standards. When FRA issued the current alcohol/drug regulations in 1985, the very small railroads were also excluded from requirements for pre-employment drug testing, from the reasonable cause testing authorization, and from "bypass" requirements.

FRA did make very small railroads subject to requirements for post-accident toxicological testing, as well as the prohibitions of § 219.101 ("Federal Rule G"). However, since the institution of these requirements not a single small railroad has had an accident sufficiently severe to qualify under the mandatory post-accident testing requirements. Nor do we have any other information indicating public safety consequences from drug use on very small railroads.

FRA agrees that imposition of mandatory random testing on very small railroads is unnecessary and inappropriate. Although small railroads can certainly have accidents, they have few accidents that involve hazard to persons off their rights-of-way. As a consequence, the final rule exempts railroads with 15 or fewer employees from the random testing requirement. However, this exemption does not apply where the small railroad has trackage rights over another railroad or otherwise engages in joint operations with another railroad.

FRA believes that the criterion of 15 or fewer Hours of Service employees should, as a time-honored distinction

embodied in the Hours of Service Act, serve as the line of delineation between those railroads subject to the random testing requirement and those not subject. This threshold is clearly in the range of reasonableness as a distinction between very local and limited rail operations and somewhat more extensive operations involving greater potential hazards.

FRA recognizes that small railroads above the exemption limit will require assistance to develop and implement random testing programs. FRA believes that the combination of concerted action through the ASLRA, FRA assistance, contracts with larger railroads, consortia among smaller railroads, and other approaches yet to be devised will permit orderly implementation of random testing on these properties. Similarly, very small railroads that operate over other railroads should be able to make reasonable arrangements for testing services from the host railroad or from other sources. FRA has considered but decided against mandating the participation of larger railroads in these arrangements, believing that workable solutions can only be fashioned on a business basis without FRA involvement.

Alcohol

Comments: Safe Travel America and six railroads would extend the random testing mandate to include alcohol. Commenters favoring inclusion of alcohol noted that alcohol is the single most abused drug in our society and feared that testing for other drugs alone could cause abusers to use alcohol instead. United Transportation Union witnesses viewed alcohol as a problem six or seven times greater than abuse of other drugs.

The AAR and certain other commenters believed that alcohol is more easily detected than use of other drugs. It was noted that testing for job-related use of alcohol would require blood or breath sampling, with attendant logistical complications.

Conclusions: Random testing for alcohol is a proposal that is technically beyond the scope of the NPRM. FRA did not include random testing for alcohol in the NPRM because it appeared that existing countermeasures, including the reasonable cause testing program, have been effective in reducing the use of alcohol by employees. Since post-accident toxicological testing began in early 1986, the positive rate for alcohol has remained at or below one percent. In one 7-year period prior to the issuance of the current rule, significant alcohol presence was determined in about one of every six or seven employees killed on the job in train incidents. In the two and one-half years since the effective date of the current rule, the only employee fatalities in train incidents for which alcohol has been detected are three non-Hours of Service employees (i.e., employees not subject to the current rule).

Further, FRA had noted that testing for alcohol presents separate issues that require independent analysis. It is not possible to test a single urine specimen and determine current blood alcohol concentration. Breath testing is the preferred method of detection and evaluation, but clearly would involve a separate logistical structure to administer in a random manner.

Accordingly, FRA has determined that the alcohol issue should continue to be addressed through existing programs, without prejudice to the possibility of further regulatory action at a later time.

Preemption

Comments: Comments were received indicating that some states have enacted laws which limit or regulate drug testing by private employers. In order to comply with these state requirements a railroad may have to vary the nature of its testing program from state to state. Two operators and the EEAC request that the FRA indicate in the final rule that state laws concerning drug testing are preempted by the federal mandate.

The RLEA commented that the final rule should also supersede any current or future random testing programs which are not implemented under the authority of the FRA rule.

Conclusions: Section 205 of the Federal Railroad Safety Act of 1970 provides, in effect, that state and local laws and regulations are preempted by any Safety Act regulation addressing the same subject matter. This statutory preemption is restated in the current regulation, which this final rule amends. Therefore, issuance of this random testing rule will preempt any state legislation regarding random drug testing for railroad employees, whether or not inconsistent with the final rule. FRA understands the scope of preemption to be as broad as necessary to ensure uniformity, both with respect to the occasions on which testing may be required and the technical safeguards for that testing.

Penalties

Comments: The FRA received a number of comments alleging abuses of present drug testing programs. Several union organizations, concerned that random testing may be misused by some members of railroad management, urged the FRA to provide harassed or mistreated employees with specific remedies. The Brotherhood of Locomotive Engineers asked for a $5,000 penalty for harassment, defined as a willful violation of the regulations. One railroad believed that railroads should be excused if, during the first year, the testing target was not met. Other comments were beyond the scope of the notice.

Conclusions: FRA has updated the penalty schedule to reflect the higher levels of penalties allowed under the Rail Safety Improvement Act of 1988. Additional revisions may be made in the context of the pending review of all penalty schedules (53 FR 28594; July 28, 1988).

International Commerce

It has been determined not to make the random testing requirement applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department of Transportation and other U.S. Government officials will be working closely with representatives of foreign governments with the goal of reaching a permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Administrator may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989 that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the **Federal Register**. While we recognize that any decision not to apply our rule to foreign

citizens has the potential to create some anomalous conditions in competitive situations, it is the intention of the U.S. Government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Section-by-Section Analysis of Final Rule

The final rule reflects substantial revisions as a result of comments received, issues raised during the exchanges at the public hearings, and further review within FRA. Each comment received has been considered by the FRA in preparing this final rule.

Amendments to Part 219

The final rule amends the existing alcohol/drug control rule (49 CFR Part 219) by adding a prohibition on non-medical use of controlled substances at any time, creating a new subpart requiring submission and implementation of random drug testing programs, adding a new subpart that sets forth rigorous conditions and safeguards for urine drug testing authorized or required under the part, and making conforming changes in the general subpart. As noted below, further amendments will be issued in this same proceeding to conform Subparts D and F to the new Subpart H and revise Subpart C to incorporate enhanced procedures similar to those contained in Subpart H.

Subpart A amendments

Section 219.3 is amended to exclude from the operation of Subpart G (random testing) any person for whom compliance would violate the domestic laws or policies of another country.

Section 219.9 is amended to place the responsibility for compliance with random testing and testing safeguards on the railroad. Paragraph (d) of § 219.9, added by a recent amendment (53 FR 28594, 28600; July 28, 1988), imposes responsibility for compliance on individuals with respect to any applicable provisions and makes individuals subject to penalty for willful violations.

Subpart B amendment. The final rule amends Subpart B by adding a new § 219.102, entitled "Prohibition on use of controlled substances." The rule expressly states the proposition that an employee who performs covered service ay not use a controlled substance at any time, except as permitted by § 219.103. Section 219.103 allows use of a controlled substance under medical authorization where the medical practitioner has made a good faith judgment, with notice of the employee's assigned duties and on the basis of available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties.

The purpose of this prohibition is to promote the fitness of employees engaged in safety-sensitive functions and thereby to promote public and employee safety on the railroad. The prohibition is stated broadly to encourage responsible use of controlled substances and to put the employee on notice that detection of residues of controlled substances may have adverse consequences. Without proper medical guidance, employees may use controlled substances that have terminal half-lives of many hours or even days without being aware of the potential for adverse consequences on the job. Further, without such guidance, employees may cease to use drugs precipitously, resulting in withdrawal or hangover effects that can also degrade performance.

The rule neither authorizes nor requires surveillance by the railroad or any other person of off-duty conduct. Rather, the rule establishes a standard of conduct to guide the covered employee.

Subpart G. The final rule adds a new Subpart G to Part 219. The subpart requires establishment of random testing programs.

Section 219.601 deals with content and approval of random testing programs. *Paragraph (a)* requires each railroad to submit a random testing program for approval by the Administrator not later than June 19, 1989. Subsequent amendments would also be reviewed prior to implementation.

Paragraph (b) requires random testing programs to meet certain criteria. First, they must provide for statistically random selection of employees. In order to allow for rounding errors associated with multi-stage selection processes, the rule provides that each employee must have a "substantially equal" statistical chance of selection within a specified time frame. Any exercise of discretion in selection is specifically prohibited.

Second, programs must select for testing a sufficient number of employees so that the annualized rate of testing is equal to 50 percent of the relevant workforce. (Selection of a greater number of employees than are actually tested is a common feature of random testing programs, since at any given time some employees will be unavailable for testing due to use of annual or sick leave, training away from the normal work site, etc. The railroad program should address precisely how these problems will be addressed.)

The final rule also makes allowance for gradual start-up of the program. For some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move immediately to a 50 percent random testing rate. If required to have tested at a rate equal to 50 percent of all covered employees by the end of the first year, employers might have to test at rates far above 50 percent toward the end of the year, to make up for lower rates at the beginning. Employers should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively more routine. Clearly, it would not be wise to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule therefore provides an implementation procedure that would allow employers to phase in random drug testing during the first 12 months in which tests are conducted. Employers would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the year to permit the employer to phase in to the 50 percent rate, and the total number of tests conducted would have to be equal to at least 25 percent of the covered population.

Suppose, for example, that a railroad has 1,000 covered employees. At a 50 percent annual rate, 500 tests would have to be conducted during a year. Under the phase-in, however, the employer could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first year, the annualized rate of 50 was achieved. Thus, if the railroad's random testing program contemplated administering random tests on 12 occasions during the year, the employer would need to administer at least 42 tests (500 divided by 12) on the last occasion, but could administer fewer tests until then. Overall, the employer would have to conduct at least 250 random tests the first year. In subsequent years, the 50 percent rate would be maintained.

Third, the programs must meet certain criteria to ensure effectiveness. The program must be structured so that each employee perceives the possibility that he or she will be subject to testing. For example, the program must sample employees who regularly work late night and early morning shifts, not just

employees on day shifts. Pool crews and extra board employees should also be subject to selection and testing on a basis that creates an expectation that selection may occur under circumstances where the employee is available for testing. Notice of selection shall not be provided until the duty tour during which testing occurs and then only so far in advance of collection as is necessary. Testing procedures and safeguards must be consistent with the requirements of Part 219.

Fourth, random testing programs must provide that an employee shall be subject to testing only while on duty. Employees who are off duty may not be notified that testing is required. Although the rule does not bar calling employees to duty exclusively for the purpose of testing if they are available for service under the collective bargaining agreement, they may not be notified of the testing requirement until they have reported. Since it is in the mutual interest of employees and railroads to provide for testing in connection with regular duty tours, FRA believes that random testing programs will be so designed as to create the minimum impact on employees' lives and therefore minimum cost to the railroad.

Finally, programs must provide that employees selected on a random basis be so informed. FRA anticipates that this would be done through initial verbal notification and through a check-off on the urine custody and control form.

Paragraph (c) provides for approval or disapproval (and resubmission) of random testing programs.

Paragraph (d) requires implementation of approved programs not later than November 20, 1989. Prior to implementation, each covered employee must receive a notice announcing the forthcoming commencement of the program, the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and reminding the employee of the right to self-refer for counseling and treatment without adverse consequences. The notice is intended to encourage affected employees to cease using drugs prior to the implementation of random testing.

Section 219.603 requires participation in random testing and prescribes a 9-month disqualification from covered service for refusing to provide a sample. This period is similar to the period set forth for refusal of a post-accident test, and hearing procedures are likewise similar. The section clarifies that tampering by the donor is a refusal. The requirement that the employee be disqualified from covered service is one that operates against the railroad (including a subsequent employer with notice of the refusal) and is issued under the Secretary's general regulatory authority conferred by section 202 of the Federal Railroad Safety Act. Following the end of the 9-month period, the disqualified employee could be returned to work only after presenting a negative sample and would be subject to follow-up testing. The employee would also have to complete any program of rehabilitation deemed necessary after professional evaluation.

Section 219.605 deals with consequences of a test result. *Paragraph (a)* recites that a test result is not considered positive until confirmed and reviewed by a medical review officer. *Paragraph (b)* provides for notification to the employee. *Paragraph (c)* requires the railroad to suspend from covered service an employee who is believed to be in violation of § 219.102 as a result of a positive test result. *Paragraph (d)* preserves any procedural rights available to the employee under a collective bargaining agreement or at common law. Most railroad employees are subject to specific procedural rights under the collective bargaining agreements with respect to lodging of a rule charge, investigation, grievance and arbitration. It is FRA's intent that this mechanism continue to be used to resolve issues of compliance by the employee with Federal and railroad alcohol/drug rules. For instance, should a railroad investigating officer or arbitrator determine, after hearing, that the employee had not been shown to be in noncompliance with § 219.102 or a railroad rule, the deciding officer could reinstate the employee with full back pay and benefits. This is the same system currently being used to determine employee responsibility under existing regulations.

Paragraph (e) provides that an employee who has been determined to have violated § 219.102 may not be returned to service unless the employee has presented a negative urine sample, been evaluated for chemical dependency or other treatable disorder, and completed any course of counseling or treatment determined to be necessary by an EAP counselor (a term defined in § 219.5). The determination referred to is the determination of the railroad (which is ordinarily subject to review and modification by an arbitrator or court of competent jurisdiction). This paragraph does not require that the employee be provided an opportunity for treatment, nor does it bar disciplinary sanctions. It merely establishes a safety "floor" for return of the recovering substance abuser to covered service. Upon return to service, the employee is subject to the requirement of participation in aftercare, if required by the EAP counselor, and to a reasonable program of follow-up testing not more than 60 months in duration. These provisions will allow the exercise of sound professional judgment by substance abuse and medical professionals and do not provide license for pursuit of collateral agendas.

Section 219.607 provides for record retention. Detailed records for positive tests must be retained for at least 2 years in order to ensure their availability to FRA and arbitrators (as necessary). Records of negative tests must be retained for 1 year. Summary records of test results and employee rehabilitation must be retained for at least 5 years. These records must be maintained for a reasonable period, by employee, if adequate data is to be gathered with respect to the success of drug abuse treatment.

Section 219.609 excludes from the subpart a railroad that employs not more than 15 Hours of Service employees and that does not operate on the tracks of another operating railroad. The exclusion does apply to a small railroad that leases track from another railroad, so long as the small railroad is the exclusive operator. FRA recognizes that this section does not precisely parallel the application language of § 219.3(b). FRA will resolve this tension in a forthcoming rulemaking.

Subpart H. The final rule adds a new Subpart H, which provides enhanced testing standards for existing Subparts D and F, as well as the new random testing subparts. This subpart becomes fully effective on July 19, 1989. This will allow time for HHS to complete its certification of laboratories, for railroads to make additional arrangements for collection and enter into new contracts for laboratory services, and for other necessary steps to be implemented. Earlier compliance is, of course, consistent with current regulations.

Subpart H will function in tandem with the Procedures for Transportation Workplace Drug Testing Programs, 49 CFR Part 40, which is published elsewhere in today's **Federal Register**. This part will, in effect, codify the HHS Guidelines with adaptations for DOT-regulated parties. Through incorporation by reference, Subpart H makes the DOT Procedures mandatory on railroad employers with respect to reasonable cause testing, pre-employment drug testing, and random testing. In the case of any perceived conflict of interpretation between Part 219 and Part

40, Part 219 controls because of its more particular application.

Section 219.701(a) gives effect to the DOT Procedures and applies them and Subpart H to Subparts D, F and G. For emphasis, the provision notes that only HHS-certified laboratories may be employed for this testing.

Paragraph (b) requires that the railroads' contracts with certified laboratories provide for appropriate inspection rights. The purpose of inspection as specified here is continuing laboratory quality control.

Paragraph (c) requires that labaratory contracts also provide for the laboratory's compliance with this part, including the laboratory standards provisions of the HHS Guidelines.

It should be noted that the DOT Procedures contain special provisions relieving smaller employers of blind proficiency testing requirements where the employer uses a laboratory already subject to blind proficiency testing by a transportation employer or Federal agency. Railroads covered by the blind testing requirement employ the great majority of employees subject to Part 219 and will submit to certified laboratories large volumes of employee samples and blind proficiency testing samples. Requiring this of smaller railroads would have little marginal effect with respect to quality control of the laboratories but would involve considerable expense and administrative burden. Further, involving a proliferation of smaller businesses in a blind proficiency testing program at this juncture in the development of the art would create unacceptable risks that samples could be mishandled and lead to confusion over the meaning of proficiency testing results. Although laboratory capacity for drug urinalysis is more than adequate, the number of firms providing expert external quality control services is presently limited. It is more important that large volume programs challenge the laboratories properly than it is for a large number of small clients to submit a relative handful of blind samples.

Section 219.703 deals with collection of urine samples.

Paragraph (a) provides that collection shall be handled in accordance with 49 CFR Part 40, the adapted HHS Guidelines.

Paragraph (b) refers to the policy of the DOT Procedures, which recognizes two groups of qualified collectors. The first is licensed medical professionals and technicians. Medical personnel may conduct collections if they have received instructions for collection under Part 40 and if they conduct the collection and certify its completion as required in that Part. Medical personnel are an essential resource for collection of urine samples following injury-producing events, where the employee has the option to provide a blood sample (as is the case under Subpart D), and in remote rural locations. Further, many railroads will wish to use independent medical facilities for collections (even when not required) in order to provide reassurance to employees that the process is fair and unbiased. Medical personnel are familiar with basic procedures for collection, identification and handling of body fluids used for diagnostic purposes. The adapted Guidelines set forth supplementary procedures that guard against intentional tampering by the donor while ensuring that the specimen is properly secured and handled in accordance with chain-of-custody procedures. Medical personnel must be provided written instructions ensuring that those procedures are followed.

Other personnel may also be trained to collect a urine specimen in accordance with the adapted Guidelines.

Paragraph (c) bars use of supervisors and co-workers as collectors. Collection should be accomplished in a detached and professional manner. Employees should not be subject to collection by persons with whom they work in the railroad operating environment. The term "co-worker" is defined for purposes of the paragraph to mean a person with whom the employee is assigned or could be assigned in a crew or other working unit to perform normal transportation duties on the railroad. FRA is aware that this limitation may make it difficult for smaller railroads to provide for collection on railroad property using their own personnel as collectors. However, FRA believes that smaller railroads will be able to use commercial collection services and local medical personnel to accomplish the collections.

Section 219.705 deals with the range of controlled substances for which testing is conducted. *Paragraph (a)* provides that samples shall be analyzed for controlled substances identified in paragraph (b). Under the DOT Procedures, testing is also authorized for specific gravity, creatinine (a natural waste present in all urine) concentration, and for suspected adulterants such as soap, vinegar or other agents that might be introduced in an attempt to defeat a screening test. These preparatory steps do not involve determination of any information that would be reported by a laboratory to any other person, unless the sample was deemed not suitable for analysis.

Paragraph (b) requires that each sample be analyzed for marijuana, cocaine, phencyclidine (PCP), opiates (morphine and codeine), and amphetamines (amphetamine and methamphetamine). Obviously, in the case of certain of these drugs it is the metabolite of the drug that is the target compound.

The five drug groups identified in this section generally represent the most widely abused controlled substances. Even in the case of PCP, for which the prevalence rate among employed populations is very low, there is an important public safety interest in identifying the few employees who may use the drug, since it is capable of producing lasting and extreme mental disorders, as well as irrational and uncontrolled conduct during its period of acute activity. Inexpensive screening tests are available for each of the drug groups.

Paragraph (c) provides that a railroad may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. (Part 40 further emphasizes that testing of the specimen other than that specifically authorized or required is prohibited.) That is, a railroad must test the sample for the five major drugs listed in each DOT regulation. Only if, in the context of reasonable cause testing, the FRA authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshold) may the railroad also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of any DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request.

Section 219.707 provides for review of test results by the railroad's medical review officer (MRO) under provisions of 49 CFR Part 40. Under Part 40, test results are reported exclusively to the MRO, and only after performance of the confirmatory test.

Under *paragraph (a)* and Part 40, the MRO has the responsibility to review the laboratory report and consider alternate explanations for the presence

of the compound detected, such as medical use of the controlled substance.

Paragraph (b) requires the MRO to complete review of the test results in not more than 10 working days, unless additional time is required because the MRO is awaiting supplementary documentation from the employee.

Paragraph (c) requires prompt delivery of any positive report to the employee. In no case may a railroad take adverse action against the employee without providing the employee a copy of the test result.

Paragraph (d) provides that the MRO shall report all negative results, including analytical positives indicating medical use of controlled substances and tests for which laboratory data is deemed insufficient, over the MRO's signature. The intent of this provision is for there to be a single form of negative report that does not disclose the basis on which the result is considered negative. The paragraph bars dissemination of medical drug use information to non-medical personnel, whether the information is derived from a test result or information provided by the employee or the employee's physician. The medical review officer is not barred from using therapeutic drug use information in the context of an established medical qualifications program, since enforcement of such a bar would inappropriately inject FRA into a confidential relationship and create major problems of enforcement. Where such programs exist, as they have with respect to railroads of significant size for many decades, the employee waives normal privacy interests with respect to matters bearing on medical fitness for duty.

Section 219.709 addresses sample retention and retesting.

Paragraph (a) provides for retention of samples deemed positive on confirmation for a one-year period. Within this period the employee may request that the sample be retained for a further reasonable period.

Paragraph (b) creates a right to have the original sample retested if the employee makes the request within 60 days of receipt of a positive test result from the MRO. The employee may designate retesting by the original laboratory or another HHS certified laboratory. The railroad may require the employee to advance the cost of reanalysis, subject to reimbursement if the retest is negative.

Paragraph (c) provides that inter-laboratory transfers be handled in accordance with chain-of-custody procedures.

Paragraph (d) provides that retest results shall be reported down to the level of sensitivity of the assay. Some drugs and metabolites deteriorate during handling and storage, therefore use of the same cut-offs employed for original testing is not appropriate.

Section 219.711 requires that test results be held in confidence. *Paragraph (a)* restricts handling of test results by laboratories. This paragraph must be effectuated through the railroad's contract with the laboratory (*see* § 219.701(c)).

Paragraph (b) provides that test results may be used within the railroad only for the purpose of compliance with Part 219. No further dissemination may be made within or external to the railroad, except with the written voluntary consent of the employee. The paragraph also requires that the railroad institute internal procedures sufficient to guard the information against unauthorized disclosure. Compliance with this part would include suspension of the employee, completion of any disciplinary proceeding required to determine compliance with § 219.102 or a similar company rule (including review of the determination by a professional arbitrator), and referral of the individual to an employee assistance program, if applicable.

FRA recognizes that it may be appropriate for future railroad employers of persons testing positive to be aware that the employee has been determined to have violated § 219.102, particularly where the employee requires rehabilitation prior to being returned to service or is subject to aftercare or follow-up testing. Railroads can achieve this objective by requesting the applicant to provide the necessary consent as a condition of employment. Such a consent is voluntary within the meaning of this part.

Paragraph (c) deals with handling of post-accident test results under Subpart C. Railroads are required to maintain those test results in the same manner as provided for other test results, except to the extent the results are made public in connection with an accident investigation. The section also recites FRA's present policy of treating test results indicating medical use of controlled substances as not subject to disclosure except where it is necessary to consider the information in relation to determination of probable cause.

The final rule also amends the *Schedule of Civil Penalties, Appendix A*, to provide penalties for violations of the random testing provisions (which incorporate by reference Subpart H). Other portions of the penalty schedule will be similarly amended prior to the effective date of Subpart H. Amounts set forth in the schedule amendments reflect the increased penalty range recently enacted into law in the Rail Safety Improvement Act of 1988.

Amendment to Part 217

The final rule also amends § 217.13 (Annual Report) to require reporting of alcohol/drug tests and observations in a standard format and to require reporting of new data elements related to the random testing program. Experience under the existing provision has indicated that the railroads and the FRA share a common need to obtain comparative aggregate data regarding this subject matter.

Further Rulemaking

The final rule makes certain changes in the safeguards for urine drug testing conducted under Subparts D and F of the current rule (49 CFR Part 219), effective July 19, 1989. In summary, the provisions of the new Subpart H will displace a number of provisions designed to provide for accurate and well-administered urine drug testing with the state-of-the-art requirements now available under the HHS Guidelines, as adapted through the DOT Procedures. Where appropriate, existing text will be removed and cross-references to the new regulatory language will be inserted. Provisions for mandatory post-accident toxicological testing will also be updated to incorporate procedures and further safeguards equivalent to those set forth in the DOT Procedures, which are themselves based on HHS Guidelines issued in April of 1988 and not yet fully implemented through laboratory certifications. Certain other decisions made in this proceeding will also require conforming changes in previous regulatory language in order to ensure consistency and orderly implementation.

FRA is publishing this final rule as soon as possible in order to allow the railroads ample time to plan and implement random testing programs. However, FRA recognizes that a supplemental final rule will have to be issued to make the conforming changes, and certain additional issues will have to be handled through separate notice and comment.

The supplemental final rule will be issued in the very near future, well ahead of the implementation dates announced in this final rule.

A supplemental NPRM will also be issued addressing the issues of approval of testing for other controlled substances, adjustment of random testing level of effort in light of experience gained under the rule, and

crediting of other short-notice tests to the random testing 50% target level.

Additional notices of proposed rulemaking regarding minor substantive changes may also be issued in the near future. FRA remains committed to making a significant number of perfecting changes in the existing rule text and will do so with appropriate opportunity for further public participation.

Regulatory Analysis

E.O.12291 and DOT Regulatory Policies and Procedures

These final regulations have been evaluated in accordance with existing regulatory policies and are considered to be non-major under Executive Order 12291. However, they are considered to be significant under the DOT policies and procedures (44 FR 11034; February 26, 1979) because they initiate a substantial regulatory program.

Consequently, FRA has prepared and placed in the rulemaking docket a regulatory evaluation addressing the economic impact of these rules. It may be inspected and copied in Room 8201, 400 Seventh Street, SW., Washington, DC 20590.

FRA's "base case" estimate yields program costs over the first ten years of approximately $81 million and direct benefits from reduced train accidents of more than $87 million (current values at 10 percent discount), resulting in a positive benefit to cost ratio of 1.08 to 1. The favorable ratio would be significantly higher if the rule avoided a major catastrophic accident, such as a hazardous materials accident involving loss of a number of lives and destruction of valuable property.

FRA believes that additional direct and indirect benefits will accrue as a result of the deterrence of drug abuse and treatment of those detected for the first time. (Railroad policies typically allow reinstatement of recovering drug abusers on a leniency basis if they have completed appropriate treatment.) These benefits will include reduced personal injuries on and off the job, improved productivity and reduced absenteeism, reduced medical and worker's compensation claims, theft reduction, and diversion of cash resources of employees from non-productive expenditures for purchase of drugs to productive, legitimate uses. Accordingly, the total benefits flowing from the rule should preponderate over costs by a significantly higher ratio than presented in the quantitative analysis.

Regulatory Flexibility Act

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Although a significant number of small railroads are subject to these regulations, the economic impact of the rules will not be significant for several reasons. Although unit costs for small railroads for certain services required under the regulations may be somewhat higher, small railroads have the latitude to utilize cooperative buying services and, from testimony received during the rulemaking, will find at least some connecting Class I railroads willing to assist in areas such as laboratory contracts. Preparation of random testing programs will be facilitated by the small railroads' industry association. Gross testing costs will be generally proportional to the scale of the railroad, since costs vary by number of employees required to be tested.

FRA has taken two specific actions that will limit impacts on small entities. First, very small railroads employing 15 or fewer Hours of Service employees will be excluded from the requirement for random testing programs if they are not engaged in joint operations with other railroads. Second, smaller railroads are excluded from the requirement for blind proficiency testing if they utilize laboratories subject to blind challenge by other Government or transportation clients.

Comments received on this issue are summarized above.

Paperwork Reduction Act

The rules being adopted in this proceeding contain revised information collection requirements in the following sections: §§ 219.601, 219.603, 219.605, 219.607, 219.701 (incorporating 49 CFR Part 40), 219. 705, 219.707, 219.709, 219.711. Revised information collection requirements are also contained in the amendments to § 217.13. FRA is submitting these information collection requirements to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). FRA anticipates that OMB will undertake prompt action on these requests for approval. When OMB has approved these revised requirements, FRA will publish a notice in the **Federal Register** announcing that action and revising § 219.21 accordingly. Compliance with the revised information collection requirements is not required until the approvals have been provided. Any comments on the revised information collection requirements should be provided to Mr. Gary Waxman, Regulatory Policy Branch, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., Washington, DC 20503. Copies of any such comments should be provided to the docket of this rulemaking.

Environmental Impact

FRA has evaluated these regulations in accordance with its procedures for ensuring full consideration of the environmental impact of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and DOT Order 5610.1c. These regulations meet the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This final rule will not have a substantial 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. Thus, in accordance with Executive Order 12612, preparation of a Federalism assessment is not warranted. Under section 205 of the Federal Railroad Safety Act of 1970, 45 U.S.C. 434, this rule preempts any state or local law addressing the subject matter of the rule. The Safety Act provides for uniform regulation of railroads involved in interstate commerce.

List of Subjects

49 CFR Part 217

Railroad safety, Railroad operating rules, Reporting and recordkeeping activities.

49 CFR Part 219

Railroad safety, Control of alcohol and drug use, Reporting and recordkeeping requirements, Urine drug testing standards.

In consideration of the foregoing, Chapter II, Subtitle B, of Title 49, Code of Federal Regulations is amended as follows:

PART 219—[AMENDED]

1. The authority citation for Part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100–342; and 49 CFR 1.49(m).

2. Part 219 is amended as follows:

a. The table of contents is amended to add new entries as follows:

Subpart B—Prohibitions

* * * * *

219.102 Prohibition on abuse of controlled substances

* * * * *

Subpart G—Random Drug Testing Program

Sec.
219.601 Railroad random testing programs
219.603 Participation in testing; refusals
219.605 Positive test results; procedures
219.607 Reports; FRA access to records; confidentiality
219.609 Exclusion from subpart

Subpart H—Procedures and Safeguards for Urine Drug Testing

219.701 Standards for urine drug testing
219.703 Collection
219.705 Drugs tested
219.707 Review by MRO
219.709 Retest
219.711 Confidentiality of test results

* * * * *

b. Section 219.3 is amended by adding a new paragraph (c) at the end thereof to read as follows:

§ 219.3 Application.

* * * * *

(c)(1) Subpart G of this part shall not apply to any person for whom compliance with that subpart would violate the domestic laws or policies of another country.

(2) Subpart G is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of that subpart raises a question of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of Subpart G to such person on and after January 1, 1990.

(c) Section 219.9 is amended by revising paragraph (a)(1), redesignating paragraph (a)(5) as (a)(7) and republishing it, by adding new paragraphs (a)(5) and (a)(6), and by republishing the introductory text of paragraph (a) to read as follows:

§ 219.9 Responsibility for compliance.

(a) A railroad that—

(1) Having actual knowledge, requires or permits an employee to go or remain on duty in covered service while in violation of § 219.101 or § 219.102;

* * * * *

(5) Fails to adopt or publish, or willfully and with actual knowledge fails to implement, a program required by Subpart G of this part;

(6) Willfully and with actual knowledge, requires an employee (or applicant) to submit to testing under a program required by Subpart C, D, F or G without observance of the procedures and safeguards contained in the subpart under which testing is conducted or, in the case of a test under Subpart D, F or G, without observance of the procedures and safeguards contained in Subpart H; or

(7) Fails to comply with any other requirement of this part;

shall be deemed to have violated this part and shall be subject to a civil penalty as provided for in Appendix A and paragraph (d) of this section.

* * * * *

d. Section 219.102 is added to read as follows:

§ 219.102 Prohibition on abuse of controlled substances.

On and after July 19, 1989, no employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by section 219.103 of this subpart.

e. Subpart G is added to read as follows:

Subpart G—Random Drug Testing Program

§ 219.601 Railroad random testing programs.

(a) *Submission.* No later than June 19, 1989, or in the case of a railroad commencing operations thereafter not later than 30 days prior to such commencement, each railroad shall submit for FRA approval a random testing program meeting the requirements of this subpart. The program shall be submitted to the Associate Administrator for Safety, FRA, for review and approval by the Administrator. If, after approval, a railroad desires to amend the random 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 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 ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame (except where approval has been granted under paragraph (e) of this section). 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 select for testing a sufficient number of employees so that, during the first 12 months—

(i) The random testing program is spread reasonably through the 12-month period;

(ii) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(iii) The total number of tests conducted during the 12 months is equal to at least 25 percent of the number of covered employees.

During each subsequent 12-month period the program shall select for testing a sufficient number of employees so that the number of tests conducted 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 Administrator.

(3) Railroad random testing programs shall ensure to the maximum extent practicable that each employee shall perceive the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection shall not be provided until the duty tour in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing.

(5) The program shall include testing procedures and safeguards, and procedures for action based on positive test results, consistent with this part.

(6) An employee shall be subject to testing only while on duty.

(7) Each time an employee is selected for random testing the employee will be informed that selection was made on a random basis. The program shall provide that the employee will be permitted to retain a copy of a writing to that effect (e.g., a urine custody and control form with this information set forth).

(c) *Approval.* The Administrator will notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Administrator determines that the program does not conform to those criteria, the Administrator will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions. The railroad shall resubmit its program with the required revisions within 30 days of such notice. Failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this subpart.

(d) *Implementation.* (1) No later than 45 days prior to commencement of random testing, the railroad shall publish to each of its covered employees, individually, a written notice that they will be subject to random drug 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 § 219.102 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 § 219.102 of this part.

(2) Each railroad shall implement its approved random testing program not later than November 20, 1989 (or, in the case of a railroad commencing operations thereafter, on the expiration of 60 days from approval by the Administrator or November 20, 1989, whichever is later).

§ 219.603 Participation in testing; refusals.

(a) *Participation.* A railroad shall, under the conditions specified in this subpart and Subpart H, require a covered employee selected through the random testing program to cooperate in urine testing to determine compliance with section 219.102, and the employee shall provide the required sample 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.

(b) *Refusals.* (1) An employee who, upon being notified of the requirement to provide a sample under this subpart, refuses to provide a sample shall be withdrawn from covered service and shall be deemed disqualified for a period of nine (9) months. The disqualification required by this paragraph shall apply with respect to employment in covered service by any railroad with notice of such refusal. 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.

(2) Upon being withdrawn from service under this section, the employee shall be entitled to the same procedural protections as those set out in § 219.213(b) of this part with respect to refusal of post-accident testing. The purpose of the hearing shall be to determine whether the employee refused to provide a sample, having been notified of the requirement to do so, and whether the employee can establish a basis for being excused under the criteria stated by paragraph (a) of this section.

(3) Tampering with a sample in order to prevent a valid test (e.g., through substitution, dilution or adulteration) constitutes a refusal to provide a sample.

(c) 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 § 219.605(e) of this part.

§ 219.605 Positive test results; procedures.

(a) *Medical review.* The result of a test required under this subpart shall be deemed positive only after it has been properly confirmed as required in Subpart H of this part and reviewed by a Medical Review Officer (MRO) as provided in subpart H to determine if it is evidence of prohibited drug use under § 219.102. This section establishes procedures for administrative handling by the railroad in the event a sample provided under this subpart is reported as positive by the MRO.

(b) *Notification.* Except as provided in Subpart H of this part, within the period specified in § 219.707 of this part the railroad shall notify an employee of the results of any test that is

(1) positive, by providing a copy of a laboratory report meeting the requirements of subpart H or

(2) negative, by providing a written notice issued by the MRO.

(c) *Suspension.* If the railroad determines that there is reason to believe that an employee is in violation of § 219.102, as evidenced by a positive test result, the railroad shall immediately remove the employee from covered service. In each case, the employee shall be provided with the report of the test results and notice of the basis for the removal not later than the time of removal.

(d) *Hearing procedures.* Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of the positive test result.

(e) *Return to service.* An employee who has been determined to have used a controlled substance in violation of § 219.102 of this part as a consequence of a positive test result under this subpart shall not be returned to covered service unless the employee has—

(1) Presented a urine sample for testing under Subpart H of this part that tested negative for controlled substances assayed;

(2) Been evaluated by an EAP counselor to determine if the employee is affected by a psychological or physical dependence on one or more controlled substances or by another indentifiable and treatable mental or physical disorder involving abuse of alcohol or drugs as a primary manifestation; and

(3) Successfuly completed any course of counseling or treatment determined to be necessary by the EAP counselor prior to return to covered service.

An employee returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the EAP counselor and shall be subject to a reasonable progam of follow-up drug testing without prior notice for a period of not more than 60 months following return to service.

§ 219.607 Reports; FRA access to records; confidentiality.

Each railroad shall retain for at least 2 years all records of each test conducted under this subpart that is reported as positive by the Medical Review Officer, including urine custody and control forms, laboratory reports, and certification statements. Records of negative tests shall be retained for at least 1 year. Each railroad shall maintain for at least 5 years summary records of employee drug test results and rehabilitation for each covered employee. Records required to be kept shall be made available to FRA as provided by section 208 of the Federal Railroad Safety Act of 1970.

§ 219.609 Exclusion from subpart.

This subpart does not apply to a railroad that employs not more than 15 employees covered by the Hours of Service Act (45 U.S.C. 61–64b) and that does not operate on tracks of another railroad (or otherwise engage in joint operations with another railroad) except as necessary for purposes of interchange.

f. A new Subpart H is added to read as follows:

Subpart H—Procedures and Safeguards for Urine Drug Testing

§ 219.701 Standards for urine drug testing.

(a) Effective upon the expiration of July 19, 1989, the conduct of urine drug testing under Subparts D, F, and G of this part shall be governed by this subpart and Part 40 of Subtitle A of this title. Laboratories employed for these purposes must be certified by the Department of Health and Human Services under that Department's Mandatory Guidelines for Federal Workplace Drug Testing Programs.

(b) Each railroad's contract with a laboratory conducting testing subject to this subpart shall provide that the FRA and the railroad shall have the right to unannounced inspection during normal business hours through qualified personnel or designated contractors. Such inspection rights shall, at minimim, include reasonable accompanied access to all records pertinent to testing under this part, quality control data incident thereto, samples submitted under this part, and equipment and personnel related to analysis of those samples.

(c) Each such contract shall also require that the laboratory comply with all applicable provisions of this part and 49 CFR Part 40, including requirements for employee access to specified laboratory records and any applicable conditions imposed upon approvals issued under this subpart or 49 CFR Part 40.

§ 219.703 Collection.

(a) Urine samples shall be collected and handled as required in 49 CFR Part 40 and this section.

(b) The following persons are qualified to perform urine collections under this subpart:

(1) A licensed medical professional or medical technologist or technician who is provided instructions for collection under 49 CFR Part 40 and who performs the collection and certifies completion as required therein; or

(2) A person who has successfully completed training as a collector as required in 49 CFR Part 40.

(c) A person with management or supervisory responsibility over the employee to be tested, or a co-worker of the employee to be tested, may not serve as a collector. For purposes of this paragraph, "co-worker" means a person with whom the person to be tested is assigned or could be assigned in a crew or other working unit to perform normal transportation duties on the railroad.

§ 219.705 Drugs tested.

(a) Urine samples collected under Subparts D, F, and G of this part shall be analyzed for the presence of controlled substances designated in paragraph (b) of this section and may be analyzed by procedures reasonably incident to analysis of the specimen for controlled substances (e.g., determination of pH or tests for specific gravity, creatinine concentration, or presence of adulterants).

(b) Each sample submitted shall be analyzed for marijuana, cocaine, phencyclidine (PCP), opiates (morphine and codeine), and amphetamines (amphetamine and methamphetamine).

(c) As part of the reasonable cause testing program established by Subpart D of this part, a railroad may test for additional controlled substances in addition to those specified in this section only with approval granted by FRA and for sustances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 219.707 Review by MRO.

(a) Test results reported positive by the laboratory as provided in 49 CFR Part 40 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 49 CFR Part 40 and this section.

(b) The MRO shall complete review of test results within not more than 10 regular working days of receipt of the laboratory report or they shall be declared negative, unless any portion of the delay shall result from the unwillingness or inability of the employee to appear for an interview or provide documentation of prescription or other authorized use of medications. If the employee is responsible for such delay, the 10-day period may be extended by a period equal to the period attributed to the employee's delay. This paragraph shall not be read to bar reporting of a positive result if the employee, without a reasonable basis, fails to respond to an opportunity to provide supplementary information.

(c) After the MRO has reviewed the pertinent information and the laboratory assessment is verified as indicating presence of controlled substances without medical authorization consistent with § 219.103 of this part (and the review required by paragraph (b) of this section is completed), the MRO will report the results to a designated railroad officer for action in keeping with the requirements of this part. The employee shall be provided a copy of the approved test results within 48 hours of delivery to the railroad officer, or immediately upon the railroad's taking any action adverse to the employee, whichever first occurs.

(d) Test results reported as negative by the laboratory shall also be communicated to the employee through the MRO. The MRO shall promptly transmit the negative finding to the employee. All negative test results, including results involving medical use or administration of controlled substances or insufficiency of laboratory data, shall be transmitted to the designated railroad officer over the MRO's signature. The MRO may not disclose medically approved drug use or administration information obtained under this part (whether ascertained through testing or reported by the employee or the employee's medical practitioner at the employee's request) to non-medical railroad personnel; however, nothing in this part bars use of such information by the railroad's medical officer in the context of an established medical qualifications program.

§ 219.709 Retest.

(a) Samples that yield positive results on confirmation shall be retained by the laboratory in properly secured, long-term, frozen storage for at least 365 days, as required by Part 40 of this title. Within this 365-day period, the employee or his representative, the railroad, or the FRA may request that the laboratory retain the sample for an additional period. If, with the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be discarded following the end of the 365-day period.

(b) In the case of a test declared positive by the MRO, the original sample shall be retested if the employee makes a written request to the Medical Review Officer for retesting within 60 days of receipt of the final test result from the MRO. The employee may specify retesting by the original laboratory or by a second laboratory

that is certified by the Department of Health and Human Services as described in 49 CFR Part 40. The railroad may require the employee to advance the cost of shipment (if any) and reanalysis of the sample, but the employee shall be reimbursed for such expense if the retest is negative.

(c) If the employee specifies retesting by a second laboratory, the original laboratory shall follow approved chain-of-custody procedures in transferring a portion of the sample.

(d) Since some analytes may deteriorate during storage, detected levels of the drug below the detection limits established in 49 CFR Part 40, but equal to or greater than the established sensitivity of the assay, shall, as technically appropriate, be reported and considered corroborative of the original positive results.

§ 219.711 Confidentiality of test results.

(a) A laboratory reporting results of tests conducted under this subpart shall report those results only to the designated Medical Review Officer of the railroad. The results shall not be disclosed by the laboratory to any person other than the employee to whom the sample was identified. This paragraph shall not be read to bar normal access to analytical data for laboratory accreditation or certification processes, but records shall be maintained by specimen identification number (or accession number) rather than employee name.

(b) No record of tests conducted subject to this subpart or information drawn therefrom shall be used or disseminated by the railroad or within the railroad for any purpose other than providing for compliance with this part (and railroad rules consistent herewith), unless with the voluntary written consent of the employee. Such written consent shall specify the person to whom the information may be provided. Each railroad shall adopt and implement procedures to guard this information against unauthorized disclosure both within and external to the railroad company.

(c)(1) Effective July 19, 1989, results of post-accident toxicological testing under Subpart C of this part are reported to the railroad's Medical Review Officer, and the railroad shall treat the test results as subject to paragraph (b) of this section, except where publicly disclosed by FRA or the National Transportation Safety Board.

(2) To the extent permitted by law, FRA treats Subpart C test results indicating use of prescription or physician-administered controlled substances (and employee declarations of medical use incident to such testing) as confidential and withholds public disclosure except where it is necessary to consider this information in an accident investigation in relation to determination of probable cause. However, FRA may provide any result of testing under Subpart C to the National Transportation Safety Board.

3. Appendix A to Part 219 is amended by adding the following entries at the end of the table:

APPENDIX A—SCHEDULE OF CIVIL PENALTIES [1]

Section		Violation	Willful violation
	* * * * * *		
	Subpart G—Random Drug Testing		
219.601	Failure to implement and/or submit to FRA for approval a random drug testing program that satisfies the requirements of this Subpart and subpart H		10,000
	Failure to facilitate conduct of required random drug testing by failing to take all practical steps to require employee participation or by otherwise failing to comply with Subpart G such that test cannot be conducted	2,000	5,000
	Required employee to provide samples in reliance on Subpart G based on other than random selection	5,000	10,000
219.603	Required employee to submit to testing without observance of procedures and safeguards contained in Subparts G and H	5,000	7,500
219.605	Failure to provide notice of positive test result	2,000	2,500
	Failure to comply with other Subpart G requirement	1,000	2,500
	* * * * * *		

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

PART 217—[AMENDED]

1. The authority citation for Part 217 is revised to read as follows:

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

2. Part 217 is amended by revising the introductory text of paragraph § 217.13(d) and by amending § 217.13 to add a new paragraph (d)(5) as follows:

§ 217.13 Annual Report.

* * * * *

(d) The number, type and result of each test and inspection related to enforcement of Part 219 of this subchapter and the railroad's rule on alcohol and drug use ("Rule G"). This information shall be reported on Form FRA 6180.77 and shall include the following:

* * * * *

(5) Number and results of random drug tests conducted under the authority of § 219.601 of this chapter. For positive tests indicate the number for each controlled substance by drug group, and the following information: number and type of disciplinary actions taken, number of employees referred for evaluation, number of employees evaluated as not requiring formal treatment, number of employees

evaluated as requiring outpatient treatment, number of employees evaluated as requiring inpatient treatment, number of employees failing to complete abatement or rehabilitation (as determined by clinical judgment or positive test on return-to-work urinalysis), number of employees who completed abatement or rehabilitation determined after investigation to have been involved in subsequent alcohol/drug disciplinary offenses, and number of follow-up tests and results by drug group (including refusals). Also indicate the number of refusals to cooperate in random testing and provide a summary of any negative test findings based upon scientific insufficiency (without personal identifying information).

Issued in Washington, DC on November 14, 1988.

John H. Riley,

Federal Railroad Administrator.

[FR Doc. 88-26612 Filed 11-15-88; 3:52 pm]

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Part VII

Department of Transportation

Federal Highway Administration

49 CFR Parts 391 and 394
Controlled Substances Testing; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 391 and 394

[FHWA Docket No. MC-116]

RIN 2125-AA79

Controlled Substances Testing

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This rule sets forth regulations to require motor carriers who operate commercial motor vehicles in interstate commerce to have an anti-drug program including testing of commercial motor vehicle drivers for the use of controlled substances. Testing under these rules must be conducted prior to employment/use, periodically, based on reasonable cause, and random selection and is the responsibility of motor carriers. Post-accident testing must also be performed and is the responsibility of the driver. Generally, drivers of commercial motor vehicles with a gross vehicle weight rating (GVWR) over 26,000 pounds, vehicles transporting hazardous materials which require to be placarded, and certain buses are covered by this rule.

The overall goal of testing is to ensure a drug-free transportation environment which, in turn, would reduce accidents and casualties in motor carrier operations. This rule is necessary to prohibit a driver from driving while that driver has a prohibited drug in his or her system or if that driver has used drugs as evidenced by a drug test showing the presence of drugs or drug metabolites. The rule is intended to ensure a drug-free motor carrier workforce and to eliminate drug use and abuse in the motor carrier industry.

DATES: Effective Date: This final rule is effective on December 21, 1988.

The drug testing requirements must be in place no later than December 21, 1989, for motor carriers with 50 or more "drivers subject to testing." By December 21, 1990, all other motor carriers and drivers must be included in a drug test program which meets this rule. "Drivers subject to testing" is defined as: (1) employee drivers, and (2) contract drivers under contract for a total of 90 days or more in any 365-day period. Only the "drivers subject to testing" are required to be tested under a program implemented by large motor carriers by December 21, 1989. Random testing is to be phased in over a 1-year period starting with the applicable date noted above.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas P. Kozlowski, Office of Motor Carrier Standards, (202) 366-2981, or Mr. Thomas P. Holian, Office of the Chief Counsel, (202) 366-1350, 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 holidays.

SUPPLEMENTARY INFORMATION:

Background

On May 13, 1986, the FHWA published an advance notice of proposed rulemaking (ANPRM) (51 FR 17572) asking several questions on drug testing. These questions were:

1. Should the FHWA mandate urine drug screening (preemployment and biennial) for all interstate commerce drivers?

2. Should the FHWA only state it permits urine drug screening in the regulation, leaving the decision to the motor carrier and the examining physician whether to perform the test?

3. Whether urine drug screening is mandated or optional, should the urine drug screening, where positive, be automatically subjected to more specific and sensitive tests for further confirmation?

4. Should the list of prohibited drugs, as now named, be changed to prohibit use of all drugs in the Schedules of Controlled Substances (SCS), Schedules I through V, 21 CFR Part 1308? If the SCS is adopted in its entirety, should a provision be added that specifically addresses instances of drivers using SCS drugs under doctor's orders?

The FHWA also published a notice of proposed rulemaking (NPRM) (BMCS Docket No. MC-120, Notice No. 86-3; 51 FR 17572) in the **Federal Register** on the same date as the ANPRM (May 13, 1986). The NPRM sought comments on the qualification and disqualification of drivers, background investigation and inquiries into the drivers' driving records, written examinations, and road tests. With regard to the qualification of drivers, the NPRM sought comments on a proposal to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to include a drug testing, standard for drivers of certain hazardous materials-laden vehicles. Comments were also sought on whether the proposed drug testing plan should mandated or be a recommended industry practice.

On June 14, 1988, the FHWA published, in the **Federal Register**, an NPRM proposing drug testing for commercial motor vehicle drivers who operate in interstate commerce (53 FR 22268). This NPRM addresed the issues contained in both earlier rulemaking actions.

The FHWA also held a series of public hearings on the proposed regulations. These hearings were held on July 12, 1988, in Cleveland, Ohio; July 25, 1988, in Dallas, Texas; August 4, 1988, in Los Angeles, California; and August 9, 1988, in Washington, D.C. The proceedings of all the hearings were recorded by a court reporter. The transcript of each hearing and any statements or other material submitted to the hearing panel during the hearings have been placed in the public docket. This material also has been carefully reviewed during the development of this final rule.

Current Rules

The FHWA has a very strong anti-drug program in place to combat drug use, primarily drug-related impairment while driving, in the motor carrier industry. The following is a description of current rules pertaining to the use of drugs by drivers of commercial motor vehicles being operated in interstate commerce.

Under the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. App. 2707, the FHWA has established a regulation to disqualify drivers who operate motor vehicles while under the influence of alcohol or drugs. (**Federal Register** Volume 53, No. 140, July 21, 1988) These Federal disqualifications apply to intrastate drivers, as well as those operating vehicles in interstate commerce. The regulation disqualifies a driver for 1 year from driving a commercial motor vehicle in intrastate or interstate commerce if found to have committed a first violation of driving a commercial motor vehicle while under the influence of alcohol or a controlled substance. If such a driver was transporting hazardous materials cargo, the disqualification period is 3 years. A second offense will result in a lifetime ban from driving a commercial motor vehicle unless the Secretary, by regulation, reduces the penalty to no less than 10 years.

Also, under subtitle T of title I of the Anti-Drug Abuse Act of 1986 (Pub. L. 99-570, section 1971, 100 Stat. 3207-59), it is a Federal crime for the operator of a common carrier (i.e., rail carrier, a sleeping car carrier, a bus transporting passengers in interstate commerce, a water common carrier, an air common carrier) to operate under the influence of alcohol or a controlled substance. The maximum penalties, upon conviction, are 5 years imprisonment and a $10,000 fine. This Federal law is codified at 18 U.S.C.A. section 342 (West Supp. 1987).

The FHWA has adopted regulations which prohibit the use, by a driver, of a Schedule I drug or other substance, an amphetamine, a narcotic, or any other habit-forming drug (49 CFR 391.41(b)(12) (1987)). A driver who uses such a drug is not qualified to operate a commercial motor vehicle in interstate commerce (49 CFR 391.11(b)(6)(1987)). Unqualified persons who operate in commercial motor vehicles in interstate commerce are subject to civil and criminal penalties (49 U.S.C. 521(b) (1982 & Supp. III 1985)).

The FHWA has issued specific regulations prohibiting the operation of a commercial motor vehicle when drugs are involved. This rule provides that no driver shall be on duty and possess, be under the influence of, or use a Schedule I drug or other substance, an amphetamine, a narcotic, or any other substance, to a degree which renders the driver incapable of safely operating a commercial motor vehicle (49 CFR 392.4(a) (1987)). This provision does not apply to the possession or use of a drug administered by or under the instructions of a physician who has advised the driver that the drug will not affect the driver's ability to safely operate the vehicle (49 CFR 392.4(c)). Also, this section does not prohibit the "possession" of a drug which is manifested and transported as part of the shipment (49 CFR 392.4(d)).

Under 49 CFR 391.15, upon a conviction for driving under the influence of a prohibited drug, the driver is disqualified for at least 1 year and up to 3 years depending on previous convictions.

On October 4, 1988, the FHWA published a final rule required by the Commercial Motor Vehicle Safety Act of 1986 pertaining to alcohol use by commercial drivers. That rule which became effective October 27, 1988, reduces the blood alcohol concentration (BAC) level at or above which a driver can be disqualified for operating a commercial motor vheicle under the influence of alcohol. The rule establishes 0.04 percent as the BAC level to be used. States will be required to adopt and enforce this BAC level in order to comply with the provision of the 1986 Act in order to avoid the loss of Federal-Aid Highway funds. The disqualification provisions are enforceable from a Federal perspective effective October 27, 1988.

This final drug testing rule complements these rules by requiring drug testing by certain motor carriers. The existing rules generally address impairment due to drug use and resulting possible disqualification. This final rule generally addresses drug use and the determination that a driver is medically unqualified to drive.

Jurisdiction

Authority pertaining to motor carrier safety has been delegated to the FHWA at 49 U.S.C. 104 (1982 and Supp. III 1985) and 49 CFR 1.48 (1986). Under 49 U.S.C. 3102 (1982 & Supp. III 1985), the FHWA may prescribe requirements for the qualifications and maximum hours of service of employees and the safety of operation and equipment of motor carriers. For purposes of this section, motor carriers include for-hire motor carriers of passengers or property and private motor carriers of property operating in interstate commerce. Motor vehicles subject to this regulatory authority are not limited by size or weight. Under this authority, the FHWA has established the FMCSRs, 49 CFR Parts 350–399.

Section 206 of the Motor Carrier Safety Act of 1984 (Act), 49 App. U.S.C. 2505 (Supp. III 1985), directs that Federal safety standards be established for motor vehicles that, at a minimum, ensure that—

(a) Commercial motor vehicles are safely maintained, equipped, loaded, and operated;

(b) The responsibilities imposed upon operators of commercial motor vehicles do not impair their ability to operate such vehicles safely;

(c) The physical condition of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely; and

(d) The operation of commercial motor vehicles does not have deleterious effects on the physical condition of such operators.

This regulatory authority is applicable to for-hire and private motor carriers operating commercial motor vehicles in interstate commerce. A commercial motor vehicle is defined in the 1984 Act as a vehicle used in interstate commerce if the vehicle—

(a) Has a gross vehicle weight rating of 10,001 or more pounds;

(b) Is designed to transport more than 15 passengers, including the driver; or

(c) Is used to transport hazardous materials in a quantity requiring the vehicle to be placarded under the Hazardous Materials Regulations, 49 CFR Parts 171–179 (1986).

Policy Statement

It is the policy of the FHWA that drivers on the highways of our Nation should be free of drugs. To detect and deter the use of drugs by bus and truck drivers, this rule requires motor carriers to establish a program of four types of driver testing for the use of controlled substances: Pre-employment, periodic (biennial), reasonable cause, and random testing. In addition, this rule requires drivers to ensure that they are tested for drug use after a reportable accident. The testing procedures will protect individual privacy, ensure accountability and integrity of specimens, require confirmation of all positive screening tests, mandate the use of laboratories operating within the guidelines established by 49 CFR Part 40, provide confidentiality for test results and medical histories, and ensure nondiscriminatory testing methods. The FHWA proposes to require all motor carriers subject to these rules to establish effective drug use prevention programs for drivers.

Goals of Testing

The overall goal of the required testing is to ensure a drug-free transportation environment which, in turn, will reduce accidents and casualties in motor carrier operations.

Under this rule, a driver may not use controlled substances on or off duty. In this rule, the terms "controlled substances" and "drugs" are synonymous. If controlled substance use is detected, an individual is unqualified to drive a commercial motor vehicle involved in interstate commerce. A driver could not be hired or used if he/she has a confirmed positive drug test as a result of a pre-employment, periodic, reasonable cause, post-accident or random test. In all cases of a positive test, the driver is medically unqualified until such time as the driver no longer uses controlled substances, tests negative for controlled substances, and is medically recertified.

Drug testing and sanctions for use will help discourage substance use and reduce absenteeism, accidents, health care costs, and other drug-related problems. It will act as a deterrent to those individuals who might be tempted to try drugs for the first time or who currently use drugs. Finally, drug testing will protect the health and safety of the employees of motor carriers and other users of the highway system through the early identification and referral for treatment of workers with drug use problems.

Discussion of Comments

This section discusses the major comments and FHWA's response, including revisions to the NPRM. Generally these comments, while attributed to certain commenters, reflect the views of many others and address the major issues identified by the commenters to the NPRM.

The FHWA has reformatted the final rule by amending Part 391, Qualifications of Drivers, instead of adding a new part to the FMCSRs. This is being done to streamline the FMCSRs and to clarify that this final rule generally applies to driver qualifications. This change is not substantive. The subparts included in the NPRM have been deleted as unnecessary and a new Subpart H, Controlled Substance Testing, has been added to Part 391. To aid the reader in understanding this change, the following chart of NPRM sections and corresponding final rule sections is included:

NPRM section	Final rule section
382.101	391.81.
382.103	391.83.
382.105	391.85.
382.107	Deleted.
382.109	391.87.
Not included	391.89.
382.111	Deleted.
Not included	391.93.
382.201	391.95.
382.203	391.97.
382.301	391.113.
382.303	391.115.
382.305	Deleted.
382.307	394.7, 394.9, and 394.20.
382.309	Deleted.
382.311	391.117.
382.401	391.99.
382.403	391.101.
382.501	391.103.
382.503	391.105.
382.505	391.107.
382.601	391.109.
382.603	391.111.
382.701	391.119.
382.703	Deleted.
382.705	Deleted.
382.707	391.121.
Not included	391.123.

General Overview of Comments

The FHWA received approximately 145 comments to the docket in response to the NPRM. In addition, 43 persons/organizations presented testimony at the four public hearings. During the public hearings, the Administrator of the FHWA, the hearing official for each of the hearings, requested further information from several individuals who presented statements at the hearings.

The FHWA carefully considered all comments that were submitted to the docket including those received after September 12, 1988, the closing date of the comment period, as well as all testimony presented at the hearings or submitted as requested by the Administrator at the hearings.

The breakdown, by type of commenter, is as follows:

Motor carriers: 42
Farmer organizations: 7
Associations: 39
Individuals: 28
Governmental agencies: 8
Unions: 6
Miscellaneous: 8
Medical: 5

Many of the associations were represented at several of the hearings and also submitted comments to the docket and several commenters submitted more than one comment. The majority of the individuals who testified or submitted comments, and who were not affiliated with an organization, were commercial motor vehicle drivers.

In general, the commenters support the FHWA's efforts to achieve a drug-free motor carrier workforce. There were, however, many differences of opinion regarding the method of achieving that goal. The primary differences centered around the random testing proposal and the proposal to mandate driver rehabilitation and subsequent employment reinstatement (included in 3 of the 4 rehabilitation options proposed in the NPRM). To a lesser extent, the post-accident and reasonable cause testing proposals also received a substantial number of comments.

Many of the commenters were concerned about the practical issues in implementing the rule, such as costs, equity, participation and enforcement. Commenters were also concerned about the legality of the proposal, especially the constitutionality of random drug testing. The following section discusses each of those concerns.

Specific Issues

Constitutional Objections to Drug Testing

The FHWA recognizes that there are legitimate and significant constitutional concerns surrounding drug testing in general and random drug testing as a specific component of drug testing. The FHWA acknowledges the current wide-scale litigation and apparent disparate judicial opinions on drug testing programs. Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the FHWA is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters was the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. The Fourth Amendment applies to "searches" conducted or mandated by the government (i.e., "State action") and protects individuals against "unreasonable searches and seizures." Action by a private party does not constitute State or Federal action unless there exists a close nexus between the State and the action in question. *See Jackson* v. *Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

Because drug testing programs required under the final rule are imposed by the government, two collateral issues arise concerning whether the proposed urine tests under these programs constitute a search or a seizure and, if so, is the search or seizure unreasonable within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman* v. *James*, 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also Lovvorn* v. *City of Chattanooga*, 846 F.2d 1539, 1553–54 (6th Cir. 1988) (Guy, R., dissenting) vacated and rehearing en banc Glantco (6th Cir. 1988); *National Treasury Employees Union* v. *von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). Cf. *Mack* v. *United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2d Cir. 1987).

Also assuming, *arguendo*, that urine tests of personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchéz* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search * * *," the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment (citing *Camera* v. *Municipal Court*, 387 U.S. 523, 533 (1967). *See e.g., Griffin* v. *Wisconsin*, 107 S.Ct. 3163 (1987) (plurality opinion); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. *See e.g., New Jersey* v. *T.L.O.*,

469 U.S. 325, 340–342; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560–561 (1976) (whie some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion").

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. *See e.g., United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). Thus, the courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979).

Thus far, a number of courts have held or suggested in *dicta* that testing upon reasonable suspicion alone may be inadequate. Reasonable suspicion testing allows inquiry only after a problem manifests itself at work. *See, Amalgamated Transit Union, Division 1279* v. *Cambria County Transit Authority*, No. 88–796 (W.D. Pa. July 19, 1988). Furthermore, these courts have allowed drug and alcohol testing in the context of a pre-employment physical or routine health examination. *See, e.g., Combria County Transit Authority* (drug and alcohol testing during annual physical examinations does not violate employee rights under the fourth amendment; individualized reasonable suspicion not required); *Wrightsell* v. *City of Chicago*, 678 F. Supp. 727 (N.D. III. 1988) (drug testing of police officers as part of routine, reasonably required, employment-related medical examination is permissible where there is clear nexus between test and employer's legitimate safety concern); *McDonnell* v. *Hunter*, 612 F. Supp. 1122, 1130 n. 6 (S.D. Iowa 1985) (Fourth Amendment does not preclude taking body fluid specimen as part of pre-employment physical or as part of routine periodic physical examination), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987); *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. 875 n. 7 (E.D. Tenn 1986) (no constitutional difficulty with regularly conducted physicals, even if they involve urinalysis for drugs provided they are not used as subterfuge to conduct unreasonable search and seizure). Moreover, as the court in *Cambria County Transit Authority* held, such testing serves the laudable goal of fostering a drug free and sober workforce as well as flushing out those employees with serious drug problems.

Viewed in this light, the clear public interest in assuring that commercial motor vehicle drivers perform their duties free of prohibited substances provides justification for testing and its limited intrusion on privacy expectations of these individuals. The drug problem in society in general and the probability of drug use in the interstate trucking and bus industries were discussed in the preamble of the NPRM. The impairing effects of drugs and the substantial risks to public safety posed by drivers who use drugs underlie the compelling governmental interest in the promulgate of this rule.

It is important to note that the drug testing requirements of the final rule are limited in scope and involve a minimal intrusion or privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware* v. *Prouse*, 440 U.S. 648, 654–655; *New York* v. *Burger*, 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place significant constraints on a motor carrier's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically acceptable manner, such as by use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing are also severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each motor carrier is required to implement under this final rule are narrowly tailored to respect a driver's reasonable expectations of privacy. 49 CFR Part 40 governing collection of urine samples, as referenced in the final rule, are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging the test results. Other employee drug testing programs incorporating the collection and testing procedures of the HHS Guidelines have been upheld against constitutional challenge. *See American Federation of Government Employees* v *Dole*, 670 F. Supp. 445 (D.D.C. 1987), *appeal filed*, No. 87–5417 (D.C. Cir. Dec. 11, 1987) (upholding the constitutionality of the Department of Transportation program for random drug testing of safety- and security-sensitive agency employees); *National Association of Air Traffic Specialists* v. *Dole*, 2 IND. Emp. Rts. Cases (BNA) 68 (D. Alaska 1987) (denying a motion for a preliminary injunction against the FAA's use of urinalysis drug testing as part of an annual physical examination of the agency's air traffic specialists).

Equally significant is the fact that urine drug testing of sensitive safety- and security-related employees is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make *some* employees' expectation of privacy unreasonable." *O'Connor* v. *Ortega*, 107 S.Ct. 1492 (1987). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York* v. *Burger*, 107 S.Ct 2636 (1987)] and, "in effect consent[ ] to the restrictions placed upon them." [*Almeida-Sanchez* v. *United States*, 413 U.S. at 271]. For these reasons, two Federal courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker* v. *Handel*, 795 F.2d 1136,

1142 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n of New Jersey, Local 318* v. *Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (police officers).

The FHWA recognizes that a number of Federal and State courts have rejected government-mandated drug testing programs on Fourth Amendment grounds. However, even courts striking down drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn* v. *City of Chattanooga*, 846 F.2d 1539, 1533–54 (6th Cir. 1988) (Martin, J.) vacated and regarding en banc granted (6th Cir. August 3, 1988) ("When determining then whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases"); *Policemen's Benevolent Ass'n Local 318* v. *Township of Washington*, 672 F.Supp. 779, 792 (D.N.J. 1987), *rev'd*, 850 F.2d 133 (3d Cir. 1988) ([T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officers.]"); *American Federation of Government Employees* v. *Meese*, No. C–88–1419–SAW (N.D.Cal. June 17, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The FHWA also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine tests after certain accidents, incidents, or rule violations are unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, 108 S.Ct 2033 (1988). The Supreme Court has granted a government petition for *writ of certiorari* in this case and has ordered that the case be argued this term "in tandem" with *National Treasury Employees Union* v. *von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these case may not be forthcoming until the Spring of 1989. Numerous commenters urge that FHWA should delay a decision on a final drug rule until these cases are resolved. The FHWA disagrees.

The DOT believes that FHWA's anti-drug program and similar drug testing regimens proposed by other administrations within the Department will be ruled constitutional. The critical public safety need for properly administered drug testing to ensure that employees in the transportation industry are free from drugs while performing certain sensitive safety- and security-related functions outweighs the practical considerations which would delay rulemaking so that it could be tailored to any guidance that may be offered by the Supreme Court when the pending cases are ultimately decided. Such a delay would unnecessarily defer the adoption of this important safety rule well beyond that needed to allow reasonable time for implementation.

Pre-Employment Testing

The majority of the commenters supported the proposal, without reservation, to require motor carriers to ensure that driver-applicants are chemically tested for evidence of the use of controlled substances.

Comment: Scope of Requirement. The National Private Trucking Association (NPTA) supports the proposed requirements for pre-employment testing by carriers, while expressing two concerns. The first concern deals with the scope of the requirement. The NPTA contends that pre-employment testing should be required only for those applicants the motor carrier intends to hire. It indicates that the time and costs associated with testing every applicant could be immense. Under 49 CFR Part 40 all positive initial screenings would have to be confirmed by a gas chromatography/mass spectrometry (GC/MS) test. Because the proposed rule is silent on the matter of which driver applicants carriers must specifically test, the NPTA commented that the rule should be amended for clarification purposes. The NPTA recommends that the final rule expressly limit its scope to those applicants the carrier intends to hire.

FHWA Response: The FHWA agrees with the NPTA proposal. Accordingly, § 391.103 (proposed § 382.501) has been changed to be more explicit that only those persons the motor carrier intends to hire must be tested for drugs prior to driving for the motor carrier. The order in which drug testing is performed along with the other application procedures is at the discretion of the motor carrier.

Comment: Requiring Confirmation Tests. The second concern the NPTA has relates to the costs associated with the GC/MS testing. The NPTA is opposed to requiring a second, confirmatory test for job applicants who test initially positive if the final rule would impose the responsibility of paying for the confirmatory test upon the carrier. The NPTA contends that in the pre-employment setting, carriers should be provided with as much discretion as possible concerning who they want to employ. The NPTA, therefore, recommends that the proposed rule be amended to give carriers the option of whether to obtain a confirmatory test of any driver applicant who initially tests positive, or, in the alternative, the rule should make clear that the determination of who bears the cost of a confirmatory test has been left to the carrier to decide.zx

FHWA Response: The FHWA recognizes that there is the possibility that a false positive could result from the initial, screening test. Without a confirmatory test, the driver-applicant could be wrongfully identified as a drug user. The FHWA is committed to following 49 CFR Part 40, including the requirement that a confirmation test be performed on every positive screen test. This requirement will ensure that persons are not wrongfully identified as drug users based solely on the results of the less vigorous screen test.

The FHWA is sympathetic to the concern raised by the NPTA regarding the additional costs of the GC/MS tests if they are performed on individuals who are in fact using drugs. However, the FHWA believes the intention of the motor carrier to employ a person, including the performance of a drug test, must ensure that those identified as drug users are tested through the most rigorous methods acceptable.

The FHWA, through this rule, does not intend to dictate who a motor carrier must hire. The requirement for pre-employment drug testing is to determine whether a person is qualified to drive a commercial motor vehicle. If a motor carrier intends to hire a person to drive, the results of the screen test or subsequent confirmatory test must be negative.

Comment: Pre-employment vs. Prequalification. The American Trucking Associations (ATA) also supports the FHWA proposal for pre-employment testing of driver-applicants through analysis of a urine specimen. The ATA suggests that this test should be referred to in the rule as "Prequalification" or perhaps as "Preuse" testing. The ATA agrees with the proposal that a driver who is regularly used by a motor carrier and has been tested negative for drug use, could be used temporarily by another motor carrier without an

additional drug test, provided that the driver meets the other requirements of the FMCSRs. The ATA believes that the FHWA should recognize that motor carriers who lease drivers take exception to the term "pre-employment testing" because drivers used by them are not actually "employed." If there is any indication that they treat their drivers as employees rather than independent contractors, they will have problems of non-compliance with various government requirements that are applicable to use of employees but not to use of independent contractors.

FHWA Response: This requirement is intended to ensure that before a driver is used by a motor carrier, the motor carrier assures itself that the driver is free from drugs. Within this context, the FHWA envisions that there may be many instances (e.g., a person driving for a motor carrier for the first time) where "pre-employment" and "periodic" drug tests would be combined to determine if a person is qualified to drive. In such situations, the "pre-employment" test should be considered as the initial "periodic test." Therefore, the FHWA agrees with the concept as suggested by the ATA, but to reduce confusion, has decided to retain the term "pre-employment." Section 391.103 (proposed § 382.501) has been rewritten to clarify that the term "pre-employment" testing encompasses testing of persons a motor carrier intends to hire or use.

Comment: Reporting of Test Results. Greyhound Lines (Greyhound) strongly supports pre-employment testing of all applicants considered for employment. With notice to potential applicants that they will be required to submit to a drug test, Greyhound is finding that 20 to 30 percent of the drug test requests are positive. Based upon this continuing evidence, it believes that pre-employment drug screening is essential to the driver selection process. However, Greyhound does not support the proposed requirement that drug test results should be reported to all applicants. Greyhound indicated that between 1987 and 1988 more than 5000 applicants nationwide were processed. To require notification would create a significant burden on its field organization without an identified benefit.

FHWA Response: The FHWA continues to believe that in order for these requirements to be fair to all affected parties, the results of the test must be made available to those driver-applicants requesting the information. The FHWA has revised § 391.87 (proposed § 382.109) to reflect that the motor carrier must notify drivers of the test results (either positive or negative by drug) and must make this information available to those driver applicants who request it within 60 days from the date the driver applicant was notified of not being hired. The period of 60 days was chosen as a reasonable time for the driver applicant to contact the motor carrier.

Comment: Testing by Others. Consolidated Freightways (CF) indicates it has always supported a mandatory pre-employment testing of drivers and agrees that the testing should be part of the DOT physical examination that determines qualification to drive on this country's highways. Since the inception of CF's drug screening program in November 1985, it has tested over 8000 applicants. The percentage of positive results returned in the pre-employment testing has decreased from 9.1% in 1986 to 8.0% in 1987 and to 7.6% in 1988 (through June).

The Owner-Operators Independent Drivers Association (OOIDA) believes that the best system for testing owner-operators would be a certified testing program in which the owner-operator could choose to have a drug test conducted on himself/herself. The owner-operator would be issued a certification that he/she had completed a drug test within whatever period is required. This owner-operator could present this certification to a motor carrier which could then use the owner-operator without further drug testing.

FHWA Response: The FHWA anticipates that such procedures as described by the OOIDA, or modifications thereof, could be used to meet these as well as the other testing requirements. However, the FHWA continues to believe that it is incumbent on the motor carrier to ensure that all drivers it uses, whether they be employees or not, be free from drugs. Section 391.103 (proposed § 382.501) has been modified to allow drug testing programs by entities other than those under the direct control of motor carriers, provided the motor carrier assures itself that the program conforms to this rule. The information required to be obtained by the motor carrier is specified in § 391.103 (proposed § 382.501). The FHWA emphasizes that this provision does not relieve the motor carrier of any responsibilities under this rule.

Periodic Testing

There was nearly unanimous support for the FHWA's proposal that drug testing, through the collection of a urine sample, be made a requirement of the biennial medical examination required under 49 CFR 391.11(b)(6). Many of the commenters believe that periodic drug testing serves as a continuing deterrent for those who do not use drugs and as a continuing means of detecting drug use by casual users as well as by those who are dependent upon drugs. As motor carriers became aware of the drug abuse problem, many motor carriers have implemented drug screening programs as part of the periodic medical examination required by the FMCSRs. The findings of those programs confirm the benefits of drug testing prior to using a driver and of periodic drug screening. The ATA commented that a laboratory which performs drug screens for several major carriers indicated that it has found that up to 5 percent of drug screens completed for reexaminations show positive for drug use. This has occurred even where carriers have given advance notice that a drug screen will be performed. This percentage of "hits" seems, to the ATA, to justify continuation of periodic drug testing. The International Brotherhood of Teamsters (IBT) has 4 years of experience with periodic testing under the National Master Freight Agreement. The IBT supports periodic testing and is convinced from its local unions' experiences under the NMFA that periodic testing does pose a significant deterrent to drug use.

In the preamble to the NPRM, the FHWA requested comments on whether the periodic test should be a one-time requirement. Since the test was "scheduled," the effectiveness in identifying drug users was questioned. The NPTA expressed a view shared by many others that it is too early to tell whether periodic testing should "be a part of all future drug programs, or * * * phased out after several years when the other forms of testing are established and working smoothly." The NPTA recommends that the final rule incorporate a sunset provision of 3 to 5 years which would ensure that FHWA reconsider the effectiveness of, and therefore the continued need for, the periodic testing requirement.

The California Highway Patrol (CHP) believes that while scheduled periodic testing may not be a significant deterrent to occasional drug use, it will identify chronic substance abusers. The CHP also contends that periodic testing also reinforces driver awareness of the motor carriers' and the public's commitment to drug-free driving . CHP notes that periodic testing would be very cost effective, since it would be administered in conjunction with a routine medical examination.

FHWA Response: The FHWA agrees with the majority of comments that periodic drug testing should be included in the driver's biennial physical. The final rule includes an amendment to § 391.41(b)(12) to require a drug test and to establish that a driver is unqualified if testing positive. Section 391.105 (proposed as § 382.503) has been revised to make it clear that a driver is required to submit a specimen for drug testing during the first medical examination of that driver during the calendar year after implementation of the drug testing program. This revision also states that a motor carrier may discontinue periodic testing after the first 2 years the motor carrier has implemented its random testing program according to the implementation schedule, and therefore, is testing 50 percent of covered employees under its random drug testing program.

The FHWA is revising 49 CFR 391.41(b)(12) to indicate that the drug use prohibition included in the driver qualification criteria is to be based in part on the testing requirements of this final rule. There is nothing to prohibit other procedures to be used to ensure that this requirement is met in addition to the requirements of this rule.

Reasonable Cause Testing

The FHWA currently prohibits motor carriers from allowing a driver to operate a motor vehicle if the driver's ability or alertness is impaired as a result of fatigue, illness, or any other cause (49 CFR 392.3). In addition, 49 CFR 391.11(b)(6) prohibits a motor carrier from permitting a person to drive unless that person is qualified which includes the drug use prohibition requirement contained in § 391.41(b)(12).

Comment: Definition of "reasonable cause". Many of the commenters supported the reasonable cause proposal in concept but questioned what types of actions constitute reasonable cause. As proposed in the NPRM, "reasonable cause" was defined as "the operator has violated a Federal Motor Carrier Safety Regulation or a State or local traffic law that could reasonably lead to, or has resulted in, serious injury or death; and that the motor carrier believes that the actions or appearance or conduct of the driver on duty, as defined in § 395.2 of this subchapter, are indicative of the use of a controlled substance. The conduct must be witnessed and documented by at least two employees, one of whom is in a supervisory capacity."

The commenters contended that the definition is too restrictive and very difficult to implement. They took exception with the portion of the definition that referred only to a serious violation without any observation of the driver's behavior by the motor carrier.

FHWA Response: The FHWA agrees and therefore has revised the definition of "reasonable cause" to limit it to observable actions that indicate the use of a controlled substance. The criterion regarding the commission of a violation of the FMCSRs is deleted. The FHWA believes that drug use should be identified before an action is committed that may injure someone or damage property. Also, in many circumstances, a driver may violate the FMCSRs without representatives of the motor carrier being present, making the proposed definition of "reasonable cause" ineffective.

Comment: Possible Driver Harassment. Commenters, mostly those representing drivers, including owner-operators, were concerned that the requirement for reasonable cause testing does not become a means for driver harassment or discrimination.

FHWA Response: Because of this concern, the regulatory language of the definition of "reasonable cause" has been changed to require that the supervisor must receive training regarding the circumstances and evidence necessary to make the determination. The training for supervisors is to be an element of the motor carrier's anti-drug program. The definition has been further changed to specify that the written documentation shall be signed and produced within 24 hours or before the results of the tests are released, whichever is the earlier.

In response to the comments raised about the problems regarding the availability of two persons to make a determination that a person should be tested for reasonable cause, the FHWA has revised the final rule. A motor carrier may initiate reasonable cause testing based on the observation and documentation of two supervisors or company officials trained in the detection of drug use symptoms if available. If only one supervisor is available only one may be used.

The FWHA believes that these provisions are adequate to ensure that the requirement for reasonable cause testing is not used for driver harassment.

Post-accident Testing

Post-accident testing is considered to be a necessary part of a drug prevention program. In addition, the test results will provide a valuable source of information about the relationship of controlled substance use and motor carrier accidents. Such data will be useful in identifying problems and establishing effective countermeasures.

The FHWA originally proposed mandatory testing for operators of commercial motor vehicles involved in fatal accidents. Commenters raised several areas of concern. One concern was that only motor carrier drivers would be tested, although it is probably more likely that drivers of other vehicles, especially private automobiles and light trucks, might be impaired by drugs. Testing only the motor carrier driver would be inequitable.

Another concern raised was that motor carrier drivers might be tested in accidents in which there is no evidence of their negligence. Without such evidence, many commenters stated such a requirement would be an infringement on the Fourth Amendment to the Constitution regarding unreasonable search and seizure.

The National Transportation Safety Board strongly supported the post-accident testing proposal and recommended that alcohol be included. It further recommended that the time limit for the collection of a sample be set at a maximum of four hours, not the 12 hours as proposed in the NPRM. Other commenters also supported the post accident testing requirement but with some of the concerns noted earlier.

FHWA Response: The FHWA agrees that other drivers involved in an accident might fail drug tests, but the FHWA does not have jurisdiction to require them to be tested. The FHWA, however, will work with the States, particularly the State enforcement agencies involved in the Motor Carrier Safety Assistance Program (MCSAP), to encourage the testing of all drivers involved in an accident with a commercial motor vehicle where drugs are suspected.

While the FHWA believes that these concerns have merit, they should not be used as a reason for eliminating the requirement for drug testing of commercial motor vehicle drivers after a reportable accident. The FHWA does recognize the logistical problems raised by several commenters regarding the notification of motor carriers of an accident which, under the NPRM, would require a drug test.

Therefore, the FHWA is requiring that the driver be responsible for ensuring that a urine sample is taken, a drug test performed in accordance with 49 CFR Part 40, and that the results be reported to the motor carrier after all reportable accidents involving the driver. The FHWA believes that the driver is in the best possible position to ensure that a drug test is performed. The requirement

to accomplish this should not depend upon whether the local/State policy agency or others request that such a specimen shall be provided. If the driver is too seriously injured to provide a urine specimen, the rules shall require that the individual provide the necessary authorization for the obtaining of hospital reports or other documents that would indicate whether there were any drugs in the driver's system.

A reportable accident is defined in Part 394.3 as an accident which results in death of a human being or bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or total damage to all property aggregating $4,400 or more based upon actual costs or reliable estimates.

The FHWA is also interested in obtaining additional drug-use information related to accidents. Under the final rule, an employee is subject to post-accident testing as soon as possible after the accident but in no case later than 32 hours after the accident. Selection of this time period comports with the Department of Transportation's post-accident testing program for DOT employees, which provides a maximum of 8 hours to determine if an employee is required to be tested and an additional 24 hours to obtain the sample for testing. The FHWA is also requiring that motor carriers notify the FHWA, as part of the accident reporting requirements of 49 CFR Part 394, Notification and Reporting of Accidents, if a drug test (of any body fluid) was performed and the results of such test. Section 391.87 (proposed § 382.109) and Part 394 have been revised to add this provision to this rule.

The FHWA believes this provision will provide the much needed information regarding the relationship between drug use and accidents. As noted by many commenters, mostly motor carriers and the NTSB, the practical issue of requiring a motor carrier to perform a drug test on a driver involved in an accident away from the motor carrier's place of business would be very difficult. The motor carrier may not be made aware of the accident until several hours after the accident. The final rule expands the proposed requirements by requiring a drug test for all reportable accidents. This revision should increase information about drug-related accidents from that proposed in the NPRM.

The National Governor's Association is conducting a research study on possible improvements in truck and bus accident reporting. As part of this study, it will be conducting pilot projects in several States to test a new accident reporting form, reporting criteria and procedures. Based on the results of this study, the FHWA may further modify the accident reporting requirements and procedures now contained in Part 394.

Random Testing

The NPRM proposed that motor carriers establish anti-drug programs that include random testing at a testing rate up to 125 percent. The FHWA asked how such a testing program would work for smaller motor carriers and owner-operators who are not motor carriers.

The majority of the commenters addressed the random testing element. They identified several concerns with the concept of random testing. Of concern to many, were the legal issues. The FHWA is addressing to these concerns in another section of this preamble.

The NPRM provided several suggestions on how drivers and motor carriers could comply with the testing requirements (especially the random testing element) in the rule. These suggestions were:

1. Form consortiums made up of owner-operators and small carriers that would develop a centrally administered random testing program.

2. Form consortiums, and hire a contractor to develop and implement a random testing program.

3. Contract separately with an outside company that would setup these services.

4. Have existing industry-related groups (e.g., trade associations) setup drug programs in which small entities could participate.

5. Arrange to be included as a part of a larger company's drug testing program.

The ATA stated in its comments that the FHWA cannot have an effective random drug testing program if it mandates that motor carriers must do such testing. The ATA outlines two basic problems (1) 71% of the motor carriers have only one vehicle, and most of the others have less than six vehicles. It is impossible for an owner-operator to test himself/herself randomly. (2) Drivers usually operate 100,000 miles a year. They are away from home most of the time driving, loading and unloading, and waiting for loads and are not readily available for random drug testing.

The ATA believes that in the trucking industry, random testing is possible only through roadside random drug testing. The ATA contends that roadside testing, conducted by State enforcement officers participating in the MCSAP program, overcomes the trucking industry problems of carrier size and driver availability. It overcomes the potential of management failure to have a random drug testing program and the potential for driver failure to obey an order to be tested in a timely fashion after being notified that he/she has been selected for random testing.

The ATA further contends that a roadside program would create the credible threat that any driver, at any time, might be tested. A roadside test finding of positive drug use would result in disqualification of a driver for 1 year for the first offense and lifetime for a second offense. This tougher penalty would be a much stronger deterrent than the finding of "unqualified" and a short layoff that would result from a similar test result if the FHWA mandates that motor carriers must conduct the random drug test program.

The ATA believes that the FHWA has the legal authority under the MCSAP program, to require States to conduct random drug testing programs as a condition of receiving MCSAP funds. To do this, the ATA believes, the FHWA would merely have to amend the FMCSRs to establish guidelines to be used in conducting random drug testing and amend the MCSAP requirements in 49 CFR Part 350 to specify a level of random testing required to receive MCSAP funds. Upon receipt of a positive test result, the State agency would notify the driver, the motor carrier, and the FHWA. The FHWA would obtain a copy of the test results and issue a letter of disqualification to the driver, with a copy to the Commercial Driver License Information System, the State of licensure, and the motor carrier. The FHWA would maintain a permanent record of drivers disqualified for 1 year and for those disqualified permanently.

The ATA believes that consortiums, contractors, associations, and other third party organizations will be available to help motor carriers with their drug testing programs and that this will be a benefit to the carriers and to the FHWA drug abatement objectives, with the exception of random drug testing. The ATA does not believe that permitting third parties to set up and maintain drug testing programs would solve the trucking industry problem of effective mandatory random drug testing by motor carriers. The fact that third party programs are available does not mean that motor carriers would make use of them.

Many small carriers are located far from third party testing services and the problem of driver availability for random testing will still exist with third party programs. Third party programs would not result in effective sanctions

for drivers with positive test results, comparable to the tough sanctions that would be imposed for positive test results through roadside drug testing.

The ATA also indicated that the testing rate should be initiated at a target rate of 10% and apply only to those drivers of commercial motor vehicles of more than 26,000 pounds gross vehicle weight rating (GVRW). The ATA believes that using the 26,000 pound threshold is consistent with the commercial driver license program and will focus on those drivers who travel longer distances and may be more tempted to use drugs because of being away from home for long periods. There is no deterrent from drug use for drivers if the only penalty is a short time off until they can get a "clean" test, as would be the case if the random testing program is made the responsibility of motor carriers.

The ATA agrees, however, that management must be allowed its own prerogatives for disciplining a driver who has a positive test result, over and above the penalties mandated by Congress and the FHWA. To as great an extent as possible, the ATA asserts, the FHWA requirements should avoid preemption of management programs established individually by motor carriers or through collective bargaining agreements.

The ATA also supports a suggestion the FHWA included in the NPRM to provide for a revision of the sampling rates based upon success of the mandatory random drug testing program. The ATA stated that success can be measured best through a roadside program of mandatory random drug testing, rather than requiring motor carriers to perform random testing.

The National Private Trucking Association (NPTA) supports random testing, even if it is required to be performed by the motor carrier. In supporting random testing by carriers, however, NPTA noted that a legitimate distinction does exist between the typical private carriage operation and the typical for-hire operation of a considerably large segment of the trucking industry, i.e., the truckload (TL) segment. That distinction concerns the use of owner-operators. While the NPTA has expressed its fundamental support for carrier-performed random testing, NPTA also believes the program would be more effective, both from a practical standpoint and from a constitutional standpoint, if random tests were to be conducted by law enforcement personnel in conjunction with their roadside inspections. The NPTA urged the FHWA to give serious consideration to that approach as an alternative to carrier conducted random testing. The NPTA believes the final rule should require that the annual sampling rate for random testing be no less than 50%.

The IBT stated that it is adamantly opposed to random drug testing. The IBT views it as "an affront to the human rights and personal dignity of its members who may be subjected to it." The IBT contends that the goal for a drug free transportation industry can be reached through the use of less intrusive forms of drug testing, such as reasonable cause and periodic physical examinations, which do not suffer from the same constitutional infirmities inherent in random testing. The IBT disagrees with the FHWA's stated belief that "an employer-sponsored program is the most effective form of random testing." In fact, the IBT does not believe that employer-sponsored random testing is feasible at all in the trucking industry. About 90% of the "employers" in trucking are either owner-operators or companies so small that a truly random program as the FHWA envisions is simply not workable. In the remaining small percentage of motor carriers, which will benefit least from any government imposed drug testing program, practical and logistical problems will make it very difficult, and much more expensive than the FHWA foresees, to implement coherent random testing programs.

The IBT indicated that none of the five options posed by the FHWA are really viable for random testing of owner-operators. Even supposing that voluntarily consortia could be established for random testing, there would be no way to prevent a driver from simply withdrawing when his/her number came up. There could be no enforcement by the consortium if a driver did test positive. The communications system and network of collection sites that would be needed to service such a consortium would have to be very expensive.

The American Bus Association supports a random drug testing including the 125% annual sampling rate since it led to such effective deterrence in the results published by the Department of Defense and the Coast Guard.

Greyhound Lines implemented its drug testing program in 1978 and supports the Department's initiative in the proposed rulemaking to require mandatory drug testing of all heavy duty commercial motor vehicle drivers. Greyhound is considering a random drug testing program that would annually test 75 percent of its drivers and plans to adjust that percentage based upon findings nationally and regionally as necessary. Greyhound indicated that it has a significant problem concerning structuring a random testing program that would not adversely affect locations with 10 or fewer drivers. Greyhound believes the final regulation should give motor carriers the flexibility to adjust the percentage of drivers to be tested. Under this proposal, if a high percentage of "positives" were found from random tests conducted, then the percentage of tests would be increased until a deterrent effect is noted.

The OOIDA is opposed to any form of random testing, whether by motor carriers or by Federal or State officials. The OOIDA believes that random testing is an embarrassment to those individuals who are innocent, and states that it plans to challenge, in the courts, any final rule that includes provisions requiring random testing for commercial motor vehicle drivers.

Other commenters support the concept of a random testing pilot program to evaluate the drug problem in the trucking industry and recommend appropriate steps after evaluation of the program. Many commenters believe there is insufficient evidence that random drug testing will serve as a deterrent to drug usage.

FHWA Response: The FHWA continues to believe that random testing can be an extremely effective method for decreasing drug use among commercial motor vehicle drivers because abstinence from use is the only way to prepare for an unannounced test. The success of random drug screening has been demonstrated in various programs. The United States Coast Guard implemented a random testing program for its uniformed personnel which led to a 75 percent decrease in drug use over a 5-year period. The Department of Defense has a random testing program which has resulted in a drop from 27 percent use-rate in 1980 to 8.9 percent in 1985.

The FHWA believes that random roadside drug testing at appropriate testing levels would be a very effective deterrent to the use of drugs by commercial motor vehicle drivers. The FHWA does not believe, however, that it can mandate such a program for State initiated enforcement. Unfortunately, the FHWA does not believe that this approach, as suggested by ATA and many other commenters, is a viable option at this time.

The FHWA believes, however, that an employer-sponsored program can include an effective form of random testing. As noted in the NPRM, the FHWA continues to be concerned that the programs that will be established in

response to this final rule are fair and equitable to all motor carriers and drivers. The type of operation should not be used as an excuse to evade subjecting drivers to random testing. The FHWA calls upon the industry to work together to ensure that drivers who use drugs and drive in interstate commerce are identified and banned from driving until they are drug free. Only through a cooperative effort using the general framework established by this final rule will this be achieved.

Since the majority of the comments were opposed to random testing, information on the specifics of such a program were not forthcoming. As noted in the NPRM, the FHWA is concerned about the rate of testing that would provide an adequate level of deterrence. The ATA suggests that the initial rate be set at 10% while the ABA believes the 125% rate should be used. The NTSB suggested that a level closer to the upper limit should be chosen.

The FHWA has decided that a minimum testing rate of 50% is to be used. Such a level will provide a base line to make adjustments as necessary based on evidence of use at this rate. At this time, the FHWA believes that a 50 percent minimum testing rate will provide a sufficient deterrent to drug use. This rate is also consistent with the random testing program currently applicable to civilian employees of the U.S. Department of Transportation occupying sensitive safety and security-related positions. Those drivers who attempt to falsify their medical qualifications (by not admitting to testing positive and thereby being unqualified to drive) will be identified.

Implied Consent and Waivers

The FHWA has deleted proposed §§ 382.107 and 382.111 which address waivers and implied consent. These sections are being deleted as unnecessary and/or redundant. Section 206(f) of the Motor Carrier Safety Act of 1984 provides the Secretary with authority to waive, in whole or part, any rules issued under the authority of this Act. This rule is being issued under that authority. The FHWA believes an implied consent provision is not needed in this rule since the requirements are to determine if a driver is qualified to drive in interstate commerce.

Implementation Schedule

This rule is effective December 21, 1988.

A new § 391.93, Implementation schedule, establishes a timetable for implementing testing programs (pre-employment, periodic, reasonable cause, and post-accident) based on the number of drivers under the motor carrier's control. Motor carriers with 50 or more "drivers subject to testing" are required to initiate a drug testing program by December 21, 1989, for those drivers only. Other motor carriers will be required to initiate a drug test for other drivers by December 21, 1990. "Drivers subject to testing" is defined as employee drivers and leased drivers who are leased for 90 days or more in a 365-day period. Motor carriers using less than 50 drivers subject to testing are required to initiate a drug testing program by December 21, 1990.

The threshold of 50 drivers subject to testing was chosen by the FHWA as the level that would provide for an adequate selection pool for random testing. It would also provide, along with the other drug testing requirements, a sufficient number of tests to enable a basis for determining drug use within the motor carrier's driver work force. The number of tests required may also enable the motor carrier to realize lower costs per test thus minimizing the economic impact of the rule.

The FHWA is allowing for the additional year to initiate a drug testing element to the drug testing programs for smaller motor carriers and motor carriers using drivers for short time periods to allow them adequate time to establish workable, equitable, and effective mechanisms to perform drug testing, especially random testing.

A minimum phase in schedule is also established for random testing in § 391.93. Commencing with the implementation date, motor carriers are required to perform random testing at a minimum as follows: (1) The random drug testing is spread reasonably through the 12-month period; (2) The last test collection during the year is conducted at an annualized rate of 50 percent; and (3) the total number of tests conducted during the 12 months is equal to at least 25 percent of the covered population.

For some motor carriers, particularly those with a large number of drivers subject to drug testing, it may be a substantial burden to move from no drug testing directly to a 50 percent random testing rate. If required to have tested 50 percent of all covered drivers by the end of the first year, motor carriers might have to test at rates far above a 50 percent rate toward the end of the year, to make up for lower rates at the beginning. Employers should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively more routine. We do not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule therefore provides an implementation procedure that would allow motor carriers to phase in random drug testing during the first 12 months in which tests are conducted. Motor carriers would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the year to permit the motor carrier to phase in to the 50 percent rate, and the total number of tests conducted would have to be equal to at least 25 percent of the drivers subject to testing.

Suppose, for example, that a motor carrier has 1,000 drivers subject to testing. At a 50 percent annual rate, 500 tests would have to be conducted during a year. Under the phase in, however, the motor carrier could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the year, the annualized rate of 50 percent was achieved. Thus, if the motor carrier's drug testing plan contemplated administering random tests on 12 occasions during the year, the motor carrier would need to administer at least 42 tests (500 divided by 12) on the last occasion, but could administer fewer tests until then. Overall, the motor carrier would have to conduct at least 250 random tests the first year. In subsequent years, the 50 percent rate would be maintained.

As noted in the NPRM, the FHWA envisions that many of the small motor carriers and owner-operators will form consortiums and other cooperatives to meet the requirements of this rule. The FHWA encourages this and intends to promote such consortiums. The arrangements agreed to by these drivers and carriers will be tailored to their specific operations and characteristics. The FHWA welcomes any type of arrangement as long as it complies with the requirements of this rule.

An example of such an arrangement would be a consortium of owner-operators hiring a contractor to administer their drug testing program (pre-use and random testing elements of the program). The contractor would be responsible for notifying the drivers selected for random testing, ensuring that the test collection site, chain of custody procedures, and testing laboratory all comply with 49 CFR Part 40. Furthermore, the contractor would also obtain the medical review officer who would be responsible for interpreting the results, including verification of positive tests and

notifying the driver and/or motor carrier of the results of the tests.

The consortium would also serve as the repository of all summary information regarding the "makeup" of the random test. Information regarding the number of tests performed and the results of the tests as well as the random selection procedures would provide objective and credible data to substantiate an effective and equitable testing program.

As noted in the comments, many owner-operators operating under short term trip-lease arrangements are not aware of their destinations sufficiently in advance to ensure that their location at any given time would be known to others. Often these operations consist of delivering a load in one city under a trip-lease agreement for a motor carrier, then calling a broker or another motor carrier to obtain another load, in many cases, to a destination other than the originating city. The FHWA recognizes such operations and does not intend, by this rule, to alter such arrangements. It is incumbent on the motor carrier entering into a trip-lease arrangement with the owner-operator to have drug testing program to ensure that the driver is not using drugs. With regard to the example cited above, the FHWA envisions that the motor carrier would verify that the owner operator is participating in a bona fide drug testing program through a consortium and verify that the driver is not currently unqualified because of testing positive for drug use by contacting the consortium prior to entering into a lease agreement with the driver.

The motor carrier has the option of subjecting these drivers to a random test under the motor carrier sponsored program. The rule allows motor carriers to accept bona fide consortium drug testing program in lieu of their carrier-based program.

The above example illustrates the potential for cooperation betwen motor carriers and owner-operators participating in a consortium. The motor carrier would be relying on the consortium to perform the pre-employment and random testing for potential drivers, thereby complying with the testing requirements with little impact on their operations. At the same time, drivers who are selected for testing under the consortium's random selection process could be notified through the motor carrier when the carrier calls the consortium to verify the drivers participation. Those drivers not using drugs would be subject to minimal delays in obtaining loads due to these requirements. If a motor carrier uses the same driver on a number of different trip contracts, the motor carrier would only have to check once every 6-month period on that driver. Those drivers who attempt to falsify their medical qualifications (by not admitting to testing positive and thereby being unqualified to drive) should be identified by this process.

Conflict with Foreign Laws

The FHWA has determined not to make the rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies. The FHWA has determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department of Transportation and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching a permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. The FHWA believes that considerable progress has already been made and further meetings will be held in the near future. While the FHWA believes that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The FHWA Administrator may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the FHWA's intention to issue a notice, no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the **Federal Register**. While the FHWA recognizes that any decision not to apply this rule to foreign citizens has the potential to create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those that the FHWA regulates.

Prescription Medication

A driver would be allowed to use a controlled substance (except for methadone) when taken as prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties. Under § 391.97 (proposed § 382.203) Prescribed drugs, a driver would have an affirmative defense to an allegation that he/she unlawfully used a controlled substance. The driver would have to prove, through clear and convincing evidence, that his/her use of the controlled substance was as prescribed by the licensed medical practitioner.

The motor carrier, MRO, and the driver would have flexibility in applying this provision. For example, when a driver tests positive for the use of controlled substances, a driver has the burden of proof to document the use was lawful. The motor carrier and the MRO may accept the affirmative defense and allow the driver to continue to operate, or request the opinion of another physician. The MRO may provide an opportunity for a driver to discuss a positive test result and clarify if a prescribed medication was involved. If the motor carrier elects the latter option and a medical dispute follows, the motor carrier or the driver has the option of bringing the question of the driver's qualification to the Office of Motor Carriers for resolution through 49 CFR 391.47, Resolution of conflict of medical evaluation.

The FHWA views use of § 391.47 as a last resort, however, and believes that the motor carrier, the licensed physician, and the driver can best resolve disputes regarding a positive test result due to the use of prescribed controlled substances. The final decision should be based on whether there is evidence of abuse of the medication or whether the controlled substance causes the driver to be a risk while operating a commercial motor vehicle.

The FHWA currently prohibits the use of methadone by interstate commerce drivers. Docket comments to the ANPRM of May 13, 1986, from the Legal Action Center of New York requested that we allow drivers in interstate commerce to use prescribed methadone. The Center stated that a driver on a methadone maintenance program is a safe driver even though he/she is taking an addictive controlled substance.

Section 391.97(b) (proposed § 382.203(b)) provides that nothing in this rule restricts a motor carrier from requiring a driver to notify the motor carrier of therapeutic drug use before driving.

The ATA believes that the FHWA should require a driver who is using prescription medication to notify the motor carrier before driving a commercial motor vehicle. The motor carrier should have the option of using a driver, depending upon the recommendation of a medical doctor, because there are many prescription drugs that are subject to abuse by drivers. There are also drugs that have side effect which may adversely affect a driver's ability to safely operate a commercial vehicle. The ATA believes that owner-operators and casual drivers should be required to give advance notification of prescription drug use to motor carriers prior to leasing or working for such carriers. The ATA believes that any driver who is not employed by a motor carrier, or who is a motor carrier and who is using prescription medication should be required to carry a letter from the doctor who prescribed the medication certifying that its use is not subject to abuse and that it does not have side effects which will adversely affect driving ability. If the foregoing procedures are adhered to, a driver should be able to use them as an affirmative defense against a positive drug test. The ATA continues to oppose the use of methadone by drivers and recommends that the FHWA should continue its prohibition against methadone usage.

The IBT commented that the discussion under prescription medication might lead many drivers and motor carriers to the erroneous conclusion that the "defense" that a positive drug test was caused by prescription medication will normally involve the motor carrier. In fact, the usual circumstance will be that the motor carrier's only involvement will be through the Medical Review Officer (MRO). Under 49 CFR Part 40, the section dealing with review for prescription medication states, "If the Medical Review Officer determines there is a legitimate medical explanation for the positive test result, he or she shall determine that the result is consistent with legal drug use and take no further action." Hence, the IBT believes that the question of prescription medication is one that should, in most cases, be resolved between the driver and his MRO, without company officials with personnel, labor relations, or operations responsibilities ever becoming aware of it. Only if and when the driver challenges the MRO's decision and resorts either to the § 391.47 appeals process or to a contractual grievance procedure will nonmedical personnel have occasion to find out about the medication "defense."

The NPTA supports the FHWA's proposal to give drivers the opportunity to assert their bona fide use of prescription drugs as an affirmative defense. The FHWA also agree with the concern raised in the preamble about the possible abuse of prescription drugs. The FHWA, therefore, supports requiring drivers to "demonstrate through clear and convincing evidence" that the driver's use of a controlled substance was prescribed by a licensed physician "who is familiar with the driver's medical history and assigned duties." The FHWA also supports amending the proposed rule to require that, as a precondition to asserting this defense, drivers give motor carriers advance notice of their use of any prescription drug before driving. At the same time, the NPTA also recognizes that there may be instances where providing advance notice may not always be possible. They recommend that the final rule should also make clear that if a driver fails to provide the carrier with the required notice, but later meets the requisite evidentiary burden, the decision on whether to discipline the driver is entirely the motor carrier's.

FHWA Response: The FHWA is sympathetic to the concerns raised by these commenters on this issue, but believes that § 391.97 (proposed § 382.203) as proposed in the NPRM is satisfactory. An MRO should make a determination if there was a legitimate explanation for a positive test result and that the result is consistent with legal drug use and that no further action is necessary. Most cases could then be resolved between the driver and the MRO. Motor carriers, at their option, may require drivers to provide notice that they are using prescription drugs prior to driving and/or testing.

Who Is To Be Tested

It continues to be the FHWA's belief that the driver is the most critical individual involved in ensuring the safe operation of a commercial motor vehicle. The driver is responsible for ensuring the vehicle is in safe operating condition prior to its operation, during its operation, and after he/she has finished operating the vehicle. It is believed that a person tested positive for the use of a controlled substance would be less likely to ensure that the vehicle is in safe operating condition at any given time during which the driver is on duty.

Other occupations within the motor carrier industry, most notably mechanics (i.e., mechanics, mechanic helpers, tire changers, etc.) are not covered by this rule due to the difficulty in identifying those persons, especially those who do not work for a motor carrier. The FHWA believes it would be very difficult to identify and test, in a credible manner, all the individuals who maintain and/or repair commercial motor vehicles. This final rule, however, does not prohibit motor carriers from including their mechanics or other employees in the program.

The FHWA proposed using one of two definitions to regulate motor carriers and drivers. The first was based on the definition of "commercial motor vehicle" contained in the Motor Carrier Safety Act of 1984 and the applicability provisions specified in 49 CFR 390.3, General Applicability. The FHWA published a final rule regarding the general provisions of the FMCSRs on May 19, 1988 (53 FR 18042). This definition uses a gross vehicle weight rating or a gross vehicle combination weight rating criterion of 10,001 pounds or more. Both definitions also include vehicles designed to transport 16 or more persons and all vehicles transporting placardable quantities of hazardous materials. The second definition is based on the Commercial Motor Vehicle Safety Act of 1986 which defines "commercial motor vehicle" as a motor vehicle having a gross vehicle weight rating of 26,001 pounds or more. Section 390.3, General applicability, specifies which entities are subject to FMCSRs and which entities and operations are exempt from the FMCSRs. Generally, the FMCSRs are applicable to all employees and employers who transport property or passengers in interstate commerce. The exceptions to this general applicability are:

(1) All school bus operations as defined in § 390.5;

(2) Transportation performed by the Federal Government, a State, or any political subdivision of a State, or an agency established under a compact between States that has been approved by the Congress of the United States.

(3) The occasional transportation of personal property by individuals not for compensation nor in the furtherance of a commercial enterprise;

(4) The transportation of human corpses or sick and injured persons;

(5) The operation of fire trucks and rescue vehicles while involved in emergency and related operations;

(6) Any "exempt intracity zone" operation, as defined in § 390.5, if a State has adopted and enforces State laws and regulations, compatible with

the rules in this subchapter, applicable to such intracity zone operation; and

(7) The private transportation of passengers. In addition, the rules in Part 391 (Qualifications of Drivers) of the FMCSRs generally do not apply to a farm vehicle driver. The farm driver exemptions found in 391.2 and 391.67 have been in effect since December 22, 1971, and were issued to meet specific, unique transportation needs of the country's farm community.

Several commenters were confused as to the exact applicability of the rule. While the preamble indicated that the rule would only apply to those drivers and motor carriers that were subject to the FMCSRs, the proposed regulatory language did not make this distinction. Proposed § 382.103 stated the proposed rule would apply to *all* motor carriers and drivers operating in interstate commerce. Farmer-related organizations, while supporting the NPRM, recommended that farmers be excluded from the requirements. The commenters were generally supportive of the use of the term "commercial motor vehicle" as it is used in § 390.5 of the FMCSRs (i.e., 10,001 pounds or more). The ATA recommends that the 26,000 pound GVWR threshold be used.

FHWA Response: The intent of the NPRM, though not explicitly stated in the regulatory language, was to have these drug testing requirements apply to motor carriers and drivers who are currently subject to the physical qualifications requirements of 49 CFR 391.11(b)(6). Since this rule only addresses qualification standards (as opposed to disqualification standards), only those drivers who are required to be physically qualified to drive are to be subject to this rule. Section 391.83 (proposed § 382.103) has been changed to reflect this intent. The rules in this Subpart will apply to any person who operates a commercial motor vehicle, as defined in 49 CFR 390.5 (except the vehicle size criterion is 26,001 pounds GVWR, instead of 10,001 pounds), in interstate commerce that is subject to the driver qualifications of § 391.11(b)(6). All drivers and motor carriers exempted under 49 CFR 390.3 (which becomes effective November 15, 1988) and § 391.2 are not subject to this rule.

The implementation of this Subpart is a significant undertaking for the motor carrier industry. The industry will need to expend a high level of administrative and financial resources to complete the task. The FHWA believes that the initial implementation of this rule should concentrate, as in the Commercial Driver's License Program, to drivers of vehicles which could result in the greatest benefits. Since the fatality rate for vehicles above 26,000 pounds is significantly greater than vehicles between 10,000 and 26,000 pounds, the FHWA has applied these rules at this time to vehicles with a GVWR of 26,001 pounds and above. In addition to the improved administrative costs and improved benefit/cost ratio, limitation to the heavy vehicles will also reduce the demand to create consortiums to facilitate the needs of the anti-drug programs for small carriers.

The smaller vehicles are also typically dispatched and return to a motor carrier's place of business on a daily basis. Unlike most long distance, heavy truck drivers, the operators of smaller vehicles are under the supervision and observation of the employer to a larger degree. Accordingly, the FHWA believes that the drug detection training provided to motor carrier dispatchers and supervisors will carry over to drivers of smaller vehicles.

The FHWA notes that it is developing an NPRM pertaining to the private transportation of passengers in interstate commerce. When that rule becomes final, certain drivers of such vehicles would be subject to the drug testing rules. Similarly, the intracity exempt (commercial) zones will be eliminated shortly because of legislation expected to be signed by the President and drivers in those zones will be covered by this rule.

This rule is not applicable with respect to any person for whom compliance with this part would violate the domestic laws or policies of another country. See discussion under section titled, Conflict with Foreign Laws.

Effect on the Motor Carrier Safety Assistance Program

As noted earlier, this final rule is codified in Part 391, Qualifications of Drivers as opposed a separate section (Part 382) as proposed in the NPRM. The FHWA does not intend that this revision affect intrastate motor carrier operations in anyway or Motor Carrier Safety Assistance Program funding for any State. This is consistent with the proposed applicability section (§ 382.103) which stated, "This part applies to motor carriers and drivers operating in interstate commerce."

The FHWA intends, however, to investigate in a separate notice of proposed rulemaking, the inclusion of intrastate drivers of large trucks and other vehicles in this rule.

Action on Receipt of Positive Drug Test

The IBT believes that much of the FHWA's discussion in the preamble to the NPRM under this heading, including virtually everything described in the first paragraph—except for the last sentence about taking "appropriate personnel action"—falls within the purview of the MRO under 49 CFR Part 40. This is one of the many specifics that the FHWA incorporates by reference with its repeated requirement in Subparts C, D, E, and F of the NPRM that a motor carrier shall require its drug testing program to conform with 49 CFR Part 40. The IBT stated that the FHWA should take care not to leave a contrary impression with readers of the final rule.

FHWA Response: The FHWA agrees with the IBT comment and affirmatively excludes that discussion from this final rule.

Notification of Test Results and Recordkeeping

Notification: Many of the commenters opposed the proposed requirement that a motor carrier must notify a driver-applicant of the results of a controlled substance test. Their rationale was that since such a large number of driver-applicants would be given a "pre-employment" test, it would be unduly burdensome to impose such a requirement on the industry.

FHWA Response: The FHWA believes these concerns are valid ones. However, we believe that the driver-applicant has the right to know the results of such a test if the driver-applicant requests such information within a reasonable period of time. Therefore, the FHWA will not require a motor carrier to make known the results of a "pre-employment" drug test unless the driver-applicant requests such results within 60 days of being notified of the disposition of the employment application. Conversely, the results of all other drug tests must be made known to a motor carrier employee any time the test results are "positive." The employee must be informed that the test indicated "positive" results and what drug(s) was discovered.

Record Retention: The FHWA had proposed that controlled substance test results be retained in the driver's qualification file for a period of 3 years. Most motor carrier commenters agreed with the proposal and articulated the belief that a motor carrier will establish procedures to safeguard against unauthorized release much the same as has been done for the protection of other personnel records. The ATA generally agreed with the retention period but contended that the results of a controlled substance test should be retained for a longer period of time when the test resulted in a driver disqualification for a period of 1 year or

permanently. The IBT also agreed with the retention period and went farther when it stated: "This regulation should further stipulate that the only test results in those files must be whether the outcome was reported 'negative' or 'positive' by the [medical review officer] MRO. Negative test results should only be maintained on file for a period of 12 months. Underlying laboratory reports and other confidential medical information may only be retained in the MRO's files, in keeping with 2.8 of the HHS Guidelines."

FHWA Response: The FHWA believes that the test results of any controlled substance test should be kept confidential. To accomplish this, the motor carrier is required to retain, in the driver's qualification file, such information that will indicate only the following:

(1) The employee submitted to a controlled substance test.

(2) The date of such test.

(3) The identity of the person or entity performing the test and who is the custodian of the detailed test results.

(4) Whether the test finding was "positive" or "negative."

The medical review officer (MRO) who is an agent for the motor carrier is required to be the sole custodian of the individual test results. We believe these retention requirements along with the access requirements discussed below will ensure the confidentiality desired.

Comment: Access to Individual Test Records or Test Findings. The ATA expressed concern about subsequent or prospective motor carriers being allowed access to information about controlled substance test results. It stated: "Subsequent or prospective motor carriers must be allowed access to information about drug test results and about disqualification for drug use or this whole program has little meaning. If a driver knows that subsequent users of his/her services will not be told about positive drug tests and disqualifications then the deterrent value of the tests is lost. The drug user will be able to hop from one job to another with little concern about the drug use being detected by future users of his/her service."

The IBT, on the other hand, believes that "a testing employer [under] no circumstances should be permitted to release test results to a subsequent or prospective employer." The IBT continued by stating: "The results will be of very little value to a future employer. If the testing employer has continuously employed an individual for a period of time, it can be inferred that the individual tested negative during that time. If the individual has tested positive and successfully gone through rehabilitation, that is information the prospective employer should not use in making an employment decision. If the individual was discharged on the basis of a positive test, that will become immediately apparent to the prospective employer. Furthermore, the pre-employment-employment drug test renders past drug test history of little value."

FHWA Response: As stated above, the FHWA believes that the test results of any controlled substance test should be kept confidential. Therefore, § 391.89 prohibits a MRO from releasing the confidential information in the MRO's possession to anyone without first obtaining written authorization from the affected person who was previously tested.

Comment: Maintenance of Summary Data. Measuring the effectiveness of the controlled substance testing program is essential to the success of any drug test program. The IBT asserts that the best answer lies in the collection of aggregate data, primarily from testing laboratories. In the interest of reducing the reporting burden, the IBT suggested collecting the desired data from the testing laboratories in lieu of the motor carrier. It suggested that the FHWA require monthly statistical reports to be filed by the testing laboratories since monthly statistical summaries are already required by the Department of Health and Human Services for evaluating the Federal government's drug testing program.

FHWA Response: The FHWA agrees that the collection and evaluation of statistical data is of prime importance. However, such a requirement as that proposed by the IBT could place an unnecessary burden on the testing laboratories and could require additional government expense that cannot be cost justified at this time. In an effort to ensure that the statistical data is available when needed, § 391.87 requires that each motor carrier or consortium collect and retain specific information in its files. The FHWA plans to statistically sample the available information to evaluate the effectiveness of the program. Additionally, the information collected by individual motor carriers will be reviewed whenever a compliance review is performed by the agency's field staff.

HHS Guidelines

In the notice of proposed rulemaking for the rule, the FHWA proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Drug Testing Programs of the Department of Health and Human Services (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the Federal government, and they include safeguards for the accuracy and privacy of testing.

The Department of Transportation has determined that certain modifications of the HHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free workplace regulations. The result is that the Office of the Secretary in the Department of Transportation is publishing elsewhere in today's **Federal Register** an Interim Final Rule With Request for Comments entitled, *Procedures for Transportation Workplace Drug Testing Programs*, that codifies the Department of Health and Human Service Guidelines for drug testing at 49 CFR Part 40. This new part sets forth requirements for such things as specimen collection procedures, laboratory procedures, quality assurance and certification procedures. The rule will provide further guidance on how this rule shall be implemented. These DOT Procedures are intended to preserve, to the greatest extent practicable, the important safeguards provided by the HHS Guidelines.

Some of the modifications to the HHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to references to "employers"). Other modifications are intended to take into account differences in the situations of Federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT required industries may find it necessary to conduct some kinds of testing in medical facilities or through use of mobile units, rather than the more permanent collection sites contemplated by the HHS Guidelines. It may not be practicable for regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on this drug-free workplace program rule and those proposed by other operating administrations, comments were received concerning the HHS Guidelines. These comments will be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

The FHWA acknowledges the comments regarding testing for drugs which HHS has not established cutoff levels and which are not included in the bimonthly challenge test samples which are a very important part of the HHS laboratory certification program. However, the FHWA believes that testing for the 5 classes of drugs (marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines) should be incorporated in the testing requirements for preemployment, periodic, post-accident, and random. However, the FHWA believes that testing conducted under "reasonable cause" should involve only those controlled substances as addressed in 49 CFR Part 40.

Section 391.81(b) of this regulation provides that a motor carrier may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. That is, a motor carrier must test the sample for the five major drugs listed in § 391.81(b). Only if, in the context of reasonable cause testing, the Federal Highway Administrator authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshold) may the motor carrier also test the sample for that drug.

Absent such an approval, if the motor carrier wants to test, in addition, for Drug Y, the motor carrier must obtain a second sample from the driver. The obtaining of this second sample is not under the authority of this subpart. The motor carrier must base its request for the second sample on whatever other legal authority is available, since the motor carrier cannot rely on this rule as the basis for the request.

Employee Assistance Programs and Rehabilitation

In the NPRM the FHWA had proposed several alternatives for employee assistance programs and rehabilitation. Under the first three options, an employee would have been entitled to enter a rehabilitation program, under circumstances which varied by option, and the employer would have been required to hold the employee's position open while the employee underwent rehabilitation.

The FHWA was encouraged to note that many of the commenters indicated that as part of their current drug testing programs they provide the opportunity for rehabilitation for their drivers. While the FHWA realizes that the practice of providing rehabilitation or drug testing is not universal in the motor carrier industry, the experiences of those who do provide rehabilitation and drug testing indicate that it is feasible.

While the majority of the commenters supported rehabilitation programs for drug users, there was a divergence of views on the criteria for providing rehabilitation and who should assume the costs of such a program. Related to the issue of rehabilitation was the provision that a driver be provided with employment reinstatement rights at the completion of a rehabilitation program and a negative test for controlled substances. Technical concerns, such as assurances that the driver is in fact rehabilitated, the length of a rehabilitation program and the procedures to assure that the former drug using driver continues to abstain from drug use once he/she completes a rehabilitation program, were raised by the commenters.

Those commenters representing motor carriers were in favor of leaving the decision to provide rehabilitation and reemployment rights to management-labor negotiations. These commenters also noted that they do not believe that the FHWA has the legal authority to require motor carriers to pay for rehabilitation programs for persons who the motor carrier decides should not be commercial motor vehicle drivers.

Those commenters representing drivers were in favor of motor carrier sponsored rehabilitation programs. They noted that those drivers found to be using drugs and not rehabilitated would not leave the motor carrier industry but would seek employment with another motor carrier. They believe that this would just transfer the drug problem within society, not reduce it, as they contend is the overall goal of the FHWA's anti-drug rulemaking.

FHWA Response: While the FHWA recognizes the significance of the arguments raised in defense of broad rehabilitation opportunities and job security for employees who use drugs, it is important to emphasize that the FHWA's primary duty is to consider the adverse safety consequences surrounding the issue of drug use within the motor carrier industry. The FHWA has decided that motor carriers will not be required, by this rule, to offer an opportunity for rehabilitation or to provide job security to drivers who fail a drug test, who use drugs on the job, or who voluntarily come forward and request rehabilitation.

It is understood that broad rehabilitation opportunities and job security for employees, without regard to the manner of detection of drug use, may help those drivers who are unable to help themselves. However, the FHWA believes that the comprehensive testing program of commercial motor vehicle drivers combined with an employee assistance program to educate and train all personnel, is the most effective approach to promote safety and will reduce drug use in the motor carrier industry.

Moreover, the FHWA encourages motor carriers and consortiums to develop their own policies regarding rehabilitation. This rule neither prohibits a motor carrier from assigning a driver to a nondriving duty nor requires the driver to use vacation time, sick leave or leave without pay in order to accommodate that person's rehabilitation activities. Issues such as termination, reassignment, hiring of temporary drivers to fill a position, or policies regarding a driver's absence from a position are, the FHWA believes, issues that are appropriately the subject of labor-management negotiations and are not issues to be addressed in this rulemaking action.

The FHWA investigated rehabilitation programs and found that the least time that it would take to complete a rehabilitation program would be 28 days. It would probably take an additional 14 days to enroll an individual in such a program. This would have requried an employer to keep an employee's position available for a minimum of 42 days for a rehabilitation program. Thorough rehabilitation programs which ended an employee's dependence on drugs could take much longer. There did not seem to be a means to implement mandatory rehabilitation without the FHWA being involved in the day-to-day management of the motor carrier. Rehabilitation rights also diluted the deterrent effect of the proposed regulations.

A driver with a drug problem must never be permitted to function in a position where his/her actions could affect the safe operation of a commercial motor vehicle. Consequently, rehabilitation and employment rights for employees will not be mandated. In all cases, of course, employers would be free to offer rehabilitation. This provides the most flexibility to labor and management to determine the need for and shape of any rehabilitation program. It also provides a deterrent to drug use and thus, may yield large benefits with low costs.

We note that under the Commercial Motor Vehicle Safety Act of 1986, drivers are disqualified for 1 year if they are convicted of operating a motor vehicle under the influence of alcohol or drugs. However, the issue of being under

the influence of a drug is different from simply having drugs in one's system. It is to the latter, stricter standard that this rule is addressed.

The FHWA is concerned about follow-up testing of drivers who have completed rehabilitation after testing positive in a random test. The FHWA believes that motor carriers should have wide latitude in postrehabilitation testing, permitting the motor carrier to vary the frequency and duration of such testing on a case-by-case basis. Recommendations on an adequate period of follow-up random testing vary from 1 to 3 years. Some information reveals that 3 to 4 tests per year may be sufficient. Continuing treating and follow-up testing of employees returned to driving are important measures from the point of view of the recovering substance abuser and the public safety. Although this rule does not require that persons testing positive be afforded the opportunity for rehabilitation, it is inevitable that many will be offered that opportunity, particularly many testing positive for the first time. The knowledge that a follow-up test may be required can assist the recovering driver and offer important assurance from the point of view of the public safety. The final rule provides that, after returning to work, a recovering driver must continue in any program of after-care required by the EAP counselor and be subject to follow-up testing for not longer than 60 months after return to duty.

An Employee Assistance Program (EAP) is designed to help employees solve problems and provide motor carriers with a method for dealing with driver problems, such as drugs. An EAP may include the following components:

(a) Employee policy and procedures on drug use based on a motor carrier's unique needs, organizational structure, and goals and resources;

(b) Employee communications that include ongoing printed educational materials directed at both drivers and family members;

(c) Training of supervisors; and

(d) Evaluation of the effectiveness of the EAP.

The FHWA has determined that properly managed EAPs benefit both the motor carrier and the driver. All motor carriers shall develop EAPs for their employees. Each EAP is required to have an educational component which would minimally have display and distribution of informational material; display and distribution of a community-service hot-line telephone number for driver assistance (if one is available); and display and distribution of the company policy regarding drug use by drivers. Additionally, each EAP of a motor carrier would be required to provide training for drivers and supervisory personnel. The training would minimally require the following elements: The effects and consequences of drug use on personal health, safety, and work environment; the manifestations and behavioral causes that may indicate drug use and abuse; and documentation of training given to drivers and motor carrier's supervisory personnel. An EAP training program for drivers and supervisory personnel would consist of at least 60 minutes training for every driver and supervisor.

Motor carriers will be required to appoint or designate a Medical Review Officer (MRO). The MRO will perform several functions, including review of the results of the motor carrier's drug testing program; interpretation of each confirmed positive test result; provide an opportunity for a driver to discuss a positive test result with the MRO; and evaluation of an individual in conjunction with a rehabilitation program, if the motor carrier voluntarily implements one. This rule requires that an MRO be a licensed doctor of medicine or osteopathy. The MRO could be a currently employed company physician or could be a private physician who performs MRO service for the motor carrier on a contractual basis.

The FHWA recognizes that not all motor carriers have the fiscal resources to implement a "company" EAP. However, a motor carrier has a responsibility, both to its drivers and the public, to provide an environment where safety is not jeopardized by drug use. It is suggested that a motor carrier provide EAP services through one of the following means:

(a) Motor carrier operated EAP;

(b) Contractor/consortium arrangement;

(c) Arrangements with local community service organizations; or

(d) Other workable alternatives which provide an equivalent level of service.

The FHWA believes that a long-term, will-run EAP will pay for itself over time in lower costs for health care, absenteeism, accidents, and worker compensation. A large motor carrier may find that an internal program utilizing the services of fellow drivers is most economical as well as effective. Some motor carriers may have access to programs run by community service agencies which are made available at little or no cost. Labor unions may also provide programs. Counseling services may also be available as part of a driver's medical insurance plan. Companies should investigate the facilities and services available to them and their drivers and the benefit of establishing internal programs consistent with the size and scope of their operation.

Summary of Economic Analysis

This is a summary of the industry cost impact and benefit evaluation for the regulatory changes implemented in this rulemaking on drug testing programs for commercial motor vehicle operators. Testing under these rules would be conducted prior to employment, periodically, randomly, after a reportable accident and upon reasonable cause.

The rules are needed to prohibit absolutely the presence of a prohibited drug in a driver's system at any time. The rules are intended to ensure a drug-free highway environment and to eliminate drug abuse in the commercial motor carrier industry.

The assumptions and cost factors used in preparing the economic impact estimates of the changes have been developed by the FHWA. Cost data were furnished by motor carriers, motor carrier industry associations, drug testing laboratories, and trade publications. These estimates of cost impact include revisions based on public comment and other information that became available.

This rule will affect up to approximately 200,000 interstate motor carriers and about 3 million commercial motor vehicle drivers. These entities will incur additional costs because they will be required to comply with the proposed antidrug programs specified in this rule.

The FHWA believes that three major benefits will accrue from this rulemaking. First, there will be benefits due to the prevention of fatalities, personal injuries, and property loss resulting from accidents attributed to neglect or error on the part of commercial motor vehicle operators whose judgment or motor skills were impaired by the use of illicit substances.

Second, benefits will accrue to motor carriers and drivers from the reduction in pilferage, absenteeism, medical and insurance costs, and improved general safety and productivity in the work place.

Third, the reduction of drug abuse in a vital and socially important industry such as the commercial motor carrier industry would represent a broad public benefit.

Those commenting on the economic analysis of the NPRM generally indicated that the unit costs assumed by the FHWA were too low and that not all the costs were analyzed. In addition, the

IBT questioned the basis for some of the assumptions used in the analysis. The FHWA has revised the analysis to include additional administrative costs (from $10 to $35) in response to the comments that the costs associated with the MRO to review positive test results and the recordkeeping costs were not included. The FHWA also raised the unit costs of the screen and confirmation test from $15 to $25 and from $25 to $35, respectively.

The NPRM included analyses of random testing rates of 12.5% and 125%. As noted in this rule, the FHWA is requiring a testing rate of 50% phased in over a two year period. The deterrent rates have been adjusted to reflect this testing rate. This analysis uses deterrent rates of 50 and 70 percent. The implementation schedule included in this rule is not reflected in this analysis.

Based on the revisions noted above, as well as the 26,001 pound GVWR threshold, the FHWA estimated that the costs (net present value) associated with this rule using option 4 proposed in the NPRM is $1.77 billion and the benefit is $8.14 billion for a benefit/cost ratio of 4.60.

This cost-benefit analysis did not attempt to estimate the benefits of increased productivity, lower worker's compensation claims, and reduced insurance rates that a drug-free driver work force would provide to their employers and society-at-large. It is reasonable to assume that adding the value of these more pervasive benefits to the annual cost savings of avoided accidents would significantly offset some of the costs of a drug testing program for interstate or foreign commercial motor vehicle operators.

Because the impact of this proposal will result in an annual effect on the economy of over $100 million, the FHWA has determined that this document is a major rule under Executive Order 12291. Pursuant to Executive Order 12498, this rulemaking action has been included on the Regulatory Program for significant rulemaking actions. A regulatory evaluation and regulatory flexibility analysis have been prepared and are available for review in the public docket.

The impacts of this proposed regulation on small entities are discussed in the regulatory flexibility analysis. A significant part of the motor carrier industry and other employers covered by the Act are made up of small firms, from one-person, one-truck operations of some owner-operators, to the thousands of small fleet operators throughout the country. For this reason, the benefit and cost considerations described in the regulatory evaluation/regulatory flexibility analysis as applicable to employers and the motor carrier industry in general, are equally applicable to the small entity component of the industry.

The FHWA estimates that this final rule will increase the information collection and paperwork requirements for motor carriers. In anticipation of this, the FHWA has submitted, to the Office of Management and Budget (OMB) in a revision to their revised fiscal year 1988 information collection budget, an estimate of the burden hours associated with this rule. FHWA will submit for OMB approval any information collection requirements. Comments on the paperwork burdens should be submitted to the Office of Management and Budget, Attention of Mr. Gary Waxman.

Federalism Assessment

In the NPRM, the FHWA asserted that, "Nothing in this document directly preempts any State law or regulation." 53 FR 22282. This statement was based on incomplete information. As stated further in the NPRM, "The FMCSRs establish minimum safety regulations which, at the present time, may be supplemented by the States, *except for the adoption of inconsistent regulations." Id.* (emphasis supplied).

As pointed out by some commenters, several States have recently adopted laws or regulations which limit the ability of employers to drug test employees. The FHWA is aware that at least nine States and the City of San Francisco have adopted laws or ordinances which prohibit certain forms of testing or otherwise limit the ability of employers to conduct employee drug testing. These laws, regulations, or ordinances, to the extent that they would preclude motor carriers from complying with the requirements of the FMCSRs, as amended by this final rule, are preempted by these Federal regulations.

Federal regulations have the same preemptive effect as Federal statutes. *Wood v. General Motors Corp.*, 673 F. Supp. 1108, 1113 (D. Mass. 1987), *citing Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 (1982). Federal preemption of State laws and regulations may take place in several ways. (For an excellent discussion of preemption see *Wood v. General Motors Corp., supra*, at 1112). In our view, the Federal laws under which the FMCSRs were originally issued (now codified at 49 U.S.C. 3102) and recently repromulgated (49 U.S.C. 2505), while not occupying the field of interstate motor carrier safety so as to totally displace State regulation (*but see*, 49 U.S.C. app. 2507, Review and Preemption of State Regulations), clearly establish, at a minimum, that State laws or regulations which actually conflict with Federal law are preempted. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249, 104 S. Ct. 615, 621 (1984).

The FHWA and its predecessor, the Interstate Commerce Commission, have long believed that the FMCSRs preempt inconsistent State laws and regulations, to the extent that such State laws or regulations conflict with the Federal regulations. *See, e.g., Buck v. California*, 343 U.S. 99, 101–102, 72 S. Ct. 502, 504 (1952). Accordingly, the FMCSRs have long provided that, "Except as otherwise specifically indicated, Parts 390 through 397 of this subchapter are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, *the compliance with which would not prevent full compliance with these regulations by the person subject thereto."* 49 CFR 390.30 (1987) (supplied). As part of its repromulgation of the FMCSRs, the FHWA recently issued a final rule to, among other things, renumber this section and amend it by striking the reference therein to "Parts 390 through 397" and by substituting therefor "subchapter B." 53 FR 18042, 18055 (to be codified at 49 CFR 390.9 (effective November 15, 1988)). This change recognizes that other Parts of title 49 of the Code of Federal Regulations have been issued under the authority of the Federal motor carrier safety laws referred to above, and with the same preemptive effect. The drug testing provisions adopted today are incorporated in Subchapter B of title 49 of the Code of Federal Regulations, and have the same preemptive effect.

The ATA made two recommendations with respect to this preemption issue. First, it recommended that the agency amend proposed § 382.101(b) to expressly provide that "No State may adopt, maintain or enforce any law or regulation which actually conflicts with or stands as an obstacle to the accomplishment of the full purposes and objectives of the regulations of this part." ATA comments of September 12, 1988, at 60. The FHWA declines to accept this recommendation because it believes it to be unnecessary for two reasons. First, the agency believes it is unnecessary at this time to affirmatively declare that no State may adopt such a law or regulation. States which have adopted these provisions have done so with more than motor carriers in mind. Accordingly, to the extent their laws apply to others not covered by these

rules, they remain unaffected by these rules. Second, the FHWA further believes that its preemption conclusion outlined above is expressly stated in Part 390 of the FMCSRs as discussed above, and that it is not necessary to restate this conclusion. We believe that the amendments made today coupled with the amendments which are effective on November 15, 1988, make this more clear than was the case at the time of the NPRM. This rule does not in any way preempt State or local law enforcement officials from requesting urine or blood samples from commercial motor vehicle drivers.

The second recommendation made by the ATA was to revise proposed § 382.101(c) to specifically allow motor carriers to adopt more stringent regulations. The FHWA believes that this change is unnecessary since § 391.1(b) of the FMCSRs already states that nothing in these regulations prevents a motor carrier from imposing more stringent or additional qualification requirements and examinations. 49 CFR 391.1(b) (1987). On May 19, 1988, the FHWA published a final rule that becomes effective on November 15, 1988, and which would strike § 391.1(b) and, in its place, adopt a new § 390.3(d) which provides that, "Nothing in Subchapter B of this chapter shall be construed to prohibit an employer from requiring and enforcing more stringent believes that this would permit motor carriers to impose reasonable additional qualification requirements and examinations for their drivers.

The FHWA has carefully assessed this rule under the principles and criteria of the President's Executive Order on Federalism (E.O. 12612, October 28, 1987). For the reasons stated above and in the preamble to the NPRM, the FHWA believes that the problem of drug abuse, as it affects motor carrier safety, is one of national scope justifying Federal action. The agency believes that the limited preemptive effect of its adoption of this rule, as discussed above, is in strict adherence to constitutional principles and expressly supported by statutory authority. Section 206 of the Motor Carrier Safety Act of 1984 expressly directs that "minimum Federal safety standards for commercial motor vehicles * * * (be established to) * * * ensure that—* * * commercial motor vehicles are safely maintained, equipped, loaded, and operated, * * * (and) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely * * *." 49 U.S.C. app. 2505(a). Thus, the FHWA concludes that this statute expressly authorizes the issuance of preemptive regulations. The FHWA further believes that the preemption which will occur is the minimum necessary to ensure the achievement of a primary objective of the Motor Carrier Safety Act of 1984, *i.e.*, to promote the safe operation of commercial motor vehicles.

List of Subjects in 49 CFR Part 391 and 394

Controlled substances, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety.

(Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety)

Issued on November 14, 1988.

Robert E. Farris,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA is amending Title 49, Code of Federal Regulations, Subtitle B, Chapter III, Part 391 by adding a new Subpart H by revising certain sections of the Part, and by amending Part 394 as set forth below.

PART 391—[AMENDED]

1. The authority citation for Part 391 continues to read as follows:

Authority: 49 App. U.S.C. 2505; 49 U.S.C. 504 and 3102; 49 CFR 1.48.

2. Part 391 is amended by adding Subpart H to read as follows:

Subpart H—Controlled Substance Testing

Sec.

§ 391.81 Purpose and scope.

(a) The purpose of this subpart is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage.

(b) This subpart prescribes minimum Federal safety standards to detect and deter the use of controlled substances as defined in 49 CFR Part 40 (marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP)).

(c) As part of reasonable cause drug testing programs established pursuant to this subpart, motor carriers may test for drugs in addition to those specified in this part only with approval granted by the Federal Highway Administrator under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 391.83 Applicability.

(a) This subpart applies to motor carriers and persons who operate a commercial motor vehicle as defined in this subpart in interstate commerce and are subject to the driver qualification requirements of Part 391 of this subchapter.

(b) This subpart shall not apply to any person for whom compliance with this subpart would violate the domestic laws or policies of another country.

(c) This subpart is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this subpart raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of this subpart to such person on and after January 1, 1990.

§ 391.85 Definitions.

As used in this subpart—

"Collection site" means a place where individuals present themselves for the purpose of providing body fluid or tissue samples to be analyzed for specified controlled substances. The site must possess all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and transportation or shipment of the samples to a laboratory.

"Commercial motor vehicle" means any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when:

(a) The vehicle has a gross vehicle weight rating or gross combination

weight rating of 26,001 or more pounds; or

(b) The vehicle is designed to transport more than 15 passengers, including the driver; or

(c) The vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801–1813).

"Controlled substance" has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR 1308).

"Drivers subject to testing" means employee drivers and contract drivers under contract for 90 days or more in any period of 365 days.

"Drug" means any substance (other than alcohol) that is a controlled substance as defined in this section and 49 CFR Part 40.

"FHWA" means the Federal Highway Administration, U.S. Department of Transportation.

"Interstate commerce" means trade, traffic, or transportation in the United States which is between a place in a State and a place outside of such State (including a place outside of the United States) or is between two places in a State through another State or a place outside of the United States.

"Medical practitioner" means a licensed doctor of medicine (MD) or osteopathy (DO) or a doctor of dental surgery (DDS) authorized to practice by the State in which the person practices.

"Medical Review Officer" means a licensed doctor of medicine or osteopathy with knowledge of drug abuse disorders that is employed or used by a motor carrier to conduct drug testing in accordance with this part.

"Motor carrier" means a for-hire motor carrier or a private motor carrier of property. The term "motor carrier" includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, the definition of *"motor carrier"* includes the terms *"employer"* and *"exempt motor carrier."*

"Random selection process" means that drug tests are unannounced; that every driver, of a motor carrier, subject to test-tests conducted annually shall equal or exceed fifty percent (50%) of the total number of drivers subject to testing of a motor carrier.

"Reasonable cause" means that the motor carrier believes the actions or appearance or conduct of a commercial motor vehicle driver, on duty as defined in § 395.2 of this subchapter, are indicative of the use of a controlled substance.

§ 391.87 Notification of test results and recordkeeping.

(a) A motor carrier shall notify its driver or driver-applicant of the results of a controlled substance test conducted under this subpart.

(b) A motor carrier shall notify—

(1) A driver-applicant of the results of a pre-employment controlled substance test conducted under this subpart provided the driver-applicant requests such results within 60 days of being notified of the disposition of the employment application; or

(2) A driver of the results of a periodic, random, or post-accident controlled substance test conducted under this subpart provided the results were positive. The driver must also be advised what drug was discovered.

(c) A motor carrier shall ensure that all records related to the administration and results of the drug testing program for its drivers subject to the testing requirements are maintained for a minimum period of 5 years except that individual negative test results shall be maintained for a minimum of 12 months.

(d) A medical review officer shall be the sole custodian of individuals test results. The medical review officer shall retain the reports of individual test results for a minimum of 5 years.

(e) A motor carrier shall retain in the employee's qualification file such information that will indicate only the following:

(1) The employee submitted to a controlled substance test.

(2) The date of such test.

(3) The location of such test.

(4) The identity of the person or entity performing the test.

(5) Whether the test finding was "positive" or "subnegative."

(f) A motor carrier shall produce upon demand and shall permit the Administrator to examine all records related to the administration and results of controlled substance testing performed under this part.

(g) A motor carrier shall maintain an annual (calendar year) summary of the records related to the administration and results of the controlled substance testing program performed under this subpart. This summary shall include, at a minimum:

(1) The total number of controlled substance tests administered;

(2) The number of controlled substance tests administered in each category (i.e., prequalification, periodic, reasonable cause, and random);

(3) The total number of individuals who did not pass a controlled substance test;

(4) The total number of individuals who did not pass a controlled substance test by testing category;

(5) The disposition of each individual who did not pass a controlled substance test;

(6) The number of controlled substances tests performed by a laboratory that indicated evidence of a prohibited controlled substance or metabolite in the screening test in a sufficient quantity to warrant a confirmatory test;

(7) The number of controlled substance tests performed by a laboratory that indicated evidence of a prohibited controlled substance or metabolite in the confirmatory test in a sufficient quantity to be reported as a "positive" finding to the medical review officer; and

(8) The number of controlled substance tests that were performed by a laboratory that indicated evidence of a prohibited controlled substance or metabolite in the confirmatory test in a sufficient quantity to be reported as a "positive" finding by substance category (e.g., marijuana, cocaine, opium, PCP, or amphetamine).

§ 391.89 Access to individual test results or test findings.

(a) No person may obtain the individual tests results retained by a medical review officer, and no medical review officer shall release the individual test results of any employee to any person, without first obtaining written authorization from the tested employee. Nothing in this paragraph shall prohibit a medical review officer from releasing, to the employing motor carrier, the information delineated in § 391.87(e) of this subpart.

(b) No person may obtain the information delineated in § 391.87(e) of this part and retained by a motor carrier, and no motor carrier shall release such information about any employee or previous employee, without first obtaining written authorization from the tested employee.

§ 391.93 Implementation schedule.

(a) This rule is effective December 21, 1988.

(b) Motor carriers with 50 or more "drivers subject to testing" are required to implement a controlled substance testing program which meets the

provision of this Part by December 21, 1989, for those drivers.

(c) All motor carriers with less than 50 "drivers subject to testing" are required to implement a controlled substance testing program which meets the provisions of this subpart by December 21, 1990, for all drivers.

(d) During the first 12 months following the insititution of random drug testing pursuant to this rule, a motor carrier shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the drivers subject to testing.

§ 391.95 Drug use prohibitions.

(a) No driver shall be on duty, as defined in § 395.2 of this subchapter, if the driver uses any controlled substances, except as provided in § 391.97 of this part.

(b) No driver shall be on duty, as defined in § 395.2 of this subchapter, if the driver tests positive for use of controlled substances, except as provided in § 391.97 of this part.

(c) A person who tests positive for the use of a controlled substance, as defined in 49 CFR Part 40, is medically unqualified to operate a commercial motor vehicle.

(d) A person who refuses to be tested under provisions of this subpart shall not be permitted to operate a commercial motor vehicle. Such refusal shall be treated as a positive test and subject the driver to the restrictions contained in paragraph (c) of this section.

§ 391.97 Prescribed drugs.

(a) *Affirmative defense.* Any driver who is alleged to have violated § 391.95 of this subpart shall have available as an affirmative defense, to be proven by the driver through clear and convincing evidence, that his/her use of a controlled substance (except for methadone) was prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties. The MRO may provide an opportunity for a driver to discuss a positive test result and clarify if a prescribed medication was involved.

(b) The rules in this subpart do not prohibit a motor carrier from requiring a driver to notify the motor carrier of thereapeutic drug use.

§ 391.99 Reasonable cause testing requirements.

(a) A motor carrier shall require a driver to be tested, upon reasonable cause, for the use of controlled substances.

(b) A driver shall submit to testing, upon reasonable cause, for the use of controlled substances when requested to do so by the employing motor carrier.

(c) The conduct must be witnessed by at least two supervisors, if at all feasible. If only one supervisor is available, only one supervisor need witness the conduct. The witnesses must have received training in the detection of probable drug use by observing a person's behavior.

(d) The documentation of the driver's conduct shall be prepared and signed by the witnesses within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier.

§ 391.101 Reasonable cause testing procedures.

(a) A motor carrier shall ensure that the driver is transported immediately to a collection site for the collection of a urine sample.

(b) A motor carrier shall ensure that the controlled substance testing performed under paragraph (a) of this section conforms with 49 CFR Part 40.

§ 391.103 Pre-employment testing requirements.

(a) A motor carrier shall require a driver-applicant who the motor carrier intends to hire or use to be tested for the use of controlled substances as a prequalification condition.

(b) A driver-applicant shall submit to controlled substance testing as a prequalification condition.

(c) Prior to collection of a urine sample under § 391.107 of this subpart, a driver-applicant shall be notified that the sample will be tested for the presence of controlled substances.

(d) *Exception.* (1) A motor carrier may use a driver who is a regularly employed driver of another motor carrier without complying with paragraph (a) of this section, if the driver meets the requirement of § 391.65 of this subchapter.

(2) A motor carrier may use a driver who is not employed and tested by the motor carrier provided the motor carrier assures itself that the driver participates in a controlled substance testing program which meets the requirements of this subpart. A motor carrier who uses a driver more than once a year may assure itself once every 6 months. The motor carrier's assurance shall, as a minimum, consist of contacting the controlled substance testing program entity prior to using the driver and obtaining the following information:

(i) Name and address of the program.

(ii) Verification that the driver participates in the program.

(iii) Verification that program conforms to the 49 CFR Part 40.

(iv) Verification that driver is qualified under the rules of this subpart.

(v) The date the driver was last tested for controlled substances.

(3) The motor carrier who exercises paragraph (d)(2) of this section shall include the information obtained from the controlled substance testing programs in § 391.103(d) separately from the motor carrier's own anti-drug program.

(4) The motor carrier shall retain the information required in § 391.103(d) in the driver's qualification file as required under § 391.51 of this subchapter.

§ 391.105 Biennial (periodic) testing requirements.

(a) A motor carrier shall require a driver to be tested once under the requirements of this section for the use of controlled substances during the first medical examination of the driver after implementation of the drug testing program.

(b) *Exception.* A motor carrier may use a driver who participates in a drug testing program of another motor carrier or controlled substance test consortium.

(c) A motor carrier may discontinue periodic testing after the first calendar year when the motor carrier has implemented its random drug testing program according to the implementation schedule and, therefore, is testing 50 percent of drivers subject to testing under its random drug testing program.

§ 391.107 Pre-employment and biennial testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A motor carrier shall ensure its controlled substance testing program conforms with 49 CFR Part 40.

§ 391.109 Random testing requirements.

(a) A motor carrier shall use a random selection process to select and request a driver to be tested for the use of controlled substances.

(b) A driver shall submit to controlled substance testing when selected by a random selection process used by a motor carrier.

§ 391.111 Random testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A motor carrier shall ensure its drug testing program conforms with the 49 CFR Part 40.

§ 391.113 Post-accident testing requirements.

(a) A driver shall provide a urine specimen to be tested for the use of controlled substances as soon as possible after a reportable accident but in no case later than 32 hours after the accident.

(b) A driver who is seriously injured and cannot provide a specimen at the time of the accident shall provide the necessary authorization for obtaining hospital reports and other documents that would indicate whether there were any controlled substances in his/her system.

§ 391.115 Post-accident testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A driver shall ensure that the specimen is forwarded and processed by a laboratory which conforms with the 49 CFR Part 40 Guidelines.

§ 391.117 Disqualification.

(a) *Disqualification for refusal.* Except for a driver who meets the conditions of § 391.113(b), a driver shall be disqualified by issuance of a letter of disqualification for a period of 1 year following a refusal to give a urine sample when the driver has been involved in a fatal accident.

(b) *Disqualification for use of controlled substances.*

A driver shall be disqualified by issuance of a letter of disqualification for a period of 1 year for a positive test of controlled substance use when the driver has been involved in a fatal accident.

§ 391.119 Employee Assistance Program (EAP).

(a) Every motor carrier shall establish an EAP program. The EAP program shall, as a minimum, include—

(1) An educational and training component for drivers which addresses controlled substances;

(2) An education and training component for supervisory personnel which addresses controlled substances; and

(3) A written statement, on file and available for inspection, at the motor carrier's principal place of business, outlining the motor carrier's EAP.

§ 391.121 EAP training program.

(a) Each EAP shall consist of an effective training program for the motor carrier's supervisory personnel and all drivers.

(b) The training program must include at least the following elements:

(1) The effects and consequences of controlled substance use on personal health, safety, and the work environment;

(2) The manifestations and behavioral causes that may indicate controlled substance use or abuse; and

(3) Documentation of training given to drivers and motor carrier supervisory personnel.

(d) EAP training programs for all drivers and supervisory personnel must consist of at least 60 minutes of training.

§ 391.123 After-care monitoring.

After returning to work, drivers who test positive must continue in any after-care program and be subject to follow-up testing for not longer than 60 months folowing return to work.

3. In § 391.41, paragraph (b)(12) is revised to read as follows:

§ 391.41 Physical qualifications for drivers.

* * * * *

(b) * * *

(12) Does not use a Schedule I drug or other substance identified in Appendix D to this subchapter,[1] an amphetamine, a narcotic, or any other habit-forming drug; meets the requirements of Subpart H; and

* * * * *

4. In § 391.43, paragraph (c), a new instructional paragraph is added after the paragraph headed *Diabetes* and in paragraph (e) the first paragraph of the Medical Examiner's Certificate is revised to include controlled substance testing to read as follows:

§ 391.43 Medical examination; certificate of physical examination.

* * * * *

(c) * * *

Instructions for Performing and Recording Physical Examinations

* * * * *

Controlled Substance Testing. Testing procedures and requirements as contained in Subpart H, Controlled Substance Testing.

* * * * *

Medical Examiner's Certificate

I certify that I have examined (driver's name (print)) in accordance with the Federal Motor Carrier Safety Regulations (49 CFR 391.41 through 391.49) and with knowledge of his/her duties, I find him/her qualified under the regulations including the requirement for controlled substance testing as required by Subpart H of 49 CFR Part 391.

* * * * *

[1] A copy of the Schedule I drugs and other substances may be obtained by writing to the Director, Office of Motor Carrier Standards, Washington, DC 20590, or to any Regional Office of Motor Carrier and Highway Safety of the Federal Highway Administration at the address given in § 390.27 of this subchapter.

PART 394—[AMENDED]

5. The authority citation for Part 394 continues to read as follows:

Authority: 49 U.S.C. App. 2505; 49 U.S.C. 504 and 3102; 49 CFR 1.48.

6. In § 394.7, a new paragraph (b)(11) is added and reads as follows:

§ 394.7 Immediate notification of fatal accidents.

* * * * *

(b) * * *

(11) The results of a drug test performed in accordance with § 391.113 of this chapter.

* * * * *

7. In § 394.9, paragraph (b) is revised to read as follows:

§ 394.9 Reporting of accidents.

* * * * *

(b) The motor carrier must fill in the report form in accordance with the instructions in § 394.20, completely and accurately with the most reliable information available to it at the time the report is filed. Controlled substance testing, if performed, shall be noted under item number 27 of § 394.20(a) and under item number 28 of § 394.20(b).

* * * * *

8. In § 394.20, item 27 of paragraph (a) and item 28 of paragraph (b) are revised to include information concerning controlled substance testing and reads as follows:

§ 394.20 Instruction for preparing accident reports.

(a) * * *

Item 27: An account of the accident containing the most reliable information to which the motor carrier has access at the time of reporting, sufficiently detailed and complete to convey an understanding of his/her version of the accident shall be entered under this item. This account should be continued on an extra sheet of paper if more space is needed. Either on the form or a separate sheet of paper, indicate whether a test for controlled substances was performed, the type of test performed, and the results of the test.

* * * * *

(b) * * *

Item 28: An account of the accident containing the most reliable information to which the motor carrier has access at the time of reporting, sufficiently detailed and complete to convey an understanding of his version of the accident shall be entered under this item. This account should be continued on an extra sheet of paper if more space is needed. Either on the form or a separate sheet of paper, indicate whether a test for controlled substances was performed, the type of test performed, and the results of the test.

* * * * *

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Part VIII

Department of Transportation

Urban Mass Transportation Administration

49 CFR Part 653

Control of Drug Use in Mass Transportation Operations; Final Rule

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

49 CFR Part 653

[Docket No. 88-F]
RIN 2132-AA33

Control of Drug Use in Mass Transportation Operations

AGENCY: Urban Mass Transportation Administration (UMTA), DOT.

ACTION: Final Rule.

SUMMARY: This final rule sets forth regulations to require recipients of Federal financial assistance from UMTA, and operators for such recipients, to have an anti-drug program for employees who perform sensitive safety functions. The required anti-drug program would include testing an employee for drugs prior to employment, after an accident, when there is reasonable cause, randomly, and before returning to duty to perform sensitive safety functions after a positive drug test. This rule is necessary to prohibit an employee from performing sensitive safety functions while the employee has a prohibited drug or the metabolites of a prohibited drug in his or her system. This rule is intended to ensure a drug-free transit workforce and to eliminate drug use and abuse in the public transit industry.

EFFECTIVE DATE: This rule will be effective December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Daniel Duff, Assistant Chief Counsel for Legislation and Regulations, Office of the Chief Counsel, (202) 366-4011; or Franz Gimmler, Deputy Associate Administrator for Safety, Office of Technical Assistance and Safety, (202) 366-2896; Urban Mass Transportation Administration, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Because of the length of this preamble, the following outline of the regulation's introductory material is provided.

I. Discussion

A. Background

On July 8, 1988, the Urban Mass Transportation Administration (UMTA) published a notice of proposed rulemaking (NPRM) (53 FR 25910) entitled "Control of Drug Use in Mass Transportation Operations." The NPRM invited comment from the public on the proposed regulation which would require recipients of Federal transit funding to have a comprehensive anti-drug program. UMTA provided a 60 day comment period and received over 170 comments on the regulation proposed in the NPRM.

In addition to receiving written comments on the regulation proposed in the NPRM, UMTA held four public hearings across the country. These hearings were held on July 22, 1988, in Washington, DC, on July 25, 1988, in New York City, on August 1, 1988, in Chicago, Illinois, and on August 31, 1988, in Los Angeles, California. Each hearing was recorded by a court reporter and the transcript of each hearing and any statements or other material submitted to the hearing officer during the hearing is in the public docket to this rule. Statements made and any material submitted at the hearings were considered in developing this final rule.

B. Existing Programs

In the NPRM for this rulemaking, UMTA noted, at some length, a number of statistics regarding drug use in America, the effect of drug use on individuals and on safety, scientific data and epidemiological studies regarding drug use, and the perceived dangers of drugs in transportation generally and transit in particular. UMTA will not repeat that information in this text, but rather notes that nothing was submitted in the docket to refute that information, and UMTA incorporates that background information into this document by reference.

In light of that background information, it is the goal of the Secretary of Transportation to achieve a drug-free transportation workforce. In order to ensure that transit safety is not compromised by a failure to detect drug user in the transit industry, UMTA believes that it is appropriate and necessary to establish a comprehensive anti-drug program at this time. UMTA's commitment to a drug-free workforce also applies to its own employees. In June of 1987, the Secretary of Transportation implemented the Department of Transportation's anti-drug program and in September of 1987, the Department began drug testing of employees performing sensitive safety or security-related functions.

UMTA is aware that a growing number of operators in the transit industry also are attempting to achieve a drug-free workforce and that the idea of a comprehensive anti-drug program is not a novel concept in the transit industry. As part of their comments to the NPRM, many transit operators noted that they have already implemented drug testing and employee assistance programs. For example, the Chicago Transit Authority (CTA) has had a comprehensive anti-drug program since 1976, and an employee assistance program in place since 1974. CTA employees are given annual physical exams to check their fitness for duty, including drug testing. The current drug testing and rehabilitation program at CTA is a cooperative effort between CTA management and unions. The guidelines and procedures for drug control are part of a union contract and apply to all CTA employees. CTA considers its standards for testing and rehabilitation to be among the highest in the transit industry.

The York Area Transportation Authority (YATA) is another transit agency with a well established drug testing program, involving pre-employment testing, annual screening, and reasonable cause testing. Although YATA is a small transit agency, it has effectively administered both a drug testing and an employee assistance program for several years. YATA's drug testing procedures are governed by

labor agreements and the employee assistance program is operated through a local contractor. Currently, YATA does not randomly test, but is considering the feasibility of instituting such a procedure.

The Minneapolis-St. Paul Metropolitan Transit Commission (MTC) shares UMTA's concern about drug abuse in the mass transit industry. The MTC implemented an alcohol and substance abuse policy on March 5, 1987, and it includes one of the most comprehensive drug and alcohol testing policies in the transit industry. All MTC employees and job applicants are subject to drug testing under this policy. Specifically, MTC's policy prohibits the use, sale or possession of drugs or alcohol during work hours or on MTC property. Employees violating this policy are subject to disciplinary action up to and including discharge. The policy provides for pre-employment drug testing and testing for probable cause. State law requires post-incident testing when a fatality has occurred. Additionally, MTC's employee assistance program includes rehabilitation for first time offenders. Although MTC's alcohol and substance abuse policy does not provide for the random testing of MTC employees, it is permissible to do random testing of safety sensitive employees under State law.

The Washington Metropolitan Area Transit Authority (WMATA) efforts to provide a drug free work place include an extensive Substance Abuse Policy and Employee Assistance Program dating back to 1984. WMATA's drug prevention strategies consist of education, awareness, drug testing, and rehabilitation. The drug testing rules apply to all WMATA employees. Pre-employment drug tests are given to applicants for bus operators and transit police, while post-incident testing is heavily oriented towards incidents involving vehicles. WMATA is conducting reasonable cause drug testing. The established employee assistance program works to identify troubled employees and assist them in seeking rehabilitation.

The American Public Transportation Association (APTA) shares the opinion of UMTA that drug abuse has become a major social problem and supports the Department of Transportation's goal of providing a drug free transportation environment. According to a survey conducted by APTA in 1986, of member transit systems, more than 75 percent of those responding had written rules and policies addressing drug and alcohol abuse by employees. Specifically, 60 percent of the transit systems (large bus and rail systems) responding, had employee assistance programs in operation that they feel are working effectively. These programs have the strong support of labor and management, as well as the communities in which these transit systems operate.

UMTA's conclusion that it is justified in requiring all Federally assisted public transit operations to implement a comprehensive anti-drug program to ensure the safety of the transit riding public follows from the growing problem of drugs in society and the transit industry's own recognition of a problem and its attempts to address the problem.

C. Summary of Final Rule

This final rule requires UMTA recipients, as a condition to their recipt of Federal funds, to have an anti-drug program that meets certain requirements for sensitive safety employees. An anti-drug program must provide for the following kinds of drug testing: pre-employment, reasonable cause, post-accident, return to duty, and random. All drug testing must be done in accordance with the Department of Transportation's regulations at 49 CFR Part 40, by a laboratory site certified to do drug testing for Federal agencies by the Department of Health and Human Services. Additionally, an anti-drug program must have an employee education and training program which provides information about the effects of drug use and the detection of drug use. The final rule does not require any rehabilitation, though UMTA strongly encourages recipients to provide it.

UMTA is preparing detailed implementation guidelines to assist recipients and their operators in carrying out this final rule. The implementation guidelines will include references to resources available to recipients regarding employee assistance programs, including rehabilitation.

This final rule applies to recipients of Federal financial assistance from UMTA under section 3, 9, and 18 of the Urban Mass Transportation Act of 1964, as amended, and to recipients of interstate transfer transit funds under 23 U.S.C. 103(e)(4). Any such recipient also must apply the regulation to any public or private operator providing mass transportation services for the recipient with UMTA funds.

The Office of the Secretary of the Department of Transportation is publishing elsewhere in today's **Federal Register** an Interim Final Rule and request for comments entitled, "Procedures for Transportation Workplace Drug Testing Programs." These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human Service Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and State and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

D. General Overview of Comments

UMTA received over 170 comments in response to the NPRM. UMTA considered all comments filed in a timely manner and all statements and material presented at the public hearings. During the public hearings, the Administrator and the Deputy Administrator of the Urban Mass Transportation Administration requested information from several individuals who presented statements at the hearings. While the comment period for the NPRM closed September 6, 1988, in order to accommodate the individuals who submitted supplemental information as requested by the Administrator or his Deputy, UMTA considered comments that were submitted as late as September 12, 1988.

The breakdown among commenter category is as follows:

Transit Operators (public and private)	82
Cities and counties	26
State DOTs	18
Local planning bodies/commissions	11
Medical/technical experts	6
Unions	6
Trade Associations (APTA, RLEA, NASTA)	4
Federal agencies (NTSB)	1
Colleges	2
Individual citizens	7
Senior citizen organizations	8
Other non-profit organizations	3
Chamber of Commerce	1

In general, the commenters support UMTA's efforts to achieve a drug-free transit workforce. There were, however, many differences of opinion regarding the method of achieving that goal and the manner of UMTA's involvement in any program. The primary differences arise regarding the type and scope of testing used to identify employees who perform sensitive safety functions and use drugs and the choices offered to those employees who are so identified. The comments received differed by both

category of commenter and the issues on which the commenter focused.

The issues raised in the comments fall into two broad categories. The first category of issues addressed an entire range of practical issues around implementation of the rule. The second category of issues addressed some of the legal questions surrounding the issuance of the rule. Part E of this preamble contains a discussion of each of the issues which fall into the first category of comments. Part F of this preamble contains a discussion of the legal questions raised by the second category of comments.

E. Issues Raised in Comments

1. Pre-employment Testing

Most commenters do not object to the concept of pre-employment drug testing. VIA Metropolitan Transit in San Antonio, Texas, suggests that the pre-employment drug test also should include analysis of the blood sample collected at the pre-employment physical. However, the small operators are concerned about the cost and administrative burden of pre-employment drug testing. One small non-profit operator says that it will affect her ability to recruit already low-paid drivers. Another small operators requests that the pre-employment drug test be a condition of employment that the applicant can be asked to bear.

Some commenters support giving an applicant a chance to explain a positive drug test result. Others suggest that it places an additional unnecessary burden on the operator. One commenter asks that the final rule clarify that an opportunity to explain a positive result was not the same as the right to invoke an operator's grievance procedures.

Most commenters are concerned that they be allowed to keep the results of a pre-employment drug test in the event of an EEO complaint. One commenter requests that the final rule make it clear that refusal to take the test or failing the test is in and of itself grounds for rejection of an applicant.

UMTA Response. UMTA believes that pre-employment drug testing is a necessary part of an anti-drug program. Under the rule, an applicant must pass a pre-employment drug test before he or she can be hired for a sensitive safety position. The rule does not require an employer to test each applicant for a sensitive safety position, only the individual selected for the position.

In keeping with UMTA's desire to provide transit employers the greatest amount of flexibility possible, the final rule is silent about notifying applicants of their test results or allowing applicants to explain a test result. The final rule does however, require a transit employer to put an applicant on notice that the urine sample being collected is for a pre-employment drug test. UMTA encourages transit employers to clearly set out their policies with regard to notifying applicants of their drug test results or allowing applicants to explain their drug test results.

The proposed prohibition from retaining the results of a pre-employment test has been removed from the final rule. Transit employers should treat the results of a pre-employment test as they do other applicant information in accordance with local, State, and Federal law. If a State or local law conflicts with this regulation, a recipient may qualify for a temporary waiver. The conditions for receipt of a temporary waiver are discussed in detail elsewhere in this preamble.

2. Post-Accident Testing

One of the few issues on which there was a consensus in the comments was the scope of post-accident drug testing. Virtually all of the commenters who addressed the issue believe post-accident drug testing should not be limited to fatal accidents. Many suggested the rule cover property damage and serious injury. Some suggested the final rule include all accidents and some felt the definition of accident should be a local decision. Some commenters noted that many transit operators already do drug testing after accidents which do not involve fatalities. The unions that commented seek some limitation on the post-accident drug testing requirement where it is apparent that the accident was not the fault of the operator.

The National Traffic Safety Board (NTSB) and many others believe the potential 36-hour delay after an accident before an individual is tested set out in the NPRM is too long. Suggested time frames varied from 4 to 32 hours. The NTSB also recommended that UMTA require the collection of blood specimens as well as urine for all post-accident tests.

UMTA Response. UMTA agrees with the commenters regarding the scope of post-accident drug testing. Under the final rule, post-accident drug testing is required if there is a death or injury requiring an individual to be taken to a medical facility, if there is more than $5,000 in property damage or the accident must be reported to the Federal Highway Administration, the Federal Railroad Administration or the Coast Guard. However, in response to employee concerns, the final rule also provides that post-accident drug testing is not necessary if it is determined that the performance of a sensitive safety employee was not a contributing factor in the accident. UMTA agrees with commenters that it is inappropriate to require post-accident drug testing of an employee whose performance could not have been a contributing factor in an accident.

In the NPRM, UTMA proposed that urine samples be collected within 12 hours after the determination that there was a death within 24 hours of an accident. This time frame was based on the possibility that difficulties may arise in locating an individual after a death which occurred some hours after an accident or of obtaining a urine sample from the individual, especially if the individual was injured or the accident occurred in a remote area. UMTA is aware that extended delays in sample collection after an accident may result in deterioration or elimination of a drug or drug metabolite from an individual's system. Because the final rule requires testing in the event a person needs to be taken to a medical facility, the determination as to whether a post-accident test must be given can be made at the site of the accident. UMTA encourages transit employers to make this determination as soon as possible, particularly in cases where there is little or no uncertainty that the employee's performance was a contributing factor in the accident.

UMTA has modified the post-accident provision in the final rule to require testing as soon as possible but not later than 32 hours after the accident. While this is longer than some of the time periods suggested by commenters, UMTA believes that a maximum period of 32 hours is a workable and reasonable accommodation that is appropriate for the transit industry.

The NTSB's suggestion that UMTA require an employer to conduct post-accident testing within 4 hours after an accident is based on the time-sensitive nature of toxicological testing of blood samples. Testing of urine samples does not involve the extreme time-critical considerations associated with the collection and testing of blood samples. UMTA believes post-accident urine testing is sufficient at this time to determine whether an employee had a prohibited drug or drug metabolite in his or her system.

Also, UMTA proposed only urine testing in the NPRM, specifically excluding blood testing as an option for all drug tests that would be conducted under an anti-drug program required by the final rule. Therefore, UMTA considers NTSB's recommendation

beyond the scope of the notice. UMTA does not adopt the NTSB's suggestion to require post-accident testing by collection of a blood sample.

3. Testing Based on Reasonable Cause

Very few commenters were opposed to drug testing based on reasonable cause although some commenters note that they prefer the term "reasonable suspicion." Many commenters ask for further guidance on what constitutes reasonable cause. Some commenters suggest that the definition should be left to the transit employer.

Many commenters supported the proposed rule's attempt to protect transit employees from harassemnt as exhibited by the two witness requirement in the proposed rule. Yet, almost as many commenters note that to have two supervisors available to make the decision is "a luxury." OATS, Inc. of Columbia, MO, serves 87 counties, which are divided into 7 service areas, and ther is only one supervisor per service area. Metro-Waukesha Metro Transit in Wisconsin has only 14 buses and rarely has two supervisors on duty at the same time.

UMTA Response. The final rule includes testing based on reasonable cause. UMTA's choice not to use the term reasonable suspicion was an editorial one for the sake of consistency within the Department of Transportation.

As stated earlier, UMTA wants to afford transit employers the greatest amount of flexibility possible within the framework provided by the rule so that their individual anti-drug programs may be best tailored to meet the needs of their community. For this reason, the final rule does not delineate what constitutes reasonable cause beyond requiring that the circumstances triggering the decision to test must be articulated and substantiated by specific contemporaneous physical indicators of probable drug use. This would include observations of behavioral changes and performance indicators over a period of time in conjunction with contemporaneous physical evidence. Individual anti-drug programs are free to set out specific circumstances or events which will trigger reasonable cause testing as long as the circumstances or event meets this standard. UMTA is aware that many transit employers already have negotiated such testing with their labor organizations. The implementation assistance which UMTA will make available to grantees will have additional material on the kinds of instances or circumstances which meet this standard as well.

UMTA is concerned that drug testing does not become a means by which transit employees are harassed or discriminated against. Because of this concern, the final rule calls for two supervisors to make the determination to test based on reasonable cause. However, because of the nature of many small and rural transit operations, the rule sets up a class of "small operators," which consists of recipients in areas under 200,000 population or recipients of assistance under section 18 of the UMTG Act. Under the final rule, a small operator only needs one supervisor to make the determination to require a drug test based on reasonable cause. However, UMTA encourages small operators to incorporate other protections against harassment and discrimination into their anti-drug programs. Additionally, under the final rule, the supervisor or supervisors who will make the reasonable cause determintion must have received additional training regarding the circumstances and evidence necesesary to make the determination.

4. Random Testing

Most commenters oppose random testing as proposed in the NPRM for a variety of reasons. Perhaps the primary reason cited is the unsettled constitutionality of random testing and the high rate of random testing in the NPRM. These same commenters suggest delay of the rule, or at least the random testing requirement of the rule, until the constitutionality issue is settled. They fear the high cost of litigation and questions whether UMTA would provide any financial support. Many of these commenters were not opposed to the idea of random testing, but were concerned about their own potential legal and financial liability.

Many commenters addressed the proposed rate of random testing of up to 125 percent in the NPRM. One commenter felt the maximum 125 percent rate was essential as a cornerstone to the program and "must not be reduced." Most felt the rate was too high, suggesting in the alternative anywhere from 10 percent to 100 percent. Of those who commented on the question in the NPRM regarding more latitude for operators with a high level of safety, virtually all favored such flexibility.

Many commenters said they felt random testing was unnecessary if reasonable cause testing is authorized. This was particularly true of comments from small and rural operators, who argued that the communities in which they operate in are ones where they would know if someone had a problem. Small and rural operators also noted many logistical problems associated with randomly testing small numbers of empoyees. Small and rural operators also noted confidentiality problems associated with randomly testing small numbers of employees. A few commenters felt the decision to randomly test employees should be a local one. The NTSB recommends that UMTA require the implementation of aggressive reasonable cause testing, pre-employment, post-accident and periodic testing as well as education and treatment before requiring the random testing.

A few commenters were opposed to random testing as unconstitutional. Some commenters noted State and local laws which prohibit or limit random testing of employees. A few commenters asked for clarification of what was random testing, and one suggested it be referreed to as "unscheduled screening."

UMTA Response. The constitutionality of random testing is discussed in the next section on legal concerns. UMTA is convinced, however, that an anti-drug program required by this final rule will withstand constitutional challenge and UMTA continues to believe that unannounced testing based on random selection is a fundamental component of an effective anti-drug program. Unannounced, random testing has proved to be an effective deterrent to drug use and will provide safety benefits to the transit riding public by reducing drug use by transit employees who perform sensitive safety functions. Unannounced, random testing programs initiated by the military, including the Coast Guard, and private industry, show declining drug use, evidenced by a decrease in the number of individuals who test positive for drugs, over the course of the drug testing program. A number of witnesses at the public hearings who were asked about the deterrent effect of random testing agreed that random testing does deter the use of drugs.

In response to comments on the rate that should be required for random testing, UMTA has adopted a 50 percent random testing rate in the final rule. At this time, UMTA believes that a 50 percent testing rate will provide an appropriate balance between a higher or lower rate offering a sufficient deterrent to drug use. UMTA believes the reporting required under the rule for a 50 percent random testing rate will provide enough data for UMTA to determine if the random testing program should be revised in any manner.

The 50 percent random testing rate is consistent with the random testing

program currently applicable to sensitive safety and security-related employees of the U.S. Department of Transportation. However, for some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing directly to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, employers might have to test at rates far above a 50 percent rate toward the end of the year, to make up for lower rates at the beginning. Employers should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively more routine. We do not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule therefore provides an implementation procedure that would allow employers to phase in random drug testing during the first 12 months in which tests are conducted. Employers would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the year to permit the employer to phase in to the 50 percent rate, and the total number of tests conducted would have to be equal to at least 25 percent of the covered population.

Suppose, for example, that an employer has 1000 sensitive safety employees. At a 50 percent annual rate, 500 tests would have to be conducted during a year. Under the phase in, however, the employer could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first year, the annualized rate of 50 percent was achieved. Thus, if the employer's drug testing plan contemplated administering random tests on 12 occasions during the year, the employer would need to administer at least 42 tests (500 divided by 12) on the last occasion, but could administer fewer tests until then. Overall, the employer would have to conduct at least 250 random tests the first year. In subsequent years, the 50 percent rate would be maintained.

Additionally, UMTA recognizes the logistical problems facing small and rural operators. Reasonable cause testing may indeed be very effective in small communities, however, UMTA believes that the deterrent effect of random testing will provide even further protection from employee drug use. In order to avoid some of the logistical problems associated with random testing, UMTA encourages States and their subrecipients, small and rural operators, to form consortia for the purpose of meeting the requirements of this rule, but in particular to meet the random testing requirement.

UMTA also recognizes that some States and local governments have laws which prohibit or limit random testing of employees. The final rule provides that operators that are unable to comply with this requirement because of State or local law may request a temporary waiver of the random testing requirement from UMTA. UMTA may grant a temporary waiver where an operator is making a good faith effort to eliminate the legal impediment created by State or local law. The expiration date of a temporary waiver will be no later than December 31, 1989.

5. Return to duty testing

A few commenters addressed this issue and all of them favored return to duty testing. One commenter noted that testing an employee who has missed work because of time spent in a drug rehabilitation program is of significant value in motivating that rehabilitated employee to stay drug free. Another commenter noted that there should be a policy that is consistently applied to all employees in similar circumstances in order to avoid any discrimination. One commenter said the testing should continue for one year and another said it should be authorized for the duration of the employee's employment. One commenter said the number and frequency of the tests should be determined by the employee's rehabilitation program. There were also comments to the effect that the decision to test employees returning to duty and whether to continue the testing for a specified period should be a local one.

UMTA Response. In response to these comments, UMTA is addressing the issue of return to duty drug testing in the final rule. UMTA is concerned about the safety of the transit riding public and thus in the final rule is requiring that, at a minimum, a transit employer must give a return to duty drug test to any individual who failed a post-accident, reasonable cause, or random drug test before that individual can resume performing sensitive safety duties. By including return to duty drug testing in this rule, UMTA is not requiring a transit employer to allow an employee who did not pass a drug test to come back to work, rather UMTA is providing this protection in the event a transit employer is willing to allow an employee a second chance. If an employee is given a second chance, the transit employer also may give unannounced drug tests to the individual for up to 60 months after the individual returns to duty. This type of testing is the most effective means of ensuring that an employee remains drug free. In addition to passing a return to duty drug test, an employee who failed a drug test or refused to take one would have to obtain a determination from the medical review officer that he or she could return to duty.

UMTA believes that any testing associated with an employee's rehabilitation should be left to the employee's rehabilitation program.

6. Rehabilitation

Comment was sought in the NPRM regarding four different employee assistance program options with varying rehabilitation requirements.

Under the first option, an employee who comes forward voluntarily or tests positive for drugs for the first time would be eligible for rehabilitation rather than be discharged. Once rehabilitated, the employee would be reinstated into his or her prior position. The second option would provide rehabilitation rights to an employee who comes forward voluntarily or who is identified as a drug user during a random test but would not require that the same opportunity be afforded to an employee identified as a drug user in a post-accident or reasonable cause test. In the third option, only an employee who comes forward voluntarily could claim rehabilitation rights, and anyone testing positive for drugs could be fired immediately. Under these three proposed options, recipients would be free to offer more rehabilitation options than proposed; the proposed options only establish minimum rehabilitation requirements for EAP's.

The fourth option would require the recipient to determine, as part of its anti-drug program, what rehabilitation opportunities to provide. This is essentially a "local option" approach. The recipient could choose any of the three other options as its approach or some variation of them or could choose not to provide an opportunity for rehabilitation in any circumstance.

Although many commenters agree in principle on the merit of rehabilitation for drug abusing employees, most tended to support the fourth option regarding rehabilitation, reemployment and job security opportunities that should be offered to employees. The Memphis Area Transit Authority, for example, argues that Option 4 allows recipients substantial flexibility in

designing and enforcing their anti-drug programs. The Commonwealth of Kentucky contends that rehabilitation costs should be the sole responsibility of the substance abuser and that it is unrealistic to expect the recipient to assume such a financial burden.

The States of Idaho and Alaska, with many small and geographically isolated communities without rehabilitation programs and medical facilities, suggest that the cost of sending an employee to an urban area for rehabilitation would be prohibitive; Alaska urged that UMTA consider situational exemptions from the rehabilitation requirement. The Southern California Rapid Transit District (SCRTD) advocates that recipients be permitted to decide what rehabilitation options to provide based on their financial resources, existing programs (if any) and negotiated agreements. Capital Metro (Austin, Texas) supports management's prerogative to determine the circumstances under which an employee might be provided the opportunity for rehabilitation versus automatic termination. The American Public Transit Association (APTA) summarized many comments by stating that no single option seems to be appropriate as a nationwide standard.

Labor organizations that submitted comments are strong supporters of broad EAP services and rehabilitation opportunities. The Amalgamated Transit Union (ATU) urges adoption of Option 1 in the expressed belief that the most critical aspect of dealing with drug abuse is providing an opportunity for rehabilitation; in addition, they believe that a second opportunity for rehabilitation may be appropriate. Both the Transport Workers Union (TWU) and the ATU support a requirement for recipients to pay the cost of all required rehabilitation; the United Transportation Union (UTU) National advocates that, because UMTA would be mandating rehabilitation, UMTA should share in the financial burden of the program.

Most comments regarding rehabilitation deal with the issue of whether, and under what circumstances, to offer rehabilitation and to provide job security to an employee and the length of any employee rehabilitation period.

UMTA Response. While UMTA recognizes the significance of the arguments raised in defense of rehabilitation opportunities and job security for employees who use drugs, it is important to emphasize that in this rulemaking UMTA is considering the adverse safety consequences surrounding the issue of drug use by sensitive safety transit personnel. On this basis, UMTA has decided that recipients will not be required by this Federal regulation to offer an opportunity for rehabilitation or to provide job security to employees who fail a drug test, who use drugs on the job, or who voluntarily come forward and request rehabilitation. UMTA believes that the comprehensive drug testing of sensitive safety employees, combined with an employee education and training program, is the most effective approach to promote transit safety and will reduce drug use in the transit community. More importantly, in this regard, UMTA is leaving it to each recipient to develop its own policies regarding rehabilitation and job security in its anti-drug program.

While it is understood that rehabilitation opportunities and job security for employees may help those employees who use drugs, there are a multitude of managerial and labor relations issues associated with implementing a rehabilitation program. In light of the many factors involved, UMTA believes that issues such as an adequate amount of time for rehabilitation, an appropriate amount of time to receive a recommendation to return to duty in a sensitive safety position, and job security matters are best addressed in the specific employment context.

Although, a recipient is not required to offer an opportunity for rehabilitation to any employee, to provide job security to any employee, or to provide the resources for rehabilitation, UMTA encourages recipients to consider rehabilitation opportunities and to provide job security to employees enrolled in a rehabilitation program. It should be noted that a recipient may cover an employee's rehabilitation expenses through employee benefit packages, insurance coverage, or as a matter of collective bargaining.

7. Education and Training Programs

As noted in the NPRM, UMTA proposed that recipients would provide anti-drug education and training in addition to rehabilitation. The NPRM specified the elements to be contained in the training and educational component, including a minimum time frame for the annual training of sensitive safety employees and their supervisors.

Capital Metro states that emphasis should be placed on education and awareness rather than on rehabilitation programs. The Washington, DC Metropolitan Area Transit Authority (WMATA) contends that their supervisors respond positively to training programs that provide guidelines and support when they are faced with an employee who may have a substance abuse problem. Miami Valley Regional Transit Authority (Dayton, Ohio) believes that the proposed minimum of 60 minutes of training per year is not adequate; they recommend a minimum of two hours per year. The Southern California Rapid Transit District (SCRTD) believes that all employees require continuous training in brief sessions to understand the effects and consequences of drug use, urine sample collection and chain of custody procedures and the mechanics of drug testing; in addition, SCRTD advocates that supervisors receive a full day of training on substance abuse information and recognition. The Amalgamated Transit Union (National) argues that other industries' experiences support its recommendation of a minimum of ten hours of annual training.

Recipient and employee organizations differ significantly on the mechanics and content of an education and training component of an anti-drug program. However, the majority of recipients favor local flexibility in designing that component to meet the specific needs of the company or transit system. They argue that the scope and contents of any required education and training activities should be dependent on the recipient's available resources, the extent of the drug abuse problem in the local community, the status of existing educational programs, and the availability of outside providers of assistance for drug abuse such as public health service agencies.

UMTA Response. UMTA believes that a recipient should have the ability to design an anti-drug education and training program that would best serve its employees. The ability to tailor the program to local needs is particularly important for small recipients that may not have the financial and administrative resources to support a company-sponsored program. Therefore, although the requirement for an education and training component has been retained, along with a list of the basic elements it should contain, the final rule does not specify a minimum time period (i.e., 60 minutes), except that supervisors must receive at least 60 minutes of training before they are eligible to make a determination that an employee is subject to reasonable cause drug testing. As in the case of rehabilitation, UMTA has concluded that the extent and type of anti-drug education and training provided by recipients to employees is best determined in the specific employment context. UMTA encourages recipients to provide employees with frequent and substantive information, educational

materials and training as part of an internal EAP or by contracting with community agencies, private organizations or other recipients, possibly in consortia arrangements.

8. DHHS Guidelines

The NPRM proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Drug Testing Programs (DHHS Guidelines) of the Department of Health and Human Services (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the Federal Government, and they include safeguards for the accuracy and privacy of testing.

A number of commenters, including several unions, raise important questions and concerns regarding the testing standards and laboratory selection and review procedures covered by the DHHS Guidelines. Some commenters suggest that UMTA allow for the procedures specified in the DHHS Guidelines or others which are "at least as effective" or are "their equivalent". Others argued for the flexibility and timeliness that results if screening and confirmatory tests can be done at different laboratories, the screening being on-site or nearby.

One commenter urges that UMTA and DHHS develop and implement a quality control and monitoring program of laboratories used to perform the drug tests. Another commented that the specimen collection procedures in the DHHS Guidelines were burdensome and, particularly in rural settings, impractical. Yet other commenters supported the unqualified adoption of the DHHS Guidelines.

One commenter questioned whether the DHHS Guidelines could be incorporated by reference in the UMTA Guidelines because they were circulated within the Federal Government and not issued for public comment.

UMTA Response. The Department of Transportation has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free workplace regulations. The result is the DOT "Procedures for Transportation Workplace Drug Testing Programs," which will be codified at 49 CFR Part 40. These DOT Procedures are intended to preserve, to the greatest extent practicable, the important safeguards provided by the DHHS Guidelines.

Some of the modifications of DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to references to "employers"). Other modifications are intended to take into account differences in the situations of Federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities or through use of mobile units, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances. The DOT procedures at 49 CFR Part 40 set the procedural standards for urine drug tests in the transportation industry.

49 CFR Part 40 limits both the screen test and the confirmation test to a single technology: immunoassay and gas chromatography/mass spectrometry (GC/MS), respectively. Although commenters saw this limitation in the DHHS Guidelines as unduly restrictive, UMTA believes that the established reliability of the tests and procedures in 49 CFR Part 40 are necessary to ensure the integrity of a drug testing program. If better analytical methods are validated and available at a reasonable cost, UMTA can revise this rule to recognize the technological advance.

The final rule requires recipients to use only laboratory sites which are certified by DHHS to do drug testing for Federal agencies. The DHHS certification program is the first rigorous certification specifically targeted at urine drug testing at the Federal level. The DHHS Guidelines provide national standards for recognition and periodic review. UMTA is not prepared to accept accreditation by voluntary bodies absent DHHS recognition. UMTA believes DHHS certification of laboratory sites that do drug testing is an essential element to ensuring quality analysis of drug tests. UMTA has been assured that there will be sufficient capacity at certified laboratory sites to provide quality analysis for the entire transit industry.

All comments received during this rulemaking will be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

9. Medical Review Officer

UMTA received several comments on the qualifications and duties of the proposed Medical Review Office (MRO). Although two commenters mentioned the cost implications, all of the commenters recognized the necessity of the function and the value of the services. Several commenters sought clarification of those matters which management must decide with medical advice and those decisions that could be reserved to the MRO. All but one commenter addressing the issue urges that the rule provide flexibility to each recipient to decide exactly how to define roles and responsibilities.

UMTA Response. It was apparent from the comments that there was some confusion regarding the role of the MRO. The final rule incorporates all aspects of 49 CFR Part 40 pertaining to the qualifications, duties and responsibilities of the Medical Review Officer. An MRO must be a licensed physician. However, the rule does not require a recipient to hire a physician, the recipient only needs to arrange for the services of a physician to act as MRO. The rule allows a recipient to have more than one MRO based on organizational unit or employee work location, if necessary.

Under 49 CFR Part 40, the MRO's responsibility is to receive, review, and interpret all positive drug test results. The MRO makes the determination that the results of a drug test are valid and the determination whether a positive drug test result has a legitimate medical explanation. The MRO makes the determination whether a positive drug test result has a legitimate medical explanation only after reviewing any medical information submitted in confidence by the employee. If the MRO determines that a confirmed positive drug test result has a legitimate medical explanation, the MRO reports to the recipient or operator that the individual passed the drug test. The MRO is also responsible for determining whether an employee who did not pass a drug test or refused to take one may return to duty.

10. Confidentiality

Commenters raise a number of concerns regarding the issue of confidentiality. A significant number of commenters in particular oppose UMTA's proposal in the NPRM regarding pre-employment testing that, if the applicant is not hired, no record of the test results shall be maintained by the recipient. A common theme of the comments in this regard is reflected in this statement from one submission: "if a recipient does not retain a record of test results, on a strictly confidential basis, it could be left defenseless in a later claim under the equal opportunity

laws or other legal provisions governing hiring by public agencies."

A number of commenters express concern about the release of confidential information generally. A union, for example, suggests that test results should be kept confidential unless an employee provides written consent to the release of the information.

A commenter from California noted the existence of a State statute regarding the withholding of public employee records and suggests that the UMTA final rule might be in conflict with this provision.

UMTA Response. UMTA has included a provision in the final rule that will govern release of records of an employee's drug testing results and any rehabilitation information. UMTA has decided that the legitimate individual privacy rights of an employee warrant strict limitations on the availability of an employee's drug testing results. The final rule provides that the test results of an individual may be released only with the written consent of the individual. In addition, the final rule eliminates the NPRM requirement that the results of a preemployment test of an applicant not be maintained. UMTA recognizes the importance of such information in the event of a lawsuit or complaint about a failure to be hired. Accordingly, the regulation does not preclude the information from being maintained by the recipient but, as discussed above, any such information may be released only with the applicant's written consent.

Regarding the comment about the California statute, UMTA is aware that there are other state and local laws which may pose similar problems. However, once this rule becomes final and is implemented by a recipient, to continue to receive Federal transit funds, the recipient must comply with all of its requirements, including that which allows the release of data only upon written consent of the affected individual. The final rule does have a provision for a temporary waiver of certain requirements of the rule, if they are in conflict with state or local law. This waiver provision is discussed more fully under the heading 'Period for implementation'.

11. Recordkeeping and Reporting

Several organizations provided comments to UMTA regarding the reporting requirements of the proposed rule. The Dayton, Ohio Miami Valley Regional Transit Authority (RTA) deemed semi-annual and annual reports appropriate and recommended that the reports include summaries such as: the occupational groups tested, drugs identified, and disposition of employees; RTA further suggested that statistics should be grouped by category of test. The Austin, Texas Capital Metropolitan Transportation Authority supported annual reporting that could provide UMTA with general statistical information such as job title, category of test, number of tests given and a summary of test results. Long Beach (California) Transit did not object to an annual reporting requirement and generally agreed with Capital Metro's expression of support for inclusion of data in summary format to ensure the confidentiality of the information. The Topeka Metropolitan Transit Authority recommends that UMTA provide the necessary reporting forms with proper instructions for completion and submission. A few commenters objected to semi-annual or annual reports as overly burdensome and at least one organization recommended that the Triennial Review process could serve as the proper mechanism to evaluate the effectiveness of each recipients' anti-drug program.

There was a general consensus against the separate reporting post-accident test results for fatal accidents immediately after an accident. The City of Waukesha (Wisconsin) Transit System Utility suggested that positive post-accident test results are an issue and a problem to be resolved by the employer and the employee, and that UMTA's efforts should be focused on utilizing general statistical trends to assess the effectiveness of its anti-drug regulation.,

In light of its overall support for the compilation and resporting of generalized data on a semi-annual and annual basis, Long Beach Transit questioned the benefit gained by reporting to UMTA after each positive post-accident drug test result.

There was substantial opposition to UMTA's proposed requirement that if an applicant is not hired, no record of the tests results will be maintained by the recipient. Both OATS, Inc. (a private, not for profit service provider based in Columbia, MO) and the Iowa State Department of Transportation (IDOT) point out that destruction of an otherwise qualified applicant's application records (including pre-employment drug test results) prevent a recipient from producing evidence that an employment offer was withheld for a valid and legal reason; further it might not be possible to prove that affirmative action and equal employment opportunity requirements had been met. Clark County, Washington agreed that test records are important documents in defending against claims brought by a applicant subsequent to the recipient's decision to not employ the applicant; premature destruction of the records could expose the recipient to unnecessary liability and hamper any legal defense it may care to develop. A concern was expressed by Waukesha that applicants who previously test positive might reapply at a later date, and that they view a three year record retention policy as a reasonable management practice that would be very helpful in that eventuality. The Idaho State Department of Transportation (IDOT) argued in favor of destruction of drug test records of an applicant who tests positive and who is subsequently not hired; they expressed concern that such information could lead to future discrimination of rehabilitated substance abusers.

UMTA Response. The regulatory provisions that require a recipient to submit summary reports of the recipient's program are critical measures to provide oversight of the industry's implementation of the comprehensive anti-drug program. UMTA believes that these minimal requirements are necessary to properly monitor the effectiveness of the program and to ensure compliance with the final rule. In addition, evaluation of the industry's implementation of the anti-drug program and of test results will enable UMTA to review any demonstrated trends of drug use in the transit industry and to modify the final rule if warranted by the data.

The proposed recordkeeping and reporting provisions have been modified in the final rule. UMTA is persuaded that the proposed requirement for immediate reporting of post-accident test results would be cumbersome and an unnecessary management chore, and has therefore not included it in the final rule. UMTA also has clarified the requirements and organization of material that must be submitted in the recipient's semi-annual report. In order that UMTA may accurately assess information submitted by a recipient, the final rule provides that the recipient must submit:

(1) The total number of drug tests administered;

(2) The number of drug tests administered in each occupational category (e.g., vehicle operator);

(3) The number of drug tests administered in each testing category (i.e., pre-employment, post-accident, reasonable cause, random, and return to duty);

(4) The number of post-accident drug tests administered in each accident

category (i.e., fatal, personal injury, or property damage);

(5) For each post-accident test, the number of hours between the accident and the collection of a urine specimen;

(6) The total number of individuals who did not pass a drug test;

(7) The number of individuals who did not pass a drug test by occupational category (e.g., vehicle operator);

(8) The number of individuals who did not pass a drug test by testing category (e.g., reasonable cause);

(9) The number of individuals who did not pass a postaccident drug test by accident category (e.g., fatal);

(10) The disposition of each individual who did not pass a drug test;

(11) The number of drug tests submitted to the laboratory that showed evidence of one or more prohibited drugs or drug metabolites in the immunoassay screen in a sufficient quantity to warrant a confirmatory test;

(12) The total number of drug tests submitted to the laboratory that showed evidence of one or more prohibited drugs or drug metabolities in the confirmatory test in a sufficient quantity to be reported as positive to the medical review officer; and

(13) The number of drug tests submitted to the laboratory that showed evidence of one or more prohibited drugs or drug metabolite in the confirmatory test in a sufficient quantity to be reported as positive by category (i.e., marijuana, cocaine, opiate, PCP, or amphetamine).

Because most drug testing laboratories report much of this information when reporting summary drug test results to the recipient, UMTA does not anticipate that the reporting requirements will be overly burdensome. However, in the case of multimodal recipients, the data must be broken down by mode. UMTA believes that the semi-annual reporting requirement is necessary and vital to gain a timely understanding and to evaluate the effectiveness of the anti-drug program. However, UMTA anticipates that the semi-annual reporting requirement will be modified or possibly eliminated within the next three to four years, if it is incorporated into the annual Section 15 reporting process.

Additionally, UMTA has withdrawn the proposed requirement that if an applicant is not hired, no record of the test results will be maintained by the recipient. In response to numerous comments, the recipient must retain all records related to the collection process and the reports of individuals not passing a drug test, regardless of the category of the test, for at least five years. The recipient must retain the reports of individuals passing a drug test for at least one year. Additionally, the medical review officer must keep the reports of individual test results that do not pass a drug test for at least five years and of individual test results that pass a drug test for at least one year. These records are subject to limited release, as discussed in Section 653.31.

12. Small Operators

The single issue raised by the NPRM that elicited the most comments was the impact of the proposed rule on small agencies and operators. Comments on this issue came from individuals, small entities both public and private, several States and several national organizations. Large operators also spoke out on behalf of the smaller agencies. The comments requested special consideration for groups variously categorized as the recipients of federal funds under section 18, section 16(b)(2) recipients, and other groupings defined by size of vehicle fleet, levels of employment, and numbers of safety sensitive positions.

Many of the commenters stated, and a number cited evidence that, rural, small, and specialized operators had "no safety problem" or a "better" or "much better" safety record than transit as a whole. Several went on to describe only very small or nonexistent drug problems in that good safety record.

Comments also emphasized the small size of the administrative staffs in most small systems. Frequently the manger splits his time between managing and driving and there are no other support personnel.

Among the concerns expressed, generally in order of importance, include:

- The cost to administer, cost to test, cost to rehabilitate, cost as a percentage of operating budget, as a percentage of Federal grant;
- The high level of personal and institutional development necessary to create and administer effective programs;
- The time needed to develop the required management capacity and to negotiate labor contracts and other agreements;
- Logistic and operational complexities imposed on small geographically dispersed systems (e.g., back-up drivers, collection sites, Medical Review Officers);
- The difficulties presented by irregular employment arrangements including part-time and voluntary worker and high employee turnover;
- The potential exposure to legal challenge and the costs associated with litigation and damages; and
- The apparent inequities resulting from requiring recipients of funds under section 18 to have an anti-drug program, but not recipients under section 16(b)(2).

In almost all comments, particular emphasis was placed on the special burdens imposed by the proposed random testing requirement and the proposed maximum 125 percent sampling rate. Relief was proposed in a variety of ways: establish new Federal assistance programs to fund the costs of the required drug programs; exclude from the rule agencies by funding category, size, or the demographics of their service area; eliminate one or more of the test categories from those required of smaller operators; eliminate other program elements from the requirements such as EAPs and/or rehabilitation; extend the period allowed for implementation of one or more of the program requirements; stagger or phase implementation time-tables; establish State or National programs to administer the required drug control activities; impose requirements selectively on those with a demonstrated drug problem; establish a Federal program to bear the costs of defending against legal challenges to agency actions in compliance with the rule; make EAP programs voluntary for small systems, also training; allow exemptions and waivers from some DHHS Guideline requirements; allow for and promote development of private providers of all services necessitated by the rule; reduce the sampling rate for the random testing program to something like 50 percent instead of 125 percent; allow more time to accomplish the post accident test; and allow for entire drug program or specific aspects to be accomplished by State Government and State or local police.

UMTA Response. Upon review of the docket, UMTA found several arguments made on behalf of small entities to be persuasive. UMTA has therefore prepared the final rule to accommodate small entities. UMTA has excluded all recipients of section 16(b)(2) funds from coverage under the rule, although UMTA will be studying data on this issue to determine whether some future rulemaking to cover section 16(b)(2) recipients might be warranted. UMTA has increased the implementation period for large recipients from 6 to 12 months, UMTA has increased the implementation period for section 18 recipients and other small operators from 6 months to 24 months; and UMTA has selected a rehabilitation option

making all aspects of that program element voluntary.

UMTA has excluded volunteer workers from the mandatory coverage of the rule.

UMTA is requiring the State to certify compliance with the rule for all sensitive safety employees of section 18 recipients. This is consistent with UMTA's administration of section 18 program, and allows the States to establish Statewide requirements or to pass the requirements through to subrecipients.

13. Covered Employees

In the NPRM, UMTA sought comment on which employees should be subject to the drug testing rule. The NPRM proposed that all employees in sensitive safety positions would be covered, including vehicle operators, controllers, and mechanics. The NPRM specifically asked whether this definition was broad enough or whether other categories of employees also should be covered.

A number of comments were received on this point. Some commenters suggest that the rule should not be limited in its application to sensitive safety employees. Rather, these commenters argue that all of a recipient's employees should be covered in order to emphasize the importance of a drug-free workplace, and to assure that all employees are subject to the same requirements. The National Transportation Safety Board, for example, supports the inclusion of all employees who perform sensitive safety functions.

On the other hand, other commenters did not specifically recommend that certain categories of employees be covered or excluded from coverage of the definition. Rather, these commenters suggest that each recipient should be given the flexibility to itself determine which employees perform safety functions sufficient to bring them under the definition. The transit industry's association, the American Public Transit Association (APTA), for example, supports this approach by recommending adding the phase "as defined specifically in the local program" at the end of the last sentence of the definition. "This would permit each transit system to tailor the definition of safety sensitive position to their own needs and circumstances, while still providing adequate guidance." (APTA also recommended that UMTA use the term "safety sensitive position" rather than "sensitive safety" to parallel the usage in the transit industry.) Other commenters suggest that the definition be defined as broadly as possible so long as the recipients are able to specifically decide which employees come under the category.

Many small operators suggest that the rule should not apply to their operations given their size, their ability to closely supervise employees, and the administrative and economic burdens that would result from the application of the rule to their operations. Consequently such commenters did not generally discuss which employees should be considered sensitive safety, except for the issue of volunteers, discussed below.

A few commenters representing large transit authorities suggest that security personnel should be considered sensitive safety employees under the rule. A New York City transit authority states that "* * * all security-related positions should be subject to a drug testing program for the same reasons that sensitive safety positions are and, in addition, because there is a higher burden placed on these employees to secure property and protect other employees and the riding public. Failure of such employees to perform their duties effectively could interfere with the safe operation of the authority and place the public at risk."

Regarding temporary employees, in the NPRM UMTA specifically asked for comments on whether such employees should be subject to rehabilitation, and thus few comments were received on the question of whether temporary employees should be covered by the rule. One State Department of Transportation states that all safety employees, full-time and temporary, should be subject to drug testing, especially pre-employment testing.

A significant number of small operators ask whether the rule was meant to apply to volunteers in sensitive safety positions. These commenters note that small systems particularly rely on volunteer drivers, many of whom are elderly, and suggest that this very needed and useful voluntary service would be seriously affected if such volunteers were to be subject to the anti-drug regulation.

UMTA Response. UMTA in the final rule will continue to limit the rule's coverage to sensitive safety employees. We believe we have no basis to extend the coverage of the rule to all of the employees of a transit system. Moreover, this would significantly increase the cost of the final rule. Recipients are reminded, however, that the rule establishes minimum requirements and does not prevent a recipient from establishing on its own a program that exceeds the rule's requirements.

UMTA does not agree with those commenters who suggest that each recipient should have the flexibility to decide which employees are to be considered sensitive safety and therefore subject to the rule. The rule should be uniform with respect to applicability to all recipients. In so deciding, however, we recognize that a more specific definition of the term sensitive safety is necessary and have therefore added a detailed provision in the "Definitions" section of the rule. It provides that such employees are those with duties related to the safe operation of transportation service by a recipient, including operating a revenue service vehicle; controlling dispatch or movement of a revenue service vehicle; maintaining a revenue service vehicle or equipment used in revenue service; and those who supervise individuals performing such sensitive safety functions. UMTA recognizes that even within the context of this more specific definition there may be questions about whether particular employees are covered, and recognizes that a recipient will have to make these determinations on a case-by-case basis, taking into consideration the extent of the employee's potential impact on safety.

UMTA has not included security personnel in the definition of "sensitive safety". However, UMTA agrees with the commenters who contend that security workers are involved in helping to provide safe transportation, and UMTA strongly encourages recipients to consider including security personnel in an anti-drug program.

UMTA has considered carefully the issue of whether volunteers should be subject to the rule. UMTA is persuaded by the comments of small operators who contend that coverage of this category under the rule might discourage individuals from volunteering their services, and have decided to exclude volunteers from the applicability of the rule. UMTA encourage those recipients that use volunteers to consider asking them to voluntarily place themselves under the recipient's anti-drug program.

Finally, part-time and temporary employees are included in the definition of "sensitive safety" employees. UMTA simply finds no basis to exclude such workers from the drug testing program, and agree with those commenters recommending their coverage under the rule.

14. Private Operators

Comments to the docket on this issue were limited. Commentators were concerned with the cost implication of the requirements, particularly in a

competitive environment. They saw the control of drug program costs to be a significant new management task and one that would have a significant impact on their competitiveness. At the same time, both private operators and the public agencies with which they were under contract saw no alternatives to including private sensitive safety employees under the drug rule if the current growth of competition and private participation in public transit was to continue.

UMTA Response. The rule covers employees of private companies providing mass transportation services for a recipient if the employees perform sensitive safety functions. It is important to emphasize that it is the responsibility of the recipient to ensure, and certify to UMTA that any private operator with employees in this category complies with this rule.

15. Alcohol

Some commenters suggest that while drugs are a problem generally in society, alcohol abuse is an even greater problem. They argue that the rule should be broadened to cover alcohol abuse among sensitive safety transit employees as well.

UMTA Response. UMTA is concerned about impairment resulting from the abuse of other substances, principally alcohol. We believe, however, that this rulemaking will best accomplish a useful purpose by addressing only controlled substances. Although both alcohol and controlled substances may result in impairment in a driver's ability to control his or her vehicle, and although current law and regulations prohibit a person from driving while under the influence of either, certain differences are evident. The possession and use of controlled substances is nearly always illegal, while alcohol consumption is in many circumstances legal. Because of the legality of alcohol and its widespread use, most people have enough contact with users to recognize the indicators of its use. The appearance and actions of a person are often clear evidence of alcohol impairment.

Because alcohol is a legal substance, it is necessary to establish violation of existing prohibitions and actual impairment due to use, rather than simply establishing use, as is done in instances where illegal drugs are used. In instances where chemical testing is used, it would be to determine the degree of alcohol impairment. Testing will often be of a different type than is used to determine the use of drugs. UMTA is not prepared at this time to mandate blood testing programs. However, this regulation or other UMTA policy in no way prevents a recipient from instituting a program of chemical testing for alcohol use. Such testing could be done either in conjunction with an anti-drug program under this rule or separately.

Moreover, on October 4, 1988 the Federal Highway Administration (FHWA) issued a final rule at 53 FR 39044 regarding the use of alcohol by drivers that will affect many UMTA recipients. Under section 12008(f) of the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99–570), among other things, the FHWA has established a BAC level of 0.04 percent as the standard for when a person is deemed to be driving under the influence of alcohol while driving a commercial motor vehicle.

16. Period for Implementation

Many commenters present views on this issue. In the NPRM, UMTA proposed that the rule would have to be implemented within 180 days of its effective date. Commenters uniformly contend that this is too short a period of time for implementation of the anti-drug rule. The American Public Transit Association, for example, states that, "* * * a deadline of 180 days is too short a time frame to require transit systems to establish and implement a drug program in compliance with the UMTA regulations." The Association also lists a number of administrative and legal barriers to implementing the rule in 180 days, and recommends that a 12-month period of time be provided for a recipient to establish and implement its anti-drug program.

UMTA Response. UMTA is persuaded by the many comments on this issue that 180 days is too brief a time period for implementation. Accordingly, the rule provides that for recipients (other than small operators) the time period for implementation is 12 months from the effective date of the rule (which is 30 days after the date the rule is published in the **Federal Register**). Moreover, recognizing that small operators will need more time to implement the rule, UMTA is providing such recipients with 24 months to implement the rule. "Small operators," discussed in more detail elsewhere, are section 18 recipients, and those recipients in urbanized areas of less than 200,000 in population. The rule also permits a recipient to seek a temporary waiver from this implementation period if the recipient is unable under State or local law to comply with the regulation.

A request for a temporary waiver must include a legal opinion regarding the conflict between the rule and the state or local law, an indication of how the recipient is addressing the conflict at the State or local level, and an estimate of how long it will take to resolve the conflict. A temporary waiver will specify which provisions are being waived and a date on which the waiver expires. The expiration date of a temporary waiver will be no later than December 31, 1989. A recipient must certify compliance with all provisions not included in the waiver within the 12 or 24 month requirement. A recipient then must certify compliance with the provisions included in the waiver within 12 months after the expiration date of the waiver.

F. Legal Concerns Raised In Comments

1. Constitutionality

A number of commenters question the constitutionality of drug testing programs for transit personnel. UMTA recognizes that there are legitimate and significant constitutional concerns surrounding drug testing in general and random testing in particular. UMTA acknowledges the current widescale litigation and apparent disparate judicial opinions on drug testing programs.

UMTA Response. Although the state of the case law is evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, UMTA is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters is the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. As a threshold matter, the Fourth Amendment applies to "searches" conducted or mandated by the government and protects individuals against "unreasonable searches and seizures."

A second issue concerns whether urine tests under these programs are "searches" within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman v. James,* 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also, Lovvorn v. City of Chattanooga,*

1988 U.S. App. Lexis 6952 (6th Cir. May 23, 1988) (Guy, J., dissenting); *National Treasury Employees Union v. von Raab*, 808 F.2d 10057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). *Cf. Mack v. United States, F.B.I.*, 814 F.2D 120, 125 N.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of transit personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266,277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search * * *," the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment [citing *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967)]. *See e.g., Griffin v. Wisconsin*, ——— S.Ct.——— (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. at 340–342; *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561 n.—— (1976) (while "* * * some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure[.] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion").

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey v. T.L.O.*, 469 U.S. at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, "the government's need for supervision, control and the efficient operation of the workplace" outweighs the individual's legitimate expectation of privacy. *O'Connor v. Ortega*, 480 U.S.———, 107 S.Ct. 1492, ——— (1987). *Also see e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Thus, the courts must "* * * consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. at 559.

Thus far, a number of courts have held or suggested in *dicta* that testing upon reasonable suspicion alone may be inadequate. Reasonable suspicion testing allows inquiry only after a problem manifests itself at work. *See, Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority, 691 F.Supp. 898* (W.O. Pa. 1988). Furthermore, these courts have allowed drug and alcohol testing in the context of a pre-employment physical or routine health examination. *See, e.g., Cambria County Transit Authority* (drug and alcohol testing during annual physical examinations does not violate employee rights under the fourth amendment; individualized reasonable suspicion not required); *Wrightsell v. City of Chicago*, 678 F.Supp. 727 (N.D. Ill. 1988) (drug testing of police officers as part of routine, reasonably required, employment-related medical examination is permissible where there is clear nexus between test and employer's legitimate safety concern); *McDonnell v. Hunter*, 612 F.Supp. 1122, 1130 n. 6 (S.D. Iowa 1985) (Fourth Amendment does not preclude taking body fluid specimen as part of pre-employment physical or as part of routine periodic physical examination), *aff'd as modified*, 809 F.2d at 1302 (8th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 341 (D.C. Cir. 1987) Pet. for cert. filed, No. 87–1706, April 15, 1988), (not unreasonable to require drug testing where an employee's duties involve direct contact with young school children and other physical safety, where the testing is conducted as part of a rountine employment-related medical examination and where there is a clear nexus between the test and the employer's legitimate safety concern). Moreover, as the court in *Cambria County Transit Authority* held, such testing serves the laudable goal of fostering a drug free and sober workforce as well as identifying those employees with serious drug problems.

Viewed in this light, it is beyond dispute that the public has an overriding interest in assuring that sensitive safety transit personnel perform their duties free of prohibited substances. The drug problem in society in general was discussed in the NPRM. The impairing effects of drugs and the substantial risks to public safety posed by sensitive safety- or security-related transit personnel who use drugs underlie the compelling governmental interest in promulgating this rule.

In contrast, the drug testing requirements of the final rule involve a minimal invasion of privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware v. Prouse*, 440 U.S. at 654–655 (footnote omitted); *New York v. Burger*, 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place significant constraints on an employer's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically-acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees. Moreover, recipients will be required to have an anti-drug program in accordance with the provisions of the final rule, to ensure that discretion is in fact limited in the administration of drug tests under the anti-drug program. *Cf. National Treasury Employees Union v. Reagan*, 685 F.Supp. 1346, 1352–53 (E.D. La. 1988) (holding that the constitutionality of an Executive Order requiring Federal agencies to establish drug testing programs for Federal employees was not ripe for review since each agency had not implemented a finalized, particular plan).

The actual testing procedures that each employer is required to implement under this final rule also are narrowly tailored to respect an employee's reasonable expectations of privacy. The Departmental regulations at 49 CFR Part 40 governing collection of urine samples, as referenced in the final rule, are based on the DHHS Guidelines which were carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging results. Other employee drug testing programs incorporating the collection and testing procedures of the DHHS guidelines have been upheld against constitutional

attack. *See American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987), appeal filed, No. 87–5417 (D.C. Cir. Dec. 11, 1987) (upholding the constitutionality of the Department of Transportation program for random drug testing of safety- and security-sensitive agency employees); *National Association of Air Traffic Specialists v. Dole*, 2 Ind. Emp. Rts. Cases (BNA) 68 (D. Alaska 1987) (denying a motion for a preliminary injunction against the Federal Aviation Administration's use of urinalysis drug testing as part of an annual physical examination of the agency's air traffic specialists).

Equally significant is the fact that urine drug testing of sensitive safety employees is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make *some* employees' expectation of privacy unreasonable." *O'Conner v. Ortega*, 107 S.Ct. at 1498 (emphasis in original). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. 2636 (1987)] and, "in effect consent[ ] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271]. For these reasons, two Federal courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986) (horse racing jockeys); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (police officers).

UMTA recognizes that a number of Federal and State courts have rejected government-mandated drug testing program on Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn v. City of Chattanooga*, 1988 U.S. App. 84 F.2d 1539, 1553–54 (6th Cir. 1988) (Martin, J.) panel decision vacated and rehearing en banc (August 3, 1988), ("When determining, then, whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *American Federation of Government Employees v. Meese*, 688 F. Supp. 547, 548 (N.D. Cal. 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security"). Within the mass transportation industry itself, a number of courts have reviewed service providers' drug testing programs and, in most cases, have upheld such programs in the face of constitutional and statutory challenges, even where such programs require employee testing in the absence of individualized suspicion. Thus, an early drug testing case upheld a drug testing program of the Chicago Transit Authority requiring, *inter alia*, drug and alcohol testing of operating employees directly involved in a serious accident. *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976). The Suscy court reasoned that "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." 538 F.2d at 1267. *Accord Jones v. McKenzie*, 833 F.2d at 340 ("The case law on this point is clear that a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or of others.")

More recent court decisions also provide further support for the testing programs required by this final rule. See, *e.g., Amalgamated Transit Union, Local 933 v. City of Oklahoma City*, No. CIV–86–2182–A (W.D. Okla. September 6, 1988) (upholding annual physical, post-accident, reasonable suspicion, pre-employment and return to duty from-unscheduled-absence testing of transit workers); *Burka v. New York City Transit Authority*, 680 F. Supp. 590 (S.D.N.Y. 1988) (drug testing as part of routine, periodic physical examinations; pre-employment or incident to a promotion; as a result of an on-duty incident; or based upon reasonable suspicion of impairment found not to violate Rehabilitation Act and equal protection; however, disposition of Fourth Amendment issues not made on summary judgement); *Dozier v. New York City*, 519 N.Y.S.2d 135, 142 (1987) ("testing applicants for public safety-related jobs is reasonable under the Fouth Amendment if the applicant is given reasonable notice of drug testing"); *Transport Workers', Local 234 v. SEPTA*, 678 F. Supp. 543 (E.D. Pa. 1988) (upholding constitutionality of random testing of operating employees); *Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority, supra*, 691 F. Supp. 898 (mandatory drug and alcohol testing during annual physical examination does not violate Fourth Amendment); *Shaw v. Unemployment compensation Board of Review*, 539 A.2d 1383 (pa. 1988) (taking of bus drivers' blood and urine based on supervisor's reasonable suspicion comports with Fourth Amendment). Cf. *Sanders* v. *WMATA*, 819 F.2d 1151 (D.C. Cir. 1987) (employees' constitutional and statutory challenge to compulsory drug test and discharge on basis of test results after on-the-job accidents or incidents were bared by doctrine of sovereign immunity). But see *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987) (random drug and alcohol testing of bus drivers and maintenance workers constitutes an unreasonable search).

UMTA also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine testing after certain accidents, incidents, or rule violations is unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988). The Ninth Circuit based its views, in part, on the proposition that "* * * the vast bulk of [railroad] safety regulation is directed at owners and managers of railroads, not employees." *Id.* at 585.

The Supreme Court has granted a government petition for a *writ of certiorari* in *Railway Labor Executives' Association v. Burnley* and has ordered that this case be argued this term "in tandem" with *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the spring of 1989. However, in the absence of Supreme Court guidance, UMTA is convinced that the need for drug testing by urinalysis in the transit industry to determine fitness for duty of sensitive safety employees and, thereby, to ensure public safety clearly outweighs the privacy interest of individuals in this class.

While not totally free from doubt, it is UMTA's opinion that UMTA's anti-drug program, and similar drug testing regimens proposed by other administrations within the Department of Transportation, will be determined to be constitutional. The critical need for properly-administered drug testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their system while performing sensitive safety functions outweighs the reduced privacy interest of these employees.

2. Statutory Basis for the Rule

Some commenters suggest that UMTA does not have sufficient statutory authority to issue a rulemaking that requires drug testing of employees of recipients of UMTA funds. One recipient notes that the "Findings and Purposes" of the UMT Act (section 2) provides no specific safety statutory authority, but rather states that the purposes of the UMT Act are to (1) assist in the development of improved mass transportation facilities, equipment, techniques and methods; (2) encourage the planning and establishment of area wide urban mass transportation systems needed for economical and desirable urban development; and (3) provide assistance to State and local governments and their instrumentalities in financing such systems. Another commenter points out that section 9 of the UMT Act sets forth specific provisions of the UMT Act that apply to the section 9 formula program, but that section 9(e)(1) provides that no other condition, limitation or UMT Act provision applies to the program. Finally, a commenter notes that section 12(d) of the UMT Act provides that "[n]one of the provisions of this Act shall be construed to authorize the Secretary to regulate in any manner the mode of operation of any mass transportation system with respect to which a grant is made under section 3 * * *," and concludes that this prevents UMTA from issuing this drug regulation.

UMTA Response. As noted in the NPRM, the grant programs under both section 3 and section 9 of the Urban Mass Transportation Act of 1964, as amended (The UMT Act) require a recipient of Federal financial assistance to have the inherent capacity to carry out the purposes of the transit grants. Under the section 3 discretionary grants program, section 3(a)(2)(A)(i) provides that "No grant or loan shall be provided under this section unless the Secretary determines that the applicant has or will have—(1) the legal, financial, and technical capacity to carry out the proposed project; * * *."

Essentially the same requirement is contained in the formula grant program under section 9, although in the form of a certification. Section 9(e)(3) provides that each recipient of section 9 funding "* * * should submit to the Secretary annually a certification that such recipient * * * has or will have the legal, financial, and technical capacity to carry out the proposed program of projects * * *". This provision also requires, as does section 3, a certification by the recipient that it has "satisfactory continuing control" over the use of UMTA-assisted facilities and equipment.

The technical capacity to carry out a mass transit project necessarily must include an ability to provide essentially safe mass transportation services, and it is within the scope of this requirement for UMTA to require recipients of sections 3 and 9 funding to undertake measures that would enhance their ability to provide safe operations. "Satisfactory continuing control" also necessarily implies the ability to ensure that the safe operation of UMTA-assisted facilities and equipment is not endangered by drug use by employees who perform sensitive safety functions.

Under the section 3 discretionary program, moreover, the Secretary is authorized to make grants "* * * on such terms and conditions as the Secretary may prescribe * * *," providing even broader authority under this program to require a recipient to institute a drug program before a grant will be awarded. Funds made available under 23 U.S.C. 103(e)(4), moreover, essentially are subject to the same provisions and requirements applicable to funds made available under section 3.

For the section 18 transportation program for non-urbanized areas, subsection 18(f) provides that "grants under this section shall be subject to such terms and conditions (which are appropriate to the special needs of public transportation in areas other than urbanized areas) as the Secretary may prescribe." The requirements proposed here would be among the terms and conditions imposed under the authority of this section.

In addition, Congress has indicated its policy that UMTA have a continuing role in transit safety in section 22 of the UMT Act. That section provides the Secretary (and, by delegation, UMTA) with authority to investigate certain conditions which the Secretary believes create a serious hazard of death or injury. If the Secretary determines that such conditions do create such a hazard, the Secretary shall require the recipient of UMTA funding to submit a plan for correcting or eliminating such condition. The Secretary is authorized to withhold funding under the UMT Act until the plan is implemented.

Regarding the comments raised above, we recognize the general nature of the "Findings and Purposes" section of the UMT Act as originally enacted, as well as the cited restrictions on UMTA's authority under sections 3 and 9. It is important to note, however, that each time the UMT Act has been amended by reauthorization legislation, UMTA generally has been given a broader mandate to administer and regulate the activities of its grantees. For example, under the most recent transit reauthorization law, the 1987 Surface Transportation and Uniform Relocation Assistance Act (Pub. L. 100–17), UMTA specifically was required to issue no less than seven rulemakings. That same Act, moreover, implicitly recognizes UMTA's authority to provide guidance and oversight with respect to its grantees' activities by requiring at section 12(i) that any UMTA "* * * statement of general or particular applicability designed to implement, interpret, or prescribe law or policy in carrying out provisions of this Act" be issued as a "rule" subject to notice-and-comment rulemaking in the **Federal Register.**

UMTA is charged with the responsibility of overseeing the expenditure of approximately $3 billion annually. This final rulemaking, consistent with the underlying statutory authority in sections 3, 9, and 18 of the UMT Act, is in furtherance of that responsibility.

3. Preemption of state and local law

In the NPRM, UMTA noted that the rule would not preempt State or local laws, and there could be instances in which a State or local agency could face a conflict between compliance with the proposed regulation and State and local requirements. The comments bear this out. For example, the final rule requires random testing. Some State or local laws apparently prohibit or limit random testing. In this situation, the UMTA rule would not preempt the application of the State or local law; if compliance with the State or local law prevented the grantee from complying with the UMTA rule, however, the grantee's UMTA funding could be jeopardized. Many grantees operate under "consent" statutes that permit them to take all necessary actions to comply with Federal grant conditions. Such laws, in most cases, could resolve the potential conflict outlined above. Not all States have such "consent" statutes, however.

In the NPRM, UMTA sought comment on whether conflicts of this sort therefore are likely to arise and, if so, what steps should be taken to avoid or resolve them.

A number of comments and concerns were presented on this issue, and UMTA recognizes that because the anti-drug rule does not preempt State law, conflicts may indeed occur. Accordingly, UMTA has decided to permit a recipient to seek a temporary waiver from any particular part of the rule that the recipient believes it is unable to comply with because of State or local law. Temporary waivers are discussed in detail elsewhere in this preamble.

4. Effect of rule on other federal regulations

Commenters brought to UMTA's attention an issue we did not address in the NPRM, that certain recipients may be subject not only to UMTA's drug rule but the related rules of the Federal Railroad Administration (FRA), the Coast Guard, and the Federal Highway Administration (FHWA).

More specifically, a number of recipients of UMTA funds provide commuter rail operations and, as such, are subject to FRA regulation, including the FRA anti-drug regulation. In addition, certain UMTA recipients operate ferry boats in mass transporation service, and ferry boats are subject to Coast Guard jurisdiction and to its anti-drug regulation.

Since both the FRA's and the Coast Guard's anti-drug regulations are generally consistent with UMTA's, UMTA has decided to permit a recipient to certify to UMTA that its sensitive safety employees are covered under the FRA or Coast Guard regulation. Standard certification language to this effect is included in UMTA's final regulation. Such a certification will satisfy the recipient's requirements under the UMTA drug regulation for those operations the Coast Guard or FRA cover. A recipient may have to submit two separate certifications if it is subject, say, to the Coast Guard regulation with respect to ferry boat operations but otherwise is subject to UMTA's regulation for its bus operation. That recipient would submit a certification of compliance with the Coast Guard rule for the ferry boat operations, and the UMTA certification for its other operations.

The FHWA also is issuing an anti-drug rule. That rule, however, includes a governmental exemption, the effect of which is to exclude all UMTA public body recipients from its coverage. It is possible that the FHWA rule may cover certain private operators under contract to an UMTA recipient if such operators are engaged in interstate commerce. UMTA is willing to consider a request from a recipient on behalf of a private operator subject to the FHWA rule not to be subject as well to the UMTA rule, but we do not propose a blanket certification to this effect. We believe this will not be a signficant issue and would rather address it on a case-by-case basis, taking into consideration the compliance of the private operator with the FHWA rule and other factors.

G. Section by Section Analysis

This final rule includes three parts: Subpart A covering general matters; Subpart B covering drug testing; and Subpart C addressing administrative issues. Each of these Subparts is summarized below.

Subpart A includes general information about the anti-drug rule. Section 653.1, Purpose, describes the rule's requirement that a recipient of funds from UMTA must establish an anti-drug program meeting the minimum criteria set forth in the rule.

Section 653.1(b) of this regulation provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. That is, an employer must test the sample for the five major drugs listed in this regulation. Only if, in the context of reasonable cause testing, UMTA authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of this regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on this regulation as the basis for the request.

Section 653.3, Scope, indicates that the program applies to a recipient of funds under sections 3, 9, or 18 of the UMT Act, or a recipient of interstate transfer-transit funds under section 103(e)(4) of 23 U.S.C. In addition, if a recipient uses a public or private operator to provide mass transportation services, this rule also affects the operator through the recipient's certification to UMTA.

Section 653.5, Definitions, defines key terms as they are used in the regulation. "Accident" is defined as an occurrence involving a vehicle in revenue service in which a death occurs or someone must be treated at a medical facility. An accident also covers a situation where property damage is estimated to be $5,000 or more or one which must be reported to the Federal Highway Administration, the Federal Railroad Administration, or the Coast Guard. As § 653.15 makes clear, the fact that an accident has occurred does not itself require post-accident drug testing. Rather, the recipient must first determine that the employee contributed to the accident or cannot completely be discounted as a contributing factor to the accident.

Moreover, this section defines "pass a drug test" and points out that the laboratory analysis of a specimen is not the sole criterion for determining the presence of drugs. Rather, the medical review officer must independently review those test results before a positive drug test results will be reported to a recipient or operator.

"Prohibited drug" means marijuana; cocaine, opiates; phencyclidine (PCP), and amphetamines.

"Recipient" is defined as a direct recipient of Federal financial assistance from UMTA. Under the section 18 rural program, the States are the recipients of funds from UMTA. The States generally then make the funds available to subrecipients throughout the State. For purposes of the anti-drug regulation, the States make the certification of compliance to UMTA and may then administer the program directly or require subrecipients separately to comply with the regulation as a condition of receiving Federal funds through the State. In either case, UMTA will deal directly with the States regarding the regulation, not the subrecipients. A parallel approach is used with respect to any private operator providing transit service under contract to a recipient. The recipient would certify its compliance with the drug regulation to UMTA, and the recipient in turn would have to make certain that the private operator was in compliance with the regulation.

The section defines those employees of a recipient who specifically are covered by the rule under "sensitive safety function." This definition does not include those who volunteer their services, a fairly common practice among small operators. It does cover those employees who perform duties related to the safe operation of mass transportation service in the operation, control, or maintenance functions of the system, or those who supervise such employees.

This section defines "small operator" as those under the section 18 program and section 3 or section 9 recipients in urbanized areas of less than 200,000 in population.

Section 653.7 provides that a recipient shows compliance with the regulation by certifying to that effect to UMTA. Section 653.35 provides that the certification must be made a year after the rule becomes final or, in the case of small operators, a year and a half after the rule becomes final.

Section 653.9 describes the required elements of a drug program. In addition to the five types of drug testing of sensitive safety employees, the program also must include a policy statement on drug use in the workplace, and an employee education and training program.

Subpart B sets out the specific requirements of a drug testing program. Section 653.11 requires a transit employer to give a drug test to an applicant it would like to hire for a sensitive safety position. This section prohibits the applicant from being hired for a sensitive safety position if the applicant does not pass the drug test. This section also applies to an employee who is being transferred to a sensitive safety position.

Section 653.13 requires a transit employer to give a drug test to any sensitive safety employee it reasonably suspects is using drugs. The section requires two supervisors to make the decision to test for most operators, but allows one supervisor to make the decision for small operators. The supervisor or supervisors making the decision must be able to explain and document the reason for their suspicion.

Section 653.15 requires a transit employer to give a drug test to any sensitive safety employee involved in an accident unless it is clear that the employee's performance was not a factor in the accident. Under this section, the person making the decision to test could be a road supervisor or any other person designated by the transit employer to make it. This test must be done, that is the urine specimen must be collected, as soon as possible, but not later than 32 hours after the accident.

Section 653.17 requires a transit employer to give a number of unannounced drug tests equal to 50 percent of its employees each year. The selection of who is tested under this section must be made by using a scientifically valid random number generation method.

Section 653.19 requires that if a transit employer is going to allow an employee who refuses to take a drug test or did not pass a drug test to return to work in a sensitive safety position the employee must pass a return to duty drug test. The medical review officer also must determine that the individual may return to duty. This section would apply for example, if an employee's job was held open while the employee took part in a drug rehabilitation program. Under this section the employee also may be given an unannounced drug test at any time during the first 60 months back on duty in a sensitive safety position.

Section 653.21 requires that all drug tests given under this part comply with Department of Transportation regulations at 49 CFR Part 40. These regulations include requirements regarding preparation of the collection site, verification of the specimen collected, and proper handling of the specimen.

Section 653.23 limits the laboratory sites which may be used to perform the analysis of the specimens collected to those which are certified to do drug testing for the United States government by the Department of Health and Human Services. Further information on certified laboratory sites may be obtained from the National Institute on Drug Abuse at (301) 443–6780.

Section 653.25 specifies that drug tests under this part must be evaluated for the presence of marijuana metabolites, cocaine metabolites, opiate metabolites, PCP, and amphetamines. 49 CFR Part 40 sets out the levels at which each of these drugs or their metabolites are scientifically substantial enough to indicate use of the drug. Under this section the laboratory must follow the testing precedures in 49 CFR Part 40, including performing an initial screen by immunoassay and a confirmation by using gas chromatography/mass spectrometry (GC/MS), and properly storing the remains of any specimen that tests positive both times. Under this section the laboratory notifies the medical review officer of the results of its analysis of each specimen.

Section 653.27 requires each transit employer to have a licensed physician available to act as medical review officer for its anti-drug program. The medical review officer does not need to be an employee of the transit employer; such service can be provided on a contractual basis. This section also sets out the responsibilities of the medical review officer. Most importantly, it is the medical review officer who receives the laboratory results and makes the determination whether an individual does not pass a drug test as defined in the rule. This determination involves not only analysis of the test results but includes reviewing the individual's medical information as well. The medical review officer also determines when an employee who did not pass a drug test or refused to take one may return to duty.

Section 653.29 allows an employee who does not pass a drug test to request additional analysis of the urine sample the employee provided. An employee requesting this additional analysis may be required to advance the cost of the retest, but must be reimbursed if the employee passes the drug test as a result of the retest. This section does not apply to individuals who were administered a pre-employment drug test. However, nothing in this section prohibits a transit employer from offering this same benefit to applicants.

Subpart C sets forth a number of administrative requirements under the rule, including recordkeeping and reporting requirements under § 653.31. A recipient is to submit a semi-annual report to UMTA on such matters as the total number of drug tests administered by the recipient; the total number of those who did not pass a drug test; and information in general about the program.

Section 653.33 provides that individual test results may be released to a third party only upon the written consent of the individual involved, and only so long as that consent identifies the particular person to receive the information.

Section 653.35 provides three examples of a certification a recipient provides to UMTA to be in compliance with the rule. One certification relates to those covered by the UMTA rule, while the other two cover those recipients that may also be subject to the Coast Guard or Federal Railroad Administration anti-drug regulation. Coverage under either of those programs satisfies the UMTA regulation as well so long as the recipient certifies to UMTA it is so covered.

Finally, § 653.37 allows a recipient to seek a temporary waiver from UMTA if it believes it is unable to comply with a portion of the rule, because of State or local law. Among other things, the recipient must include a legal opinion describing the legal impediment to its compliance with the regulation. Any temporary waiver granted by UMTA will specify which provision of the rule is being waived and when the expiration date of the temporary waiver. The expiration date of a temporary waiver will be no later than December 31, 1989.

H. Availability of Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Urban Mass Transportation Administration, Office of Public Affairs,

400 Seventh Street, SW., Washington, DC 20590 or by calling (202) 366–4043.

II. Economic Analysis

A. Summary

The Urban Mass Transportation Administration (UMTA) has evaluated the industry cost impacts and benefits of this final rule. What follows is a summary of a detailed economic analysis, the full text of which is available for review in the docket to this rulemaking.

The UMTA has determined that this rulemaking is not a major rule under Executive Order 12291 because the required anti-drug program is not likely to have costs of over $100 million in any one year. The assumptions used in preparing the economic impact estimates for this regulatory evaluation are based on information received from (1) public comments on the Notice of Proposed Rulemaking received during hearings or submitted in writing to the docket, (2) data on the mass transit industry included in the National Urban Mass Transportation Statistics Section 15 Annual Reports and other reports, and (3) data provided by chemical testing laboratories, the National Institute on Drug Abuse (NIDA), and other agencies and individuals knowledgeable about drug abuse and chemical testing in the United States.

In response to comments on the proposed rulemaking, a number of changes which affect the economic impact of the anti-drug program have been made in the final rule. These comments, and the responses to them, are discussed in the comments section of the preamble to the final rule.

The rule is applicable to agencies which receive Federal funds from grant programs under sections 3, 9, and 18 of the Urban Mass Transportation Act of 1964, (The UMTA Act), as amended. It is estimated that the rule initially will affect approximately 1,606 transit agencies and 195,500 persons in sensitive safety functions.

B. Costs

UMTA estimates that this rule will cost $13.21 million in the first year, $13.79 million in the second year, and $14.14 million in the third and succeeding years (in constant dollars). Costs for year one consist of $6.81 million for drug testing, $3.21 million for initial program development, $2.66 million for employee/supervisor education and training, and $0.53 million for program reporting to UMTA. These costs are detailed in Appendices A and B of the Regulatory Evaluation. The first year of testing would affect a total population of approximately 195,500 persons. Random drug testing is conducted at an annual rate of 50 percent of the affected population after the first year. It is estimated that initial drug screening tests will cost $25.00 each and confirmation tests will cost $35.00 each. Specimen collection for testing is estimated to require 30 minutes of an employee's time while on pay status, and an administrative cost of $35.00 is estimated for each test administered. Although the rule does not require rehabilitation or continued employment of persons who test positive for drugs; therefore, no costs are estimated for return to duty testing.

In addition to the direct costs for testing, each transit agency will also bear the costs for development of a drug control policy, for employee and supervisor training, and for reporting the results of drug testing to UMTA. It is estimated that the costs for program development and policy formulation will be $2,000 per transit agency. The final rule does not specify a minimum number of hours for employee and supervisor training to be conducted, except that supervisors making the determination to test based on reasonable cause must receive at least 60 minutes of training. However, for purposes of this analysis, UMTA has calculated that each employee in a sensitive safety position will receive one hour of training and each supervisor will receive two hours of training per year. Average hourly wages for employees and supervisors are estimated at $12.58 and $15.00, respectively. It is estimated that preparation of the required semi-annual and annual reports to the UMTA will require a total of 16 hours of labor at $20.00 per hour each year.

UMTA notes that a number of commenters were concerned about the costs associated with labor negotiations, arbitration, litigation, or lost wages which may result from implementation of this rule. However, because of the uncertain nature of these actions and the varied costs that might be associated with them, UMTA did not include any cost associated with them in this analysis.

Large transit operations will have twelve months to implement their drug control programs. Small entities (Section 18 funding recipients and other entities serving urbanized areas with populations of 200,000 or less) will have 24 months for program implementation.

C. Benefits

UMTA believes that two major benefits will accrue from this rule. First, will be a reduction in potential fatalities, personal injuries and property losses resulting from accidents attributed to individuals whose judgment or motor skills may be adversely affected by the use of illicit drugs. Second, will be the benefits accruing to recipients and operators from the potential reduction in absenteeism, lost productivity, medical and insurance claim costs, and improved general safety in the workplace. According to a 1987 NIDA report on Strategic Planning for Workplace Drug Abuse Programs, abusers of drugs and alcohol, in comparison to other workers, have 3.6 times as many accidents, file 1.5 times as many workers' compensation claims, are absent 2.5 times more often for sick leave of 8 days or more, and incur 3.0 times the normal medical costs.

UMTA has been unable to quantitatively estimate the extent to which this rule will reduce drug use in the mass transportation industry, and thus would enhance public safety or promote transit operations as a whole. However, a number of serious transit accidents have been reported in recent years in which operating personnel were determined to have drugs in their systems at the time of the accident. Analysis of the UMTA Section 15 Annual Report for 1985 and "A Directory of Rural and Specialized Transit Operators," by Rural America for UMTA dated June 1986 (Rural America Report) indicates that there were more than 17,300 vehicle related accidents reported involving fatalities, injuries, or significant property damage as defined in the rule. The 1985 NIDA National Household Survey on Drug Abuse reports that 19.3 percent of all Americans use some illicit drug in the past twelve months, 12.0 percent in the past 30 days. Assuming that only 10 percent of mass transit employees (as compared to 19.3 percent of the general population) use illicit drugs and that drug users are 3.6 times more likely to be involved in accidents, it is possible to estimate that approximately 28 percent of mass transportation accidents may have been caused by persons who use illicit drugs. Thus, as many as 4,844 of the 17,300 accidents occurring in 1985 could be attributed to drug abuse.

Another significant benefit of the rule, as it relates to a reduction in accidents, is the prevention of passenger deaths and injuries. It is difficult to ascribe a dollar value to human life; however, it is obvious that transit agencies face a potential financial liability in the event of death or injury of a passenger. For purposes of this analysis, it is estimated that the financial liability of a transit agency for a death to be $1 million.

Because adequate data are not available upon which to base a benefit analysis directed specifically at mass transportation, a macro approach is taken to estimate benefits. A 1984 Department of Health and Human Services (DHHS) study estimated the economic cost to American society from drug abuse to be $66 billion annually. More recent reports by the National Business Crime Information Center and the Research Triangle Institute have estimated this cost to society to be in excess of $100 billion annually. The estimated 195,500 employees in the mass transit industry covered by this rule represent approximately eight-hundredths of one percent of the United States population of 236 million. Thus, if drug use in the industry is assumed to be the same as in the general population, and if this rule were 100 percent effective in eliminating illicit drug use, the annual savings to society, based upon the DHHS estimated national cost of $66 billion annually (the lower of two estimates), would be $52.8 million. This yields a benefit to cost ratio of 4.00 for year one, 3.83 for year two and 3.73 for year three. If it is assumed that a random testing rate of 50 percent of the affected population after year one produces a proportionate reduction in program effectiveness (i.e., to one-half) the savings to society would be $26.4 million annually. This estimate yields a benefit to cost ratio of 2.00 for year one, 1.91 for year two, and 1.87 for year three and subsequent years.

III. Regulatory Impacts

A. Departmental Significance

This rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it involves important departmental policy and has generated substantial public interest.

This rule is one of a series of rules being issued by the Department to ensure a drug free transportation system in this country.

B. Executive Order 12291

This action has been reviewed under executive order 12291 and UMTA has determined this is not a major rule. This rule will not result in an annual effect on the economy of $100 million or more.

C. Executive Order 12612—Federalism Assessment

This action has been reviewed under Executive Order 12612, concerning Federalism. UMTA has determined that this rule has sufficient Federalism implications to warrant the preparation of this Federalism assessment.

The Federalism impacts of this rulemaking result from its proposal for new, uniform UMTA requirements that federally-assisted mass transportation providers create and implement the drug programs described in this notice. Historically, transportation safety in the mass transit industry has not been the subject of specific UMTA regulatory requirements. Unlike other DOT organizations (e.g., FAA, FHWA, Coast Guard, FRA), UMTA has never directly licensed or regulated industry employees for safety. These matters have been handled locally by transit authorities.

Congress has shown increasing concern about UMTA's role in transit safety, for example, in the enactment of section 22 of the UMT Act and in requiring UMTA to establish a bus testing facility by 1989. More importantly, however, the necessity of promoting safe transportation through the use of vigorous anti-drug programs designed to ensure a drug-free mass transit workplace is national in scope and overriding in importance. This safety imperative is the primary basis for UMTA's decision to propose a new Federal requirement which goes beyond the traditional relationship between UMTA, transit grantees, and their employees. The basis for imposing these requirements is the Federal financial assistance provided to the recipients by UMTA. It is also important that UMTA ensure the maximum effectiveness of its financial assistance; i.e., it must ensure that the funds are used in a safe, drug-free environment. From a national perspective, safety is important in its own right but also to ensure Federal funds are not wasted because of drug-related accidents or other misuse.

In considering the Federalism impacts of this proposal, UMTA has focused on several key provisions of Executive Order 12612.

- Necessity for action. As noted above, there is an overriding safety necessity to insure a drug-free transportation workplace. Passengers on bus, rail, and other mass transportation systems must be ensured that vehicle operators and others whose actions are important to passenger safety do not use illegal drugs and that recipients have the legal, technical and financial capability to provide safe transportation service. In the absence of an UMTA requirement for an anti-drug program, which will identify drug users, deter drug use, and may provide opportunities for rehabilitation, this assurance cannot be made.
- Consultation with State and local governments. UMTA's regulated parties are primarily State and local government agencies (e.g., State departments of transportation, local transit authorities). Consequently, the views of affected State and local agencies were or particular importance to UMTA in this rulemaking. To ensure that these State and local governments were made aware of this rulemaking, UMTA held four public hearings on it.
- National scope of the problem. As noted elsewhere, the country has a nationwide, pervasive drug problem. There is no community in the country that is not affected, actually or potentially, by this problem. Mass transit users in every community need the same assurance that their safety will not be compromised by drug use by sensitive safety transit employees. They also need assurance that their tax dollar used in Federal assistance are not wasted because of drug-related accidents.
- Need for uniform, national standards. Only with uniform minimum national standards in this area can the safety concerns of passengers and the privacy and reliability concerns of employees be resolved in a way that addresses the national drug problems we face. State and local agencies are free to tailor the basic program requirements to meet their needs. Federal intrusion into local implementation decisions will be minimized through the use of self-certification by grantees of their compliance with UMTA requirements.
- Authority. The statutory authority for this rule is discussed elsewhere in this preamble. As a statutory and constitutional matter, the authority of Federal agencies to impose reasonable and necessary conditions on the receipt of Federal financial assistance is well established.
- Preemption. This final rule does not, as such, preempt State of local law. However, there will be a few instances in which a State or local agency faces a conflict between compliance with the regulation and State and local requirements. This rule has a provision for a temporary waiver in such cases which is discussed elsewhere in this preamble.

D. Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96-354, UMTA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

In this rule, UMTA has defined a small entity to be any transit agency which receives funding under Section 18 of the UMT Act, as amended, or which

serves an urbanized area of 200,000 persons or less. This rule does not cover transit operations receiving assistance under section 16(b)(2) of the UMT Act.

The wide range of agency sizes, modes of operation, and geographical locations within this classification makes it difficult to determine the actual economic impact of this rulemaking. However, a number of the smaller transit agencies that already have drug testing programs in place commented that implementing the requirements of the rule, to include random testing, would have minimal financial impact. Additionally, a large number of the smaller transit agencies are those which receive Section 18 funding and some of these use unpaid volunteers who are not covered by the rule. Considering these factors and the benefits which accrue to transit entities from increased productivity and potential reductions in medical and insurance costs as a result of the implementation of the proposed drug control program. It is believed that this rulemaking will not have a significant economic impact on small agencies.

E. Paperwork Reduction Act

The collection of information requirements in this rule are subject to the Paperwork Reduction Act, Pub. L. 96–511, 44 U.S.C. Chapter 35. These requirements have been submitted to the Office of Management and Budget for review. Information will not be collected under this rule until OMB clearance is received and the OMB clearance number is published in the **Federal Register.**

List of Subjects in 49 CFR Part 653

Drug testing, Grant programs—transportation, Mass transportation.

IV. New 49 CFR Part 653

Accordingly, for the reasons described in the preamble, 49 CFR Chapter VI is amended by adding new Part 653 to read as follows:

PART 653—CONTROL OF DRUG USE IN MASS TRANSPORTATION OPERATIONS

Subpart A—General

Sec.

Subpart B—Drug Testing

Subpart C—Administrative

Authority: Urban Mass Transporation Act of 1964, as amended (49 U.S.C. 1601 et seq.); 23 U.S.C. 103(e)(4); and 49 CFR 1.51.

Subpart A—General

§ 653.1 Purpose.

(a) This part requires a recipient of Federal financial assistance to have an anti-drug program that is designed to detect the use of prohibited drugs by sensitive safety employees and to deter sensitive safety employees from using prohibited drugs.

(b) As part of reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by UMTA under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 653.3 Scope.

This part applies to—

(a) a recipient of Federal financial assistance under sections 3, 9, or 18 of the Urban Mass Transportation Act of 1964, as amended; and

(b) a recipient of Federal financial assistance under section 103(e)(4) of title 23 of the United States Code.

§ 653.5 Definitions.

As used in this part—

(a) "Accident" means an occurrence associated with the operation of a revenue service vehicle, whether or not such vehicle is in revenue service, if—

(1) An individual dies or must be taken to a medical treatment facility;

(2) The occurrence results in property damage that is estimated to be more than $5,000; or

(3) The occurrence must be reported to the Federal Highway Administration, the Federal Railroad Administration, or the Coast Guard.

(b) "Administrator" means the Administrator of the Urban Mass Transportation Administration or his or her designee.

(c) "Anti-drug program" means an anti-drug program required by this part.

(d) "Chain-of-custody procedures" means those procedures set out in 49 CFR Part 40 concerning the handling of a urine sample.

(e) "Pass a drug test" means that a medical review officer has determined, in accordance with 49 CFR Part 40, that the results of a drug test administered under this part—

(1) Showed no evidence or insufficient evidence of a prohibited drug or drug metabolite;

(2) Showed evidence of a prohibited drug or drug metabolite but there was a legitimate medical explanation for the result;

(3) Were scientifically insufficient to warrant further action; or

(4) Were suspect because of irregularities in the administration of the test or observation of chain of custody procedures.

(f) "Prohibited drug" means the following substances specified in Schedule I or Schedule II of the Controlled Substances Act, 21 U.S.C. 801 et. seq. and published at 21 CFR 1308.11 and 21 CFR 1308.12: marijuana; cocaine; opiates; phencyclidine (PCP); and amphetamines.

(g) "Recipient" means a direct recipient of Federal financial assistance from UMTA.

(h) "Revenue service vehicle" means a bus, van, car, rail car, locomotive, trolley car, trolley bus, ferry boat, or vehicle used on a fixed guideway or incline plane used to transport passengers.

(i) "Sensitive safety function" means any duty related to the safe operation of mass transportation service by a recipient, including:

(1) Operation of a revenue service vehicle, whether or not such vehicle is in revenue service;

(2) Controlling dispatch or movement of a revenue service vehicle;

(3) Maintaining revenue service vehicles or equipment used in revenue service; or

(4) Supervising an employee who performs a function listed in paragraph (i)(1)–(3) of this section.

(j) "Small operator" means a recipient of section 18 funds or a recipient of UMTA funds in an urbanized area of less than 200,000 in population.

(k) "UMTA" means the Urban Mass Transportation Administration.

§ 653.7 Requirement to establish an anti-drug program.

A recipient shall certify to UMTA, in accordance with section 653.35 of this part, that it or any operator providing mass transportation services for it with Federal financial assistance has

established and implemented an anti-drug program as prescribed by this part.

§ 653.9 Required elements of an anti-drug program.

(a) An anti-drug program shall contain the following:

(1) A policy statement on drug use in the workplace, adopted by the governing body of the recipient or operator, which states that—

(i) An employee may not perform a sensitive safety function while that employee has a prohibited drug in his or her system;

(ii) If an employee performing a sensitive safety function refuses to take a drug test authorized under this part or is tested for drugs under this part and does not pass the drug test, that employee shall be relieved of his or her sensitive safety duties immediately; and

(iii) An employee who refuses to take a drug test authorized under this part or does not pass a drug test administered under this part may not return to a sensitive safety function until the employee has passed a return to duty drug test required under this part.

(2) An employee education and training program for all employees who perform sensitive safety functions. The education component shall include display and distribution of: informational material; a community service hot-line telephone number for employee assistance if available; and the recipient's policy regarding drug use in the workplace. The training component for sensitive safety employees shall include information on the effects and consequences of drug use on personal health, safety and the work environment, and the manifestations and behavioral cues that may indicate drug use and abuse. Supervisory employees shall receive at least 60 minutes of additional training on the physical, behavioral, and performance indicators of probable drug use if they will be determining when an employee is subject to drug testing based on reasonable cause under this part.

(3) A drug testing program as prescribed in Subpart B of this part which includes testing before employment, when there is reasonable cause, after an accident, on a random basis, and before returning to duty after refusing to take a drug test or not passing a drug test.

Subpart B—Drug Testing

§ 653.11 Pre-employment testing.

(a) An individual may not be hired to perform a sensitive safety function unless the individual passes a drug test administered under this section.

(b) An employee who does not perform a sensitive safety function may not be assigned to perform a sensitive safety function until the employee passes a drug test administered under this section.

(c) A pre-employment drug test required by this section may be administered only after the person to be tested is informed that the urine sample being collected will be tested for evidence of—

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Phencyclidine (PCP); and

(5) Amphetamines.

§ 653.13 Reasonable cause testing.

(a) An employee who performs a sensitive safety function and who is reasonably suspected of using a prohibited drug must be administered a drug test under this section.

(b) (1) Except as provided in paragraph (b)(2), an employee is reasonably suspected of using a prohibited drug when two supervisors who are trained in the detection of drug use under § 653.9(2) articulate and can substantiate specific behavioral, performance or contemporaneous physical indicators of probable drug use.

(2) An employee of a small operator is reasonably suspected of using a prohibited drug when a supervisor who is trained in the detection of drug use under § 653.9(a)(2) articulates and can substantiate specific behavioral, performance or contemporaneous physical indicators of probable drug use.

§ 653.15 Post-accident testing.

(a) An employee who performed a sensitive safety function that either contributed to an accident, or cannot be completely discounted as a contributing factor to an accident, must be administered a drug test under this section.

(b) A decision not to administer a drug test under this section shall be made by an individual, designated by the recipient or operator, who was not involved in the accident. The determination shall be based on the best information available at the time.

(c) The urine sample for a post-accident drug test required by this section shall be collected as soon as possible but not later than 32 hours after the accident.

§ 653.17 Random testing.

(a) An employee who performs a sensitive safety function shall be subject to drug testing on an unannounced and random basis.

(b) Except as provided in paragraph (e), a recipient must administer a number of drug tests under this section equal to 50 percent of all employees who perform sensitive safety functions each calendar year.

(c) Each employee who performs a sensitive safety function shall be in a pool from which random selection is made. Each employee in the pool shall have an equal chance of selection and shall remain in the pool, even after the employee has been tested.

(d) An employee shall be selected for drug testing on a random basis by using a scientifically valid random number generation method.

(e) During the first 12 months following the institution of random drug testing under this section, a recipient or operator shall meet the following conditions.

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests administered during the 12 months is equal to at least 25 percent of all employees who perform sensitive safety functions.

§ 653.19 Return to duty testing.

(a) An employee who refuses to take or does not pass a drug test administered under this part may not return to a sensitive safety function until the employee passes a drug test administered under this section and the medical review officer has determined that the employee may return to duty.

(b) An employee who must be tested under this section may be administered an unannounced drug test for up to 60 months after the employee returns to a sensitive safety function.

§ 653.21 Testing procedures.

An anti-drug program shall ensure that the administration of a drug test under this part is consistent with 49 CFR Part 40.

§ 653.23 Qualified laboratories.

An anti-drug program may use a drug testing laboratory site only if the laboratory site—

(a) is certified by the Department of Health and Human Services to do drug testing for Federal agencies under the 'Scientific and Technical Guidelines for Drug Testing Programs' issued by the Alcohol, Drug Abuse and Mental Health Administration on April 11, 1988; and

(b) will permit unannounced inspections, including the examination of all records, at any time, by the recipient or operator, or the Administrator.

§ 653.25 Laboratory analysis.

(a) A laboratory analyzing urine samples for an anti-drug program shall test for evidence of —

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Phencyclidine (PCP); and

(5) Amphetamines.

(b) The laboratory shall follow the chain of custody and testing procedures set out in 49 CFR Part 40.

(c) If a urine sample yields a positive result on confirmation, the laboratory shall retain the remainder of the sample in properly secured, long-term, frozen storage for at least 365 days, as required by 49 CFR Part 40. Within this 365-day period, the employee or representative of the employee, the recipient or operator, medical review officer or the Administrator may request that the laboratory retain the sample for an additional period. If, with the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be discarded following the end of the 365-day period.

(d) The laboratory shall report each confirmed positive test and the level found in the sample to the medical review officer for the anti-drug program.

§ 653.27 Medical review officer.

(a) An anti-drug program shall have available the services of a designated medical review officer who is a licensed physician with knowledge of substance abuse disorders and appropriate medical training to interpret and evaluate an individual's positive test result together with his or her individual medical history and any other relevant biomedical information.

(b) The medical review officer for an anti-drug program shall—

(1) Receive the results of all drug tests from the laboratory;

(2) Verify that the laboratory report and assessment of all drug test results are reasonable;

(3) Determine whether an individual passes a drug test;

(4) Report each test that does not pass to the individual whom the recipient or operator has designated to receive the results; and

(5) Determine whether an employee who refused to take or did not pass a drug test administered under this part may return to duty.

(c) When reviewing each confirmed positive test result under this section, the medical review officer may review the individual's medical history, including any medical records and biomedical information provided, in determining whether there is a legitimate medical explanation for the result, including the use of a legally prescribed medication.

(d) A medical review officer may request the laboratory to analyze the original urine sample again in order to verify the accuracy of the test result reported to the medical review officer.

§ 653.29 Retests.

(a) An employee who does not pass a drug test administered under this part may request that the original urine sample be analyzed again.

(b) An employee requesting a retest under this section must submit a written request within 60 days of the employee's receipt of the test result. The employee may specify retesting by the original laboratory site or by a second laboratory site that is certified to perform drug tests by the Department of Health and Human Services. The originating laboratory must follow chain-of-custody procedures when transferring the sample.

(c) An employee making a request for a retest under this section may be required to advance the cost of the additional analysis and all costs associated with the transfer of the specimen to another laboratory, including shipping and handling. If the retest results in the employee passing the drug test, the recipient or operator shall reimburse any costs collected in advance.

(d) In a retest under this section some analytes may deteriorate during storage. The detected levels of the drug below the detection limits established in 49 CFR Part 40, but equal to or greater than the established sensitivity of the assay, shall, as technically appropriate, be reported and considered corroborative of the original positive results.

Subpart C—Administrative

§ 653.31 Recordkeeping and reporting.

(a) An anti-drug program shall include the collection, reporting, and retention of information as required by this section.

(b) Each recipient or operator is responsible for maintaining all records related to the administration and results of the drug testing program for its applicants and employees. A recipient or operator shall retain all records related to the collection process and the reports of individuals not passing a drug test for at least five years. The recipient or operator shall retain the reports of individuals passing a drug test for at least one year.

(c) The medical review officer shall maintain individual test results. The medical review officer shall keep the reports of individual test results that do not pass a drug test for at least five years. The medical review officer shall keep the reports of individual test results that pass a drug test for at least one year.

(d) A recipient or operator shall permit the Administrator to examine records related to the administration and results of drug testing under this part.

(e) A recipient must submit a semi-annual report to the Administrator no later than February 15 and August 15 of each year. The semi-annual report due August 15 must summarize the information listed in paragraph (c) of this section for the anti-drug program of the recipient and its operators from January 1 to June 30 of that year. The semi-annual report due February 15 must summarize the information listed in paragraph (c) of this section for the anti-drug program of the recipient and its operators from July 1 to December 31 of the prior year.

(f) A semi-annual report under this section must include the following information for each mode of transportation provided by the recipient:

(1) The total number of drug tests administered;

(2) The number of drug tests administered in each occupational category (e.g., vehicle operator);

(3) The number of drug tests administered in each testing category (i.e., pre-employment, post-accident, reasonable cause, random, and return to duty);

(4) The number of post-accident drug tests administered in each accident category (i.e., fatal, personal injury, or property damage);

(5) For post-accident tests, the number of hours between the accident and the collection of a urine specimen;

(6) The total number of individuals who did not pass a drug test;

(7) The number of individuals who did not pass a drug test by occupational category (e.g., vehicle operator);

(8) The number of individuals who did not pass a drug test by testing category (e.g., reasonable cause);

(9) The number of individuals who did not pass a post-accident drug test by accident category (e.g., fatal);

(10) The disposition of each individual who did not pass a drug test;

(11) The number of drug tests submitted to the laboratory that showed

evidence of one or more prohibited drugs or drug metabolites in the immunoassay screen in a sufficient quantity to warrant a confirmatory test;

(12) The total number of drug tests submitted to the laboratory that showed evidence of one or more prohibited drugs or drug metabolites in the confirmatory test in a sufficient quantity to be reported as positive to the medical review officer; and

(13) The number of drug tests submitted to the laboratory that showed evidence of one or more prohibited drugs or drug metabolites in the confirmatory test in a sufficient quantity to be reported as positive by category (i.e., marijuana, cocaine, opiate, PCP, or amphetamine).

(g) A recipient's first semi-annual report under this section shall cover the period from the first of the month in which the recipient or operator began drug testing under an anti-drug program to June 30 to December 31 of the same year, whichever is appropriate.

§ 653.33 Release of information.

(a) Except as provided in this subpart, no test result or other information from an anti-drug program may be released.

(b) The test result of an individual who was administered a drug test under this part may be released to a third party only if the individual tested signs a specific authorization for the release of the results to an identified person.

(c) Nothing in this section shall prohibit a recipient or operator from allowing an individual who is administered a drug test under this part to receive the results of his or her drug test.

§ 653.35 Certification of compliance.

(a) (1) Except as provided in paragraph (a)(2), a recipient shall submit the first certification required by § 653.7 of this part to UMTA no later than 12 months after the effective date of this part and annually thereafter.

(2) A small operator shall submit the first certification required by § 653.7 of this part to UMTA no later than 24 months after the effective date of this part, and annually thereafter.

(b) (1) Except as provided in paragraphs (b) (2) and (3), the text of the certification required by § 653.7 of this part shall be as follows:

I, (name), (title), certify that (name of recipient) and all operators providing mass transportation service for (name of recipient) with Federal financial assistance has established and implemented an anti-drug program in accordance with the terms of 49 CFR part 653.

(2) The text of the certification of a recipient 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 all operators providing mass transportation service for (name of recipient) with Federal financial assistance 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 employees who perform sensitive safety functions.

(3) The text of the certification of a recipient that provides waterborne transportation service regulated by the United States Coast Guard shall be as follows:

I, (name), (title), certify that (name of recipient) and all operators providing mass transportation service for (name of recipient) with Federal financial assistance has an anti-drug program that meets the requirements of the United States Coast Guard regulations for employees regulated by the United States Coast Guard, and has established and implemented an anti-drug program in accordance with the terms of 49 CFR Part 653 for all other employees who perform sensitive safety functions.

§ 653.37 Temporary waivers.

(a) A recipient that is unable to comply with all or a portion of this part because of a conflicting state or local law in effect on the effective date of this part may request from the Administrator a temporary waiver from compliance with the affected provision.

(b) A request for a temporary waiver under paragraph (a) shall be submitted to UMTA, Office of the Chief Counsel, 400 Seventh Street SW., Washington, DC 20590, and shall include—

(1) An opinion of counsel regarding the conflict between this part and the law or agreement and the legal impediment to full compliance with this part;

(2) A statement by the recipient of any action being taken to remove the legal impediment; and

(3) A statement of when the recipient expects to be able to come into full compliance with this part.

(c) A temporary waiver granted under this section shall include:

(1) A statement of which provision of this part is being waived; and

(2) A date when the waiver expires, which shall be no later than December 31, 1989.

(d) (1) A recipient shall submit its first certification of compliance with the provisions of this part which are not included in a temporary waiver to UMTA within the time period required by § 653.35 of this part.

(2) A recipient shall submit its first certification of compliance with the provision of this part which is included in a temporary waiver to UMTA no later than 12 months after the expiration date of the waiver, or the date required by § 653.35 of this part, whichever is later.

Issued on: November 14, 1988.

Alfred A. DelliBovi,

Administrator.

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LIST OF PUBLIC LAWS

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 523-6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

H.R. 1807/Pub. L. 100-656

Business Opportunity Development Reform Act of 1988. (Nov. 15, 1988; 102 Stat. 3853; 47 pages) Price: $1.50

H.R. 4399/Pub. L. 100-657

Commercial Space Launch Act Amendments of 1988. (Nov. 15, 1988; 102 Stat. 3900; 8 pages) Price: $1.00

H.R. 5115/Pub. L. 100-658
Immigration Amendments of 1988. (Nov. 15, 1988; 102 Stat. 3908; 2 pages) Price: $1.00

S. 1630/Pub. L. 100-659
Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988. (Nov. 15, 1988; 102 Stat. 3910; 12 pages) Price: $1.00

S. 2042/Pub. L. 100-660
To authorize the Vietnam Women's Memorial Project, Inc., to establish a memorial on Federal land in the District of Columbia or its environs to honor women of the Armed Forces of the United States who served in the Republic of Vietnam during the Vietnam era. (Nov. 15, 1988; 102 Stat. 3922; 1 page) Price: $1.00

S.J. Res. 314/Pub. L. 100-661
Designating October 1988 as "Pregnancy and Infant Loss Awareness Month." (Nov. 15, 1988; 102 Stat. 3923; 1 page) Price: $1.00

S.J. Res. 315/Pub. L. 100-662
Designating 1989 as "Year of the Young Reader." (Nov. 15, 1988; 102 Stat. 3924; 1 page) Price: $1.00

S.J. Res. 340/Pub. L. 100-663
Designating November 27 through December 3, 1988, as "National Sir Winston Churchill Recognition Week." (Nov. 15, 1988; 102 Stat. 3925; 1 page) Price: $1.00

S.J. Res. 386/Pub. L. 100-664
To designate the week of June 18 through June 24, 1989, as "National Grasslands Week." (Nov. 15, 1988; 102 Stat. 3926; 1 page) Price: $1.00

S. 253/Pub. L. 100-665
To convey Forest Service land to Flagstaff, Arizona. (Nov. 16, 1988; 102 Stat. 3927; 2 pages) Price: $1.00

S. 1236/Pub. L. 100-666
Navajo and Hopi Indian Relocation Amendments of 1988. (Nov. 16, 1988; 102 Stat. 3929; 6 pages) Price: $1.00

S. 1883/Pub. L. 100-667
To amend the Act entitled "An Act to provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes." (Nov. 16, 1988; 102 Stat. 3935; 26 pages) Price: $1.00

S. 2165/Pub. L. 100-668
Washington Park Wilderness Act of 1988. (Nov. 16, 1988; 102 Stat. 3961; 8 pages) Price: $1.00

S. 2204/Pub. L. 100-669
To implement the Inter-American Convention on International Commercial Arbitration. (Nov. 16, 1988; 102 Stat. 3969; 2 pages) Price: $1.00

S. 2843/Pub. L. 100-670
Generic Animal Drug and Patent Term Restoration Act. (Nov. 16, 1988; 102 Stat. 3971; 19 pages) Price: $1.00

S.J. Res. 303/Pub. L. 100-671
To designate the month of October 1988 as "National Lupus Awareness Month." (Nov. 16, 1988; 102 Stat. 3990; 1 page) Price: $1.00

S.J. Res. 325/Pub. L. 100-672
Designating the third week in May 1989 as "National Tourism Week." (Nov. 16, 1988; 102 Stat. 3991; 1 page) Price: $1.00

CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.I15New units issued during the week are announced on the back cover of the daily **Federal Register** as they become available.

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3 (1987 Compilation and Parts 100 and 101)	11.00	[1] Jan. 1, 1988
4	14.00	Jan. 1, 1988
5 Parts:		
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7 Parts:		
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2000–End	6.50	Jan. 1, 1988
8	11.00	Jan. 1, 1988
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1987. The CFR volume issued January 1, 1987, should be retained.

[3] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1988. The CFR volume issued as of Apr. 1, 1980, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

[6] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.