



# Federal Register

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**Monday,  
April 30, 2001**

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## **Part III**

# **Department of Transportation**

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**Federal Aviation Administration  
14 CFR Part 121**

**Coast Guard  
46 CFR Parts 4, 5, and 16**

**Research and Special Programs  
Administration  
49 CFR Part 199**

**Federal Railroad Administration  
49 CFR Part 219**

**Federal Motor Carrier Safety  
Administration  
49 CFR Part 382**

**Federal Transit Administration  
49 CFR Parts 653, 654, and 655**

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**Workplace Drug and Alcohol Testing  
Programs; Amendments to DOT Agency  
Rules Conforming to Department of  
Transportation Final Rule; Proposed Rules**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 121****Coast Guard****46 CFR Parts 4, 5, and 16****Research and Special Programs Administration****49 CFR Part 199****Federal Railroad Administration****49 CFR Part 219****Federal Motor Carrier Safety Administration****49 CFR Part 382****Federal Transit Administration****49 CFR Parts 653, 654, and 655**

**RINs 2105-AC49, 2120-AH15, 2115-AG00, 2137-AD55, 2130-AB43, 2126-AA58, 2132-AA71**

**Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to Department of Transportation Final Rule**

**AGENCIES:** Federal Aviation Administration, Coast Guard, Research and Special Programs Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration; Federal Transit Administration; Office of the Secretary, DOT.

**ACTION:** Notices of Proposed Rulemaking; Common Preamble.

**SUMMARY:** In a rule published December 19, 2000, the Department of Transportation has revised its drug and alcohol testing procedures regulation. The purposes of these proposed amendments is to make DOT agency drug and alcohol testing regulations consistent with the revised testing procedures regulation, avoid duplication and inconsistency, and make certain other changes to update and clarify the operating administration rules.

**DATES:** Comments should be submitted by June 14, 2001, except comments on the Coast Guard notice of proposed rulemaking, which should be submitted by June 29, 2001. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** See each individual DOT agency proposed rule for information on the docket number and address to use when commenting on each agency's proposed rule.

**FOR FURTHER INFORMATION CONTACT:** For information concerning the relationship of the proposed DOT agency amendments to the revised 49 CFR Part 40, Robert C. Ashby (400 7th St., SW., Washington DC, 20590; 202-366-9310). For information on the individual DOT agency proposed rules, see the **FOR FURTHER INFORMATION CONTACT** persons listed in each DOT agency proposed rule.

**SUPPLEMENTARY INFORMATION:** On December 19, 2000 (65 FR 79462), the Department of Transportation published a comprehensive revision to our drug and alcohol testing procedural rules (49 CFR part 40). The new Part 40 makes numerous changes in the way that drug and alcohol testing will be conducted in the future. While some provisions of the new rules will be made effective more quickly, as amendments to the existing Part 40, the entire revised part is scheduled to go into effect on August 1, 2001.

Part 40 is one element of a Department-wide set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. It is important that the six DOT agency rules that cover specific transportation industries be consistent with the revised Part 40, to avoid duplication, conflict, or confusion among DOT regulatory requirements. For these reasons, we are proposing amendments to each of the six DOT agency drug and alcohol testing regulations connected to Part 40. We intend to issue final versions of these "conforming amendments" in time to be effective on August 1, 2001, the same date that the revised Part 40 takes effect.

There are several actions that all or some of the DOT agencies propose to take in order to ensure consistency with the revised Part 40. The next section of this preamble discusses each of these items in turn. In addition, there are some provisions of the proposed rules that are DOT agency-specific. These items are discussed in a subsequent section of the preamble.

#### **Common Proposals**

##### *Substance Abuse Professionals and the Return-to-Duty Process*

Currently, most of the DOT agency drug and alcohol testing rules have their own similar, but not identical, provisions concerning the return-to-duty (RTD) process for employees who

have tested positive or otherwise violated the rules. These provisions also include (with the exception of the Coast Guard) material on the qualifications and role of the substance abuse professional (SAP).

The new Part 40 centralizes the material concerning the RTD process and the qualifications and role of SAPs. Among the provisions in new Part 40 are requirements for the qualification and training of SAPs, requirements for follow-up tests in all cases of violations, and clarification of the scope of the RTD process (i.e., that it applies following any violation, including a violation arising from a pre-employment test; that the RTD requirements follow an employee to subsequent employers).

To avoid potential duplication and inconsistency, we are proposing to remove RTD and SAP provisions from the six DOT agency rules. All six DOT agency programs would use the RTD and SAP provisions of Part 40 beginning August 1, 2001.

##### *Pre-Employment Alcohol Testing*

For several years, as the result of a court decision and subsequent legislation (§ 342 of the National Highway Systems Act of 1995), pre-employment alcohol testing requirements in the FTA, FMCSA, FRA, and FAA rules have been suspended. (Parallel pre-employment alcohol testing requirements did not exist in the RSPA and Coast Guard rules.) Section 342 deleted former provisions of the Omnibus Transportation Employee Testing Act of 1991 requiring pre-employment alcohol testing and substituted a sentence providing that "The [Secretary of Transportation's] regulations shall permit [employers] to conduct pre-employment testing of such employees for the use of alcohol."

The practical effect of the suspension of pre-employment alcohol testing requirements has been to give employers the discretion to conduct DOT pre-employment alcohol testing. However, the Department has never amended its rules to specifically reflect the legislation. In these proposed rules, we would formalize the existing situation and make the requirements consistent throughout all DOT agency rules. That is, in all six DOT agency programs, the proposed rules would authorize, but not require, employers to conduct pre-employment alcohol testing. If an employer chose to conduct pre-employment alcohol testing under Federal authority, the employer would have to conduct the testing in accordance with all Part 40 requirements.

### *Split Specimen Testing*

At the present time, FTA, FMCSA, FRA, and FAA are required by statute to collect split specimens for drug testing. Employees have the right, within 72 hours of being notified of a verified positive test, to request a test of the split specimen at a second HHS-certified laboratory. The statute in question does not apply to the Coast Guard and RSPA programs, in which split specimen testing is currently discretionary with employers.

As noted in the Part 40 rulemaking, this situation has caused some confusion among employers, employees, and service agents. Consequently, the revised Part 40 requires split specimen testing for all DOT collections. In these proposed rules, RSPA and Coast Guard propose conforming to the Part 40 requirement to use split specimen collections in all cases. The split specimen testing rules of Part 40 (including their application to validity testing) would apply to all DOT collections, including those under RSPA and Coast Guard rules. RSPA would remove a provision allowing requests for split specimens to be made within 60 days, which is inconsistent with the 72-hour provision of Part 40 and the other operating administration rules.

### *Stand-Down Waivers*

The new Part 40 permits employers to petition DOT agencies for a waiver allowing the employer to stand employees down following a report of a laboratory confirmed positive test or refusal, pending the outcome of the verification process. The stand-down provision contains the substantive requirements for obtaining a waiver, but does not include specific waiver procedures.

Each of the operating administrations has, or will add, its own process for granting waivers from its regulations. In each of today's proposed rules, the DOT agency involved proposes to connect its own waiver process with the stand-down waiver provision of new Part 40. Doing so will inform employers how they should frame stand-down waiver requests and to whom the requests should be sent.

### *Definitions*

The revised Part 40 includes a number of new or altered definitions of terms. Examples of new terms are affiliate, adulterated specimen, consortium/third-party administrator (C/TPA), continuing education, designated employer representative, dilute specimen, initial and confirmatory validity test, error

correction training, qualification and refresher training, service agent, stand-down, and substituted specimen. Other terms have altered definitions (e.g., employer, which now specifies that service agents are not employers).

In the interest of consistency and the convenience of having a definition in only one place, the DOT agencies are proposing to delete definitions of terms that duplicate terms defined in Part 40 (except where differences or greater specificity are needed in the agency rules). The DOT agency rules will make use of the terms defined in Part 40, and in some cases would be amended to use those terms.

### *Qualifications and Training*

The revised Part 40 contains new or modified qualification and training requirements for testing personnel, such as collectors, breath alcohol technicians (BATs) and screening test technicians (STTs), medical review officers (MROs), and SAPs. These include requirements for qualification training, refresher training, continuing education, and error correction training.

The DOT agency rules do not need to retain provisions related to the qualifications and training of these personnel that are now covered in Part 40. Therefore, these proposed rules would delete any references to the qualifications and training of collectors, BATs and STTs, MROs, and SAPs.

### *Enforcement Matters*

Each of the DOT agency rules incorporates Part 40 by reference. A violation of a Part 40 provision automatically becomes a violation of the DOT agency rule, and is subject to the same kinds of sanctions as other violations of the agency's rules. In some cases, the DOT agencies have predetermined sanctions for different kinds of rule violations (e.g., a "penalty table"). These agencies, as part of their proposed rules, will work Part 40 violations into their sanctions systems.

Each of the proposed rules would make clear that a violation of Part 40 is a violation of DOT agency rules. In some cases, existing DOT agency rule language says that in the event of inconsistency or conflict between Part 40 and the DOT agency rule, the latter controls. This language has created confusion about the enforceability of Part 40, and the proposed rules would delete it. Where there is a difference between Part 40 and another DOT agency rule (i.e., one required by a special circumstance of a particular industry or agency program), the agency rule will state the difference explicitly.

### *Role of C/TPAs, MROs, and Service Agents*

The new Part 40 makes a significant change in the role of C/TPAs, permitting them, for the first time, to transmit some test results and other information from MROs to employers and persons designated by an employer, as permitted by Part 40, to receive information on behalf of a specified employer. Some provisions of DOT agency rules are inconsistent with this new provision, and these proposed rules would change such provisions to be consistent with new Part 40. The new Part 40 also elaborates roles and responsibilities of service agents to a greater degree than the present Part 40, and the proposed rules, where necessary, alter DOT agency rules to be consistent with these provisions.

The new Part 40 also provides more details concerning the duties and responsibilities of MROs (e.g., in the validity testing process, with respect to conflicts of interest and supervision of staff). To the extent that any DOT agency rule has provisions that are inconsistent or overlapping with these provisions, the agency proposals would make appropriate changes to ensure consistency.

### *Employer Checks on Test Results of Applicants and Employees*

Previously, only FMCSA rules had a provision requiring employees to check on the previous drug and alcohol testing results of applicants for jobs involving safety-sensitive duties. The new Part 40 applies a requirement of this kind to all the DOT agency programs. The Part 40 provision is not identical to the current FMCSA rule. For example, the new provision requires employers to ask applicants whether there were any situations in which they tested positive on a pre-employment test for an employer that subsequently did not hire them. To ensure consistency, FMCSA would delete its current pre-employment check provision. The Part 40 provision would apply to employers by virtue of the incorporation of Part 40 in the DOT agency regulations. We seek comment on whether any additional reference to the Part 40 provision is needed in the DOT agency rules.

### *C/TPA Reports of Refusals*

Section 40.355(i) of the revised Part 40 provides that, as a general matter, service agents, including C/TPAs, must not make a determination that an employee has refused a drug or alcohol test. Section 40.355(j)(1) creates an exception to this general prohibition, permitting a service agent to make a

determination that an employee has refused a drug or alcohol test if "You are authorized by a DOT agency regulation to do so, you schedule a required test for an owner-operator, and the individual fails to appear for the test without a legitimate reason."

This section was drafted in response to a situation that sometimes occurs, in which a C/TPA directs an owner-operator or other self-employed individual to appear for a random or other test and the individual is a "no show." Because this individual is self-employed, there is usually no party (like an employer in a larger business) who can determine that the individual has refused to test and cause the individual to be removed from performing safety-sensitive functions. Section 40.355(j)(1) contemplates that, where DOT agency regulations permit, C/TPAs could make a refusal determination in this situation, since there basically is no one else in position to do it.

At present, DOT agency regulations do not address this issue. In some cases (e.g., FRA, FTA), the provision is irrelevant, because these agencies do not regulate any owner-operators. The Department seeks comment, however, on whether DOT agencies that do regulate owner-operators or other self-employed safety-sensitive personnel should add a provision to their final conforming rules authorizing this action by C/TPAs. DOT agency rule provisions could also permit or require C/TPAs, in this situation, to report the refusals to the applicable DOT agency. The Department seeks comment on whether such a reporting authorization or requirement is advisable. Another alternative would be for Part 40 to authorize reporting of this kind on a Department-wide basis, obviating the need for amendments to individual operating administration rules.

#### *Rulemaking Process Matters*

In addition to these common provisions of the NPRMs, the individual DOT agencies, in some cases, have agency-specific provisions they wish to propose. These agency-specific provisions are discussed in the preambles to each DOT agency rule.

Each of the DOT agencies involved with this rulemaking will be reviewing one another's dockets, so that suggestions that may have been made in response to only one agency's proposed rule will be available to all the agencies. Any or all of the six agencies may make changes to their proposed rules based on comments that came into the docket of another of the agencies. In addition, in some cases one agency has proposed an idea (e.g., an FMCSA proposal to

issue notices concerning random testing rates only when there is a change, rather than every year) that, after reviewing the dockets, other agencies may choose to adopt.

#### **Regulatory Analyses and Notices**

These proposed rules have been designated as non-significant under Executive Order 12886 and the Department of Transportation's Regulatory Policies and Procedures. They are non-significant because they merely make conforming changes to the revised 49 CFR Part 40, which has already been subject to extensive comment and analysis. The proposed changes would not have any incremental economic impacts on their own. The economic impacts of the underlying Part 40 changes were analyzed in connection with the Part 40 rulemaking.

Because these proposals have no incremental economic impacts, the Department certifies, under the Regulatory Flexibility Act, that these proposals, if adopted, would not have a significant economic impact on a substantial number of small entities. These proposals likewise have no incremental Federalism impacts for purposes of Executive Order 13132, so no further analysis is needed for Federalism purposes. All the information collection requirements of Part 40 have been analyzed and approved by OMB. These proposed rules would impose no information collection requirements that have not already been reviewed in context of the Part 40 rulemaking, so no further Paperwork Reduction Act review is necessary.

There are a number of other Executive Orders that can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the context of this NPRM, and we believe that the proposed rules do not directly affect the matters that the Executive Orders cover.

Issued this 9th day of April 2001, at Washington, D.C.

**Jon L. Jordan,**

*Federal Air Surgeon, Federal Aviation Administration.*

**R.C. North,**

*Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety and Environmental Protection.*

**Stacy L. Gerard,**

*Associate Administrator for Pipeline Safety, Research and Special Programs Administration.*

**S. Mark Lindsey,**

*Acting Deputy Administrator, Federal Railroad Administration.*

**Julie Anna Cirillo,**

*Acting Deputy Administrator, Federal Motor Carrier Safety Administration.*

**Hiram J. Walker,**

*Acting Deputy Administrator, Federal Transit Administration.*

**Kenneth C. Edgell,**

*Acting Director, Office of Drug and Alcohol Policy and Compliance, Office of the Secretary.*

[FR Doc. 01-9409 Filed 4-27-01; 8:45 am]

**BILLING CODE 4910-62-U**

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 121**

[Docket No. FAA-2000-8431; Notice No. 00-14]

**RIN 2120-AH15**

#### **Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

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**SUMMARY:** This action proposes amendments to the industry drug and alcohol testing regulations to conform with the changes in the Department of Transportation's revision of its drug and alcohol testing procedures regulation, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. We also propose to change the antidrug and alcohol misuse prevention program regulations in light of the amendments that have been made to the medical standards and certification requirements. We further propose eliminating certain requirements under reasonable suspicion and post-accident alcohol testing because these requirements are outdated and no longer valid. These

proposals are intended to update and clarify the regulations based on the Department of Transportation's revisions and previous FAA rulemakings.

**DATES:** Send your comments on or before June 14, 2001.

**ADDRESSES:** Address your comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001. You must identify the docket number FAA-2000-8431 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to <http://dms.dot.gov>. You may review the public docket containing comments to these proposed regulations in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Diane J. Wood, Manager, Drug Abatement Division, AAM-800, Office of Aviation Medicine, Federal Aviation Administration, Washington, DC 20591, telephone number (202) 267-8442.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this document are also invited. Substantive comments should be accompanied by cost estimates. Comments must identify the regulatory docket or notice number and be submitted in duplicate to the DOT Rules Docket address specified above.

All comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

The Administrator will consider all comments received on or before the closing date before taking action on this proposed rulemaking. Comments filed late will be considered as far as possible without incurring expense or delay. The

proposals in this document may be changed in light of the comments received.

Commentators wishing the FAA to acknowledge receipt of their comments submitted in response to this document must include a pre-addressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. FAA-2000-8431." The postcard will be date stamped and mailed to the commenter.

**Availability of Rulemaking Documents**

You can get an electronic copy of this document using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (<http://dms.dot.gov/search>).

(2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on "search."

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the document number of the item you wish to view. You can also get an electronic copy using the Internet through FAA's web page at <http://www.faa.gov/avr/arm/nprm/nprm.htm> or the **Federal Register's** web page at [http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html).

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

**Background**

On April 29, 1996, the Department of Transportation issued an advance notice of proposed rulemaking (ANPRM) (61 FR 18713) asking for suggestions in changing 49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. Subsequently, on December 9, 1999, a notice of proposed rulemaking (NPRM) (64 FR 69076) was issued proposing a comprehensive revision to 49 CFR part 40. The Department of Transportation (DOT) published its final rule on December 19, 2000 (65 FR 79462). As a consequence of the DOT's action, the FAA is proposing to amend its drug and alcohol testing regulations to integrate, as appropriate, the new DOT procedures.

In addition, on March 19, 1996, the FAA published a final rule, Revision of

Airman's Medical Standards and Certification Procedures and Duration of Medical Certificates (54 FR 11238). This final rule amended requirements for 14 CFR part 67 medical certificate holders. Since the publication of this final rule the FAA has identified some inconsistencies between 14 CFR part 121 and 14 CFR part 67 that require modification. Changes in 14 CFR part 121 are being proposed at this time because the revision of 49 CFR part 40 is causing modifications to the portions of 14 CFR part 121 that are not consistent with the 1996 changes to 14 CFR part 67. Rather than reissuing inconsistent provisions in 14 CFR part 121, appendices I and J, this notice proposes to update the regulations consistent with 14 CFR part 67.

Two sections of 14 CFR part 121, appendix J, refer to a requirement for employers to submit information to the FAA on March 15, 1996, 1997, and 1998. Specifically, 14 CFR part 121, appendix J, sections III.B.2(b) and III.D.4(b) require employers to submit to the FAA notice of any post-accident test or reasonable suspicion test that was not completed within the eight hour period required for such tests. The reporting requirements were imposed only for the first three years after the final rule on alcohol misuse prevention became effective. Those requirements have expired, therefore we propose to eliminate those paragraphs.

**The Common Preamble**

A common preamble to all of the modal NPRMs proposing changes to the drug and alcohol testing rules is being published in the same issue of this **Federal Register** with this NPRM. This common preamble contains an overview of general issues related to drug and alcohol testing requirements in the transportation industry.

**Section by Section Analysis**

The following discusses only those portions of 14 CFR part 121, appendices I and J, which the FAA is proposing to change.

**Appendix I**

**I. General**

By this action FAA proposes to add a "General" section (I. General) and a "Purpose" section (A. Purpose) to the beginning of 14 CFR part 121, appendix I for clarity and organizational purposes. This section would include paragraph "B. DOT Procedures" and paragraph "C. Employer Responsibility." These proposed changes are necessary to clarify the responsibility of employers to follow the requirements and procedures of this appendix and 49 CFR part 40. These proposed changes also reinforce that employers are responsible for all actions

of their officials, representatives, and service agents in carrying out the requirements of 14 CFR part 121, appendix I and 49 CFR part 40.

## II. Definitions

This action proposes to change the definition of "prohibited drug" to limit the definition to the five drugs that are prohibited under 49 CFR 40.85. In addition we propose adding the phrase "except as permitted in 49 CFR part 40." The current language in 14 CFR part 121, appendix I, could be misread to mean that the use of certain prohibited drugs is permitted if authorized under state law (such as medical use of marijuana that may be recommended or prescribed by physicians in certain states that have legalized its use for the treatment of some conditions). We expect that the proposed changes would eliminate any such confusion.

We propose to change the definition of "refusal to submit" to refer to 49 CFR part 40. This would be a clarifying change.

In addition, we propose to change the definitions in 14 CFR part 121, appendix I for "verified negative test result" and "verified positive test result." These definitions are necessary because these terms are used in this appendix. The proposed definitions are intended to be consistent with the broader language for verified tests used in 49 CFR 40.3.

## IV. Substances for Which Testing Must Be Conducted

This action proposes eliminating the second sentence of this section because it allows the employer to test for drugs in addition to those specified in 14 CFR part 121, appendix I with approval of 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. This action is proposed because 49 CFR 40.85 prohibits testing for additional drugs.

## V. Types of Drug Testing

F. Return-to-Duty Testing. This action proposes to change the requirements of return to duty testing to conform with 49 CFR part 40, which requires the Substance Abuse Professional (SAP), not the Medical Review Officer (MRO), to determine that the employee has successfully complied with the prescribed education and/or treatment prior to allowing the person to perform safety-sensitive functions.

G. Follow-up Testing. This proposed action changes the requirements of follow-up testing to conform with 49 CFR part 40, which requires the SAP, instead of the MRO, to determine the number of follow-up tests an employee should have. This action also proposes language to conform with the 49 CFR part 40 requirement that an employee who tests positive is subject to at least six follow-up tests after returning to duty.

## VI. Administrative and Other Matters

With regard to documents that an employer must maintain, this action proposes to alter this section to refer to 49 CFR part 40. 14 CFR part 121, appendix I would include those documents that are currently specified in this

appendix, but which have not been moved to 49 CFR part 40.

We propose to delete current paragraphs A. and B. titled "Collection, Testing, and Rehabilitation Records" and "Laboratory Inspections" respectively. These requirements are now addressed in 49 CFR part 40.

This action proposes to eliminate parts of paragraph "C. Employee Request for Test of a Split Specimen" because 49 CFR part 40 sets out these requirements for split specimens. We propose moving paragraph C.3. to the MRO section, 14 CFR part 121, appendix I, section VII.A. because it is an MRO responsibility. This change is proposed for clarity and organizational purposes.

We propose to add a new paragraph A, "MRO Record Retention Requirements." These are not new requirements but have been consolidated here from current section VII.C. because they were not included in 49 CFR part 40. Specifically, this paragraph would include two paragraphs dealing with MRO contracting services and transfer of records.

This action proposes to include paragraph B. "Access to Records." This is not a new requirement and is currently in section VII.C.4. Moving the access to records requirement would consolidate the record requirements in one section.

This action proposes to include paragraph C. "Service Agent." This would be a conforming change to 49 CFR part 40 and would specify when service agents must have records available for inspections and investigations of the employer's antidrug program. This action proposes to change paragraph D. "Release of Drug Testing Information" to conform with 49 CFR part 40.

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

We propose to rename this section from "MRO and Substance Abuse Professional" to "Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities." We also propose to rename "A. MRO and Substance Abuse Professional Duties" to "A. Medical Review Officer" and to rename "B. MRO Determinations" to "B. Substance Abuse Professional." These changes are proposed to better organize the information in this appendix and to conform to changes to 49 CFR part 40.

We propose to delete the majority of MRO and SAP responsibilities in this appendix and instead refer the reader to 49 CFR part 40. We propose to keep the MRO and employer responsibilities for 14 CFR part 67 airman medical certificate holders because these requirements are specific to the FAA. We propose to move some responsibilities from the MRO to the SAP because 49 CFR part 40 has given SAPs some duties that formerly belonged to the MROs.

In addition, we propose keeping the provision in this appendix that prohibits the MRO from delaying the verification of the primary test result pending the outcome of the split-specimen test. It will be in the section titled "VII. A. Medical Review Officer."

For organizational purposes the MRO, SAP, and Employer Responsibilities regarding 14 CFR part 67 airman certificate holders have been combined under one section. We propose titling this paragraph "C. Additional Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities Regarding 14 CFR part 67 Airman Medical Certificate Holders."

The 14 CFR part 67 final rule, dated March 1996, made a verified positive drug test result a disqualifying condition for the issuance or retention of a medical certificate. Prior to this change, the MRO was required to evaluate whether a 14 CFR part 67 airman medical certificate holder was dependent on drugs following a verified positive drug test result. If an MRO determined that an individual was dependent or could not determine drug dependency, the MRO could not recommend that the individual return to duty until the individual was found to be nondependent by, or had received a special issuance from, the Federal Air Surgeon. If the MRO determined the individual to be nondependent, the MRO could recommend that the individual be returned to duty or hired to perform safety-sensitive functions with a negative test result on a return to duty drug test.

This action proposes a change to paragraph "VII.B. MRO Determinations" to reflect the 1996 amendment to 14 CFR part 67. Since the March 1996 final rule on 14 CFR part 67, the MROs have not been permitted to "make a determination of probable drug dependence or nondependence as specified in 14 CFR part 67." This proposed action would remove paragraphs 1 and 2. The proposal would alter paragraph 3, and move that paragraph to become paragraph C.3. The proposed new paragraph C.3. would delete any reference to the MRO determining dependency for persons holding an FAA medical certificate to ensure the current requirements are consistent with 14 CFR part 67. Clarifying language in paragraph C.3. would change the requirement from the MRO to the employer to forward SAP evaluations to the Federal Air Surgeon to reflect the changes in MRO duties in 49 CFR part 40.

Under current 14 CFR part 121, appendix I, the ability of the MRO to return an individual to duty is restricted if that individual is a 14 CFR part 67 medical certificate holder. Because of the changes to 49 CFR part 40, the SAP has now assumed the return to duty role. Therefore, in paragraph C.2. we propose to similarly restrict the SAP's ability to return a 14 CFR part 67 medical certificate holder to a safety-sensitive function if that medical certificate is necessary for the performance of those functions.

Because the requirements for employers are now divided between this appendix and 49 CFR part 40, there could be confusion for an employer about the steps to follow when dealing with an employee who is required to hold a 14 CFR part 67 airman medical certificate in order to perform safety-sensitive functions. Specifically, there might be confusion as to how to return such an employee to duty after a positive test result or a refusal to test.

The FAA would like to note that an employer would not be able to use an

employee who would be required to hold a 14 CFR part 67 airman medical certificate to perform safety-sensitive duties following a positive test result until and unless the Federal Air Surgeon has issued a special issuance medical certificate. This proposal continues the requirement that the employer ensure that the employee who is required to hold a 14 CFR part 67 medical certificate meets the return to duty and follow-up testing requirements in accordance with 49 CFR part 40, once the Federal Air Surgeon has recommended that the employee who holds a 14 CFR part 67 medical certificate be permitted to perform safety-sensitive duties. These are not new concepts, and have been implicit requirements under the existing regulations. The FAA requests comments on whether these requirements to follow both 14 CFR part 67 and 49 CFR part 40 should be made explicit for clarity purposes, or whether the concepts are clear enough as implied by 49 CFR part 40 and this appendix.

If an individual is not required to hold a 14 CFR part 67 medical certificate to perform safety-sensitive functions, the SAP may return the individual to duty. The individual's 14 CFR part 67 medical certificate is subject to review by the Federal Air Surgeon, but this review would not affect the SAP's ability to return the individual to duty as long as the individual did not need a 14 CFR part 67 medical certificate to perform his/her duties.

As indicated previously this action proposes to move "C. MRO Records." Anything pertinent to MRO records can be found in section VI.D.1. "Administrative and Other Matters." This proposal would place all record retention responsibilities under one section.

This action proposes to eliminate paragraph VII.D. "Evaluations and Referrals" and replace it with paragraph B. "Substance Abuse Professional." These proposed changes to Paragraph B. would refer the reader to 49 CFR part 40, Subpart O, for SAP requirements and would conform with 49 CFR part 40, which contains the specific SAP requirements. There would be no need to list the same requirements in this appendix because they are included in 49 CFR part 40.

#### IX. Employer's Antidrug Program

This action proposes to eliminate the requirement for an entity seeking to operate as a consortium to first seek the approval of the FAA. The terms upon which the FAA granted its approval to consortia have now been changed by the requirements of 49 CFR part 40.

Also, in the common preamble published today by DOT, it is emphasized that the six DOT agencies that cover specific transportation industries needed to revise their rules to be consistent with 49 CFR part 40. It would be inappropriate for the FAA to separately grant consortium approvals when the DOT and the other modal administrations do not grant such approvals. Retaining the provision for consortium approvals by the FAA could cause confusion among the DOT regulated entities that DOT is trying to avoid.

If consortium approvals are eliminated within this appendix, then any reference to an "FAA-approved consortium" or

"consortium" would be replaced with "consortium/third party administrator" as defined by 49 CFR part 40. We are seeking public comment on the elimination of the consortium approval process and the substitution of the 49 CFR part 40 term "consortium/third party administrator" at any point that consortia are referenced, as appropriate.

#### XII. Employees Located Outside the Territory of the United States

This action proposes a change to the title of the section to "XII. Testing Outside the Territory of the United States." While 49 CFR part 40 authorizes laboratory and MRO functions to occur outside the United States in Canada and Mexico, we are proposing to clarify that this authorization would not apply to entities regulated by this appendix. We are proposing to change paragraph A. to make it explicit that no part of the testing process, including specimen collection, laboratory processing, and MRO actions, shall be conducted outside the territory of the United States.

It is important to note that, unlike DOT agencies that require drug testing by entities outside the United States, the FAA's regulations apply only to United States' entities and testing is confined to the soil of the United States and its territories. We acknowledge that it may be more convenient and practical for entities conducting testing outside the United States to use local laboratories and MROs, however, the situation is different in aviation because testing is prohibited outside the United States and its territories. The FAA has consistently declined to take a unilateral approach to testing outside the United States, and instead has been working productively with the International Civil Aviation Organization (ICAO) to develop a multilateral approach to drug and alcohol testing consistent with the Chicago Convention. The FAA's efforts through ICAO have been successful in supporting an aviation environment free of substance abuse. However, if the threat to aviation safety posed by substance abuse increases, or requires additional efforts and the international community has not adequately responded, the FAA will consider taking appropriate rulemaking action. The proposed change conforms to past FAA guidance on this section, to past practice, and to our commitment to continue to work with the International Civil Aviation Organization to address all aspects of international substance abuse testing.

#### XIII. Waivers From 49 CFR 40.21

This action proposes to add this section to address a new provision introduced in 49 CFR part 40, which would permit waivers from 49 CFR 40.21. Under 49 CFR 40.21, an employer is prohibited from temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or a drug metabolite, an adulterated test, or a substituted test before the MRO has completed verification of the test result. This practice is described in 49 CFR 40.21 as

"stand down." However, 49 CFR 40.21 (b) permits an employer to seek a waiver from 49 CFR 40.21 (a), thereby permitting the employer to stand down its employees.

In order to implement the waiver provision of 49 CFR 40.21, the FAA proposes to add a new section to this appendix. There has been no past practice of granting waivers to the FAA's drug testing regulations. Therefore, this provision is proposed to create a process to address the requests for waiver from the stand down provisions of 49 CFR 40.21. Consistent with the requirements for seeking a waiver under 49 CFR 40.21(b), this section proposes to place the responsibility upon the applicant to provide sufficient factual information, analysis and justification to obtain a waiver from the stand down provision. The FAA is given discretion, by 49 CFR 40.21(b), to grant, deny, grant with conditions, modify, and revoke waivers. Because this is detailed in 49 CFR 40.21(b), the proposed language does not address the FAA's discretion on these matters.

### Appendix J

#### I. General

This change proposes to add a paragraph "C. Employer Responsibility." The reason for this proposed change would be to ensure that employers understand that they are responsible for all applicable requirements and procedures of this appendix and 49 CFR part 40. These proposed changes would also reinforce that employers are responsible for all actions of their officials, representatives, and service agents in carrying out the requirements of the DOT agency regulations. These proposed changes would also conform to 49 CFR part 40.

This action proposes to reletter paragraph "C. Definitions" to paragraph "D. Definitions." This action also proposes the following changes to paragraph "D. Definitions."

- Delete the definition of "Consortium" because the definition is provided in 49 CFR part 40.
- Delete the definition of "Confirmation Test" because the definition is provided in 49 CFR part 40. It is redundant to list it again in this appendix.
- Change the definition of "refusal to submit to an alcohol test" to refer to 49 CFR part 40. This would be a clarifying change.
- Delete the definition of "Screening Test" since the definition is provided in 49 CFR part 40. There is no need to repeat the definition in the appendix.
- The remaining paragraphs will be relettered accordingly.

#### III. Tests Required

A. Pre-employment Testing. In order to standardize the pre-employment alcohol testing requirements, all of the Department of Transportation modal administrations are proposing the same rule language. For a discussion of the proposal, see the Department of Transportation's common preamble that is being published concurrently with this proposal.

B. Post-accident Testing. This action proposes the elimination of paragraph 2(b) in its entirety. This paragraph requires specific data to be submitted to the FAA by March

15, 1996, 1997, and 1998. The timeframes have expired and submission of the data is no longer required.

D. Reasonable Suspicion Testing. This change proposes the elimination of paragraph 4(b) in its entirety. This paragraph requires specific data to be submitted to the FAA by March 15, 1996, 1997, and 1998. The timeframes have expired and submission of the data is no longer required.

This action also proposes to eliminate in paragraph 4(d) the words "Except as provided in paragraph (b)" since paragraph (b) has been eliminated.

E. Return to Duty Testing. This action proposes to change the requirements of return to duty testing to conform with 49 CFR part 40, which now requires the SAP to determine that the employee has successfully complied with the prescribed education and/or treatment prior to allowing the person to perform safety-sensitive functions.

F. Follow-up Testing. This action proposes to change the requirements of follow-up testing to conform with 49 CFR part 40, which requires the SAP to determine the number of follow-up tests an employee should have. This change would conform with the 49 CFR part 40 requirement that any employee who receives an alcohol violation is subject to at least six follow-up tests after returning to duty. In addition, this paragraph would be reorganized for clarity.

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

A. Retention of Records. This action proposes to specify the records employers must continue to retain in addition to the records required by 49 CFR part 40.

Specifically, this action proposes to eliminate the reference to recordkeeping requirements, except annual reports submitted to the FAA, because these recordkeeping requirements are included in 49 CFR part 40. For clarity, we moved all existing record requirements throughout paragraphs 2 and 3 into the appropriate sections of the proposed paragraph 2 and noted the specific retention period for the records. We eliminated 2(c) because all of the 1-year requirements are included in 49 CFR part 40.

C. Access to Records and Facilities. This action proposes the elimination of most of this section because 49 CFR part 40 sets out the confidentiality and release of information requirements. We propose to retain the current paragraph number 8, which would now be renumbered as paragraph 2, because it reinforces to the employer the requirement to comply with this appendix regarding access to all facilities.

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

C. Notice to Federal Air Surgeon. In light of the changes to 49 CFR part 40 and the changes that were made to 14 CFR part 121, appendix I, because of the 1996 amendment to 14 CFR part 67, this action proposes to change paragraph 4 to parallel the changes to 14 CFR part 121, appendix I. In addition, this action proposes to add a new paragraph 5, which would clarify the employer's obligation to ensure that the employee met

the return to duty requirements, following the recommendation of the Federal Air Surgeon. This is a current requirement that is being clarified. Also, this requirement conforms to 49 CFR part 40.

#### VI. Alcohol Misuse Information, Training, and Substance Abuse Professional

This action proposes to change the title from "VI. Alcohol Misuse Information, Training, and Referral" to "VI. Alcohol Misuse Information, Training, and Substance Abuse Professional" for clarity and organizational purposes.

This action proposes to change the title of "C. Referral, Evaluation, and Treatment" to "C. Substance Abuse Professional Duties" for clarity purposes and to conform to 49 CFR part 40. We propose the elimination of the majority of this paragraph because the SAP requirements are detailed in 49 CFR part 40, Subpart O. This paragraph would now refer the reader to 49 CFR part 40 for SAP requirements.

#### VII. Employer's Alcohol Misuse Prevention Program

This action proposes to eliminate the requirement for an entity seeking to operate as a consortium to first submit to the FAA an alcohol misuse prevention program (AMPP) certification statement. For the same reasons that we propose to eliminate consortium approvals in section IX of this appendix, we propose to eliminate the requirement for consortia to submit AMPPs to the FAA.

Also, we propose that any references to an "FAA-approved consortium" or "consortium" would be replaced with "consortium/ third party administrator" as defined by 49 CFR part 40, as appropriate. We propose to strike the definition of "consortium" in section I, paragraph C of this appendix.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has determined that there are no new requirements for information collection associated with this proposed rule.

#### International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

#### Executive Order 12866 and DOT Regulatory Policies and Procedures

The DOT prepared a regulatory analysis indicating that the modal proposals due to the changes in 49 CFR part 40 would not have any incremental economic impacts on their own. DOT

also indicated that the modal proposed rules have been designated as non-significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. See the Department of Transportation's common preamble, "Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40" for the regulatory evaluation of the actions that the FAA is proposing due to 49 CFR part 40.

In addition to the FAA's proposed changes that are directly due to changes in 49 CFR part 40, the FAA is proposing certain clarifying changes to 14 CFR part 121, appendices I and J that are not directly due to 49 CFR part 40.

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. The FAA is not allowed to propose or adopt a regulation unless a reasoned determination is made that the benefits of the intended regulation justify the costs. The FAA's assessment of this Notice of Proposed Rulemaking indicates that its economic impact would be minimal. Since the costs and benefits of this proposed rule do not make it a "significant regulatory action" as defined in the Order, the FAA has not prepared a "regulatory evaluation," which is the written cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory Policies and Procedures. The FAA does not need to do the latter analysis where the economic impact of a proposal is minimal. The changes that are being proposed because of changes to 49 CFR part 40 would have no incremental economic impacts on their own, and the additional clarifying changes that are being proposed would impose no new requirements; they would merely clarify existing requirements.

#### Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

Because the changes proposed in this action are a reworking of existing requirements and have been subject to extensive comment and analysis in the 49 CFR part 40 rulemaking or are merely clarifying changes and should not have incremental economic impacts on their own, the FAA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

#### International Trade Impact Analysis

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this proposed rule and has determined that it would have no effect on any trade-sensitive activity.

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104-4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This proposed rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

#### Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this notice of proposed rulemaking would not have federalism implications.

#### Environmental Analysis

FAA order 1050.1d defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental assessment or environmental impact statement. In accordance with FAA Order 1050.1d, appendix 4, paragraph 4(j), regulations, standards, and exemptions (excluding those which, if implemented, may cause a significant impact on the human environment) qualify for a categorical exclusion. The FAA proposes that this action qualifies for a categorical exclusion because no significant impacts to the environment are expected to result from its finalization or implementation.

#### Energy Impact

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Pub. L. 94-163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. It has been determined that the notice is not a major regulatory action under the provisions of the EPCA.

#### List of Subjects in 14 CFR Part 121

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

#### The Proposed Amendment

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

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

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

**Authority:** 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701-44702, 44705, 44709-44711, 44713, 44716-44717, 44722, 44901, 44903-44904, 44912, 46105.

2. Amend appendix I to part 121 as follows:

- A. Revise section I;
- B. In section II, revise the definitions of "Prohibited drug" and "Refusal to submit"; remove the definitions of "Verified negative drug test result" and "Verified positive drug test result"; and add new definitions of "Verified negative drug test" and "Verified positive drug test" in alphabetical order;
- C. Revise section IV;
- D. In section V, revise paragraphs F. and G.2., G.3., and G.4;
- E. In section VI, revise paragraphs A, B, C and D.
- F. In section VII, revise the heading of the section, and revise paragraphs A, B, and C;
- G. In section XII, revise the heading of the section and the introductory text in paragraph A; and
- H. Add section XIII.

The revisions and additions read as follows:

#### Appendix I to Part 121—Drug Testing Program

\* \* \* \* \*

##### I. General

A. *Purpose.* The purpose of this appendix is to establish a program designed to help prevent accidents and injuries resulting from the use of prohibited drugs by employees who perform safety-sensitive functions.

B. *DOT Procedures.* Each employer shall ensure that drug testing programs conducted pursuant to 14 CFR parts 65, 121, and 135 of this chapter 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 (HHS) under the National Laboratory Certification Program.

C. *Employer Responsibility.* As an employer, you are responsible for all actions of your officials, representatives, and service agents in carrying out the requirements of this appendix and 49 CFR part 40.

II. *Definitions.* \* \* \*

\* \* \* \* \*

Prohibited drug means marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, except as permitted by 49 CFR part 40.

\* \* \* \* \*

Refusal to submit means that a covered employee engages in conduct specified in 49 CFR 40.191.

\* \* \* \* \*

Verified negative drug test means a drug test result from an HHS-certified laboratory that has undergone review by an MRO and has been determined by the MRO to be a negative result.

Verified positive drug test means a drug test result from an HHS-certified laboratory that has undergone review by an MRO and has been determined by the MRO to be a positive result.

\* \* \* \* \*

IV. Substances for Which Testing Must Be Conducted. Each employer shall test each employee who performs a safety-sensitive function for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines during each test required by section V. of this appendix.

V. Types of Drug Testing Required. \* \* \*

\* \* \* \* \*

F. Return to Duty Testing. Each employer shall ensure that before an individual is returned to duty to perform a safety-sensitive function after refusing to submit to a drug test required by this appendix or receiving a verified positive drug test result on a test conducted under this appendix the individual shall undergo a return to duty drug test. No employer shall allow an individual required to undergo return to duty testing to perform a safety-sensitive function unless the employer has received a verified negative return to duty drug test result for the individual. The test cannot occur until after the SAP has determined that the employee has successfully complied with the prescribed education and/or treatment.

G. Follow-up Testing. \* \* \*

\* \* \* \* \*

2. The number and frequency of such testing shall be determined by the employer's Substance Abuse Professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty.

3. The employer may direct the employee to undergo testing for alcohol in accordance with appendix J of this part, in addition to drugs, if the Substance Abuse Professional determines that alcohol testing is necessary for the particular employee. Any such alcohol testing shall be conducted in accordance with the provisions of 49 CFR part 40.

4. Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The Substance Abuse Professional may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the Substance Abuse Professional determines that such testing is no longer necessary.

VI. Administrative and Other Matters. A. MRO Record Retention Requirements. 1.

Records concerning drug tests confirmed positive by the laboratory shall be maintained by the MRO for 5 years. Such records include the MRO copies of the custody and control form, medical interviews, documentation of the basis for verifying as negative test results confirmed as positive by the laboratory, any other documentation concerning the MRO's verification process.

2. Should the employer change MROs for any reason, the MRO shall forward all records maintained pursuant to this rule to the new MRO within ten working days of receiving notice from the employer of the new MRO's name and address.

3. Any employer obtaining MRO services by contract, including a contract through a consortium, shall ensure that the contract includes a recordkeeping provision that is consistent with this paragraph, including requirements for transferring records to a new MRO.

B. Access to Records. The employer and the MRO shall permit the Administrator or the Administrator's representative to examine records required to be kept under this appendix and 49 CFR part 40. The Administrator may require that all records maintained by the service agent for the employer must be produced at the employer's place of business.

C. Service Agents. In accordance with 49 CFR part 40, service agents may maintain records for the employer. If requested by the Administrator or the Administrator's representative, all records maintained by the service agent for the employer must be produced at the service agent's place of business by the first day of a scheduled inspection or investigation of the employer's antidrug program.

D. Release of Drug Testing Information. An employer shall release information regarding an employee's drug testing results, evaluation, or rehabilitation to a third party in accordance with 49 CFR part 40. Except as required by law, this appendix, or 49 CFR part 40, no employer shall release employee information.

\* \* \* \* \*

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

A. Medical Review Officer (MRO). The MRO must perform the functions set forth in 49 CFR part 40, Subpart G, and this appendix. The MRO shall not delay verification of the primary test result following a request for a split specimen test unless such delay is based on reasons other than the fact that the split specimen test result is pending. If the primary test result is verified as positive, actions required under this rule (e.g., notification to the Federal Air Surgeon, removal from safety-sensitive position) are not stayed during the 72-hour request period or pending receipt of the split specimen test result.

B. Substance Abuse Professional (SAP). The SAP must perform the functions set forth in 49 CFR part 40, Subpart O.

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

1. As part of verifying a confirmed positive test result, the MRO shall inquire, and the individual shall disclose, whether the individual is or would be required to hold a medical certificate issued under 14 CFR part 67 of this chapter to perform a safety sensitive function for the employer. If the individual answers in the negative, the MRO shall then inquire, and the individual shall disclose, whether the individual currently holds a medical certificate issued under 14 CFR part 67. If the individual answers in the affirmative to either question, the MRO must forward to the Federal Air Surgeon, at the address listed in paragraph 4, the name of the individual, along with identifying information and supporting documentation, within 12 working days after verifying a positive drug test result.

2. The SAP shall inquire, and the individual shall disclose, whether the individual is or would be required to hold a medical certificate issued under 14 CFR part 67 of this chapter to perform a safety sensitive function for the employer. If the individual answers in the affirmative, the SAP cannot recommend that the individual be returned to a safety-sensitive function that requires the individual to hold a 14 CFR part 67 medical certificate unless and until such individual has received a special issuance medical certificate from the Federal Air Surgeon. The receipt of a special issuance medical certificate does not alter any obligations otherwise required by 49 CFR part 40 or this appendix.

3. The employer must forward to the Federal Air Surgeon a copy of any report provided by the SAP, if available, regarding an individual for whom the MRO has provided a report to the Federal Air Surgeon under section VII.C.1 of this appendix, within 12 working days of the employer's receipt of the report.

4. All reports required under this section shall be forwarded to the Federal Air Surgeon, Federal Aviation Administration, Attn: Drug Abatement Division (AAM-800), 800 Independence Avenue, SW., Washington, DC 20591.

\* \* \* \* \*

XII. Testing Outside the Territory of the United States. A. No part of the testing process (including specimen collection, laboratory processing, and MRO actions) shall be conducted outside the territory of the United States.

\* \* \* \* \*

XIII. Waivers from 49 CFR 40.21. An employer subject to this part may petition the Drug Abatement Division, Office of Aviation Medicine, for a waiver allowing the employer to stand down an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

A. Each petition for a waiver must be in writing and include substantial facts and justification to support the waiver. Each petition must satisfy the substantive requirements for obtaining a waiver, as provided in 49 CFR 40.21.

B. Each petition for a waiver must be submitted to the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 800

Independence Avenue, SW., Washington, D.C. 20591.

C. The Administrator may grant a waiver subject to 49 CFR 40.21(d).

3. In appendix J to part 121:

A. In section I, redesignate paragraphs C through F as paragraphs D through G, add new paragraph C, and amend redesignated paragraph D by removing the definitions for "Consortium", "Refuse to submit", and by adding a definition for "Refusal to submit (to an alcohol test)" in alphabetical order;

B. In section III, revise paragraphs A, B heading, and B.2; remove paragraph D.4.(b); redesignate paragraphs D.4. (c) and D.4.(d) as paragraphs D.4. (b) and D.4. (c); revise redesignated paragraph D. 4. (c); and revise paragraphs E, and F;

C. In section IV, revise paragraphs A.1, A.2, and C.2, and remove paragraphs C.3 through C.8;

D. In section V, revise paragraph C.4 and add paragraph C.5; and

E. In section VI, revise the heading and paragraph C.

The revisions and additions read as follows:

Appendix J to Part 121—Alcohol Misuse Prevention Program

\* \* \* \* \*

I. General

\* \* \* \* \*

C. Employer Responsibility. As an employer, you are responsible for all actions of your officials, representatives, and service agents in carrying out the requirements of the DOT agency regulations.

D. Definitions

\* \* \* \* \*

Refusal to submit (to an alcohol test) means that a covered employee engages in conduct specified in 49 CFR 40.261.

\* \* \* \* \*

III. Tests Required

A. Pre-employment testing

As an employer, you may, but are not required to, conduct pre-employment alcohol testing under this part. If you choose to conduct pre-employment alcohol testing, you must comply with the following requirements:

1. You must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

2. You must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

3. You must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the

employee passing the pre-employment alcohol test.

4. You must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR Part 40.

5. You must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

B. Post-Accident Testing

\* \* \* \* \*

2. If a test required by this section is not administered within 2 hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.

\* \* \* \* \*

D. Reasonable Suspicion Testing

\* \* \* \* \*

4. \* \* \*

(c) No employer shall take any action under this appendix against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this appendix from taking any action otherwise consistent with law.

E. Return to Duty Testing

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in § 65.46a, § 121.458, or § 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02. The test cannot occur until after the SAP (See paragraph V. C. 4 of this appendix) has determined that the employee has successfully complied with the prescribed education and/or treatment.

F. Follow-up Testing

1. Each employer shall ensure that the employee who engages in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional.

2. The number and frequency of such testing shall be determined by the employer's Substance Abuse Professional, but must consist of at least six tests in the first 12 months following the employee's return to duty.

3. The employer may direct the employee to undergo testing for drugs, if the SAP determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the provisions of 49 CFR part 40.

4. Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The SAP may terminate the requirement for follow-up

testing at any time after the first six tests have been conducted, if the SAP determines that such testing is no longer necessary.

5. A covered employee shall be tested for alcohol under this paragraph only while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions.

\* \* \* \* \*

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

A. Retention of Records

1. General Requirement. In addition to the records required to be maintained under 49 CFR part 40, employers must maintain records required by this appendix in a secure location with controlled access.

2. Period of retention.

(a) Five years.

(1) Copies of any annual reports submitted to the FAA under this appendix for a minimum of 5 years.

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

(3) Documents presented by a covered employee to dispute the result of an alcohol test administered under this appendix.

(4) Records related to other violations of § 65.46a, § 121.458, or § 135.253 of this chapter.

(b) Two years. Records related to the testing process and training required under this appendix.

(1) Documents related to the random selection process.

(2) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(3) Documents generated in connection with decisions on post-accident tests.

(4) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(5) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

(6) Documentation of compliance with the requirements of section VI, paragraph A of this appendix.

(7) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(8) Certification that any training conducted under this appendix complies with the requirements for such training.

\* \* \* \* \*

C. Access to Records and Facilities

\* \* \* \* \*

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

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

\* \* \* \* \*

### C. Notice to the Federal Air Surgeon

\* \* \* \* \*

4. No covered employee who is required to hold a medical certificate under part 67 of this chapter to perform a safety-sensitive duty shall perform that duty following a violation of this appendix until and unless the Federal Air Surgeon has recommended that the employee be permitted to perform such duties.

5. Once the Federal Air Surgeon has recommended under paragraph C.4. of this section that the employee be permitted to perform safety-sensitive duties, the employer cannot permit the employee to perform those safety-sensitive duties until the employer has ensured that the employee meets the return-to-duty requirements in accordance with 49 CFR part 40.

\* \* \* \* \*

## VI. Alcohol Misuse Information, Training, and Substance Abuse Professional

\* \* \* \* \*

### C. Substance Abuse Professional Duties (SAP)

The SAP must perform the functions set forth in 49 CFR part 40, Subpart O and this appendix.

\* \* \* \* \*

Issued in Washington, DC on April 11, 2001.

**Jon L. Jordan,**

*Federal Air Surgeon.*

[FR Doc. 01-9410 Filed 4-27-01; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 46 CFR Parts 4, 5, and 16

[USCG-2000-7759]

RIN 2115-AG00

#### Chemical Testing

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to revise its chemical drug testing regulations to conform with the Department of Transportation's (DOT) final rule on drug testing procedures published in the **Federal Register** on December 19, 2000. The Coast Guard proposes to amend the regulations on Marine Casualties and Investigations and Chemical Testing by removing obsolete sections and sections duplicating the DOT regulations; adding new definitions; and modifying existing text to incorporate new terms and procedures contained in the DOT

procedural requirements. This rulemaking would conform Coast Guard rules to the new requirements established by the December 19, 2000, DOT final rule.

**DATES:** Comments and related material must reach the Docket Management Facility on or before June 29, 2001.

**ADDRESSES:** To make sure that your comments and related material are not entered more than once in the docket, please submit them by only one of the following means:

(1) By mail to the Docket Management Facility (USCG-2000-7759), U.S. Department of Transportation, room PL-401, 400 Seventh Street SW., Washington, DC 20590-0001.

(2) By delivery to room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

(3) By fax to the Docket Management Facility at 202-493-2251.

(4) Electronically through the Web Site for the Docket Management System at <http://dms.dot.gov>.

The Docket Management Facility maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call LT Jennifer Ledbetter, Coast Guard, telephone 202-267-0684. If you have questions on viewing or submitting material to the docket, call Dorothy Beard, Chief, Dockets, Department of Transportation, telephone 202-366-9329.

#### SUPPLEMENTARY INFORMATION:

##### Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (USCG-2000-7759), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by mail, hand

delivery, fax, or electronic means to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

#### Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

#### Background and Purpose

On December 19, 2000 (65 FR 79462), the Department of Transportation (DOT) published a comprehensive revision to their drug and alcohol testing procedural rules (49 CFR Part 40). The revised Part 40 makes numerous changes in the way that drug and alcohol testing will be conducted in the future. While some provisions of the new rule will be made effective more quickly, as amendments to the existing Part 40, the entire revised part is scheduled to go into effect on August 1, 2001.

Part 40 is one element of a One-DOT set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. DOT has published a summary of the major changes affecting the modal drug testing rules. These major changes include changes to the "return to duty" process (49 CFR 40.21); a requirement that all modes collect "split specimens" for drug testing (49 CFR 40.71 and subpart H); a new DOT process for employers to request waiver of the policy against stand down of employees pending completion of the test verification process (49 CFR 40.21); changes in qualifications and training requirements for testing personnel, medical review officers, and other technicians and substance abuse professionals (49 CFR 40.33, 40.121 and 281); revised role of consortium/third-party administrators (C/TPA) (49 CFR 40.345 and 347); and a requirement that employers check

with previous employers for drug and alcohol testing results of applicants for safety sensitive jobs (49 CFR 40.25).

It is important that the six DOT agency rules that cover specific transportation industries be consistent with the revised Part 40 to avoid duplication, conflict, or confusion among DOT regulatory requirements. For these reasons, the Coast Guard is proposing revisions to our drug and alcohol testing regulations affected by Part 40. We intend to issue final versions of these "conforming amendments" in time to be effective on August 1, 2001, the same date that the revised Part 40 takes effect.

There are several changes that we propose to make to ensure consistency with the revised Part 40. The next section of this preamble discusses each of these items in turn.

### Discussion of Proposed Rule

The Coast Guard proposes to revise its chemical drug testing regulations to conform with the Department of Transportation's (DOT) final rule on drug testing procedures published on December 19, 2000 **Federal Register** (65 FR 79462). This NPRM would conform Coast Guard rules to the new requirements established today by 49 CFR Part 40. The Coast Guard proposes to revise 46 CFR Parts 4, 5, and 16 by removing obsolete sections and sections duplicating the DOT regulations; adding new definitions; and modifying existing text to incorporate new terms and procedures contained in the DOT procedural requirements.

Some new DOT requirements, such as the requirement for split specimens, can be implemented without a revision or conforming amendment to Coast Guard regulations. In this case, the requirement is in 49 CFR Part 40, and our regulations require employers to follow the procedures in that part when conducting required chemical tests for dangerous drugs.

The DOT revisions include new qualification and training requirements for Medical Review Officers (MROs) and Substance Abuse Professionals (SAPs). The Coast Guard is not proposing to change the current dual role of the MRO in the return-to-duty decision process. However, where an individual performs both SAP and MRO functions, Part 40 requires the individual to meet the qualification and training requirements for individuals performing each of these functions. We request comments on how these changes should be implemented by the Coast Guard. Should an MRO, in order to perform SAP functions, separately have to meet the SAP training requirements? Should

fulfillment of the MRO training requirements satisfy the requirements for SAP training? Should the MRO, performing what are called SAP functions in Part 40, have to follow the same Part 40 procedures as SAPs in the return to duty process?

Other DOT changes, such as the minimum number of follow-up drug tests required during the first year after return to work in a safety-sensitive position, would require a conforming amendment to add this requirement to our existing regulatory text.

The following is a brief discussion of how the Coast Guard proposes to amend its regulations affected by DOT's final rule.

#### 46 CFR Part 4

Throughout this part, we propose to update cross-references to point to the revised sections in 49 CFR Part 40 and the proposed revisions to 46 CFR Part 16.

#### 46 CFR Part 5

Table 5.569. We propose to clarify the Table of Appropriate Orders in § 5.569 to distinguish between a Chemical test for dangerous drugs and for alcohol, because Part 40 treats them separately.

#### 46 CFR Part 16

Definitions. We propose to change some definitions in § 16.105 by removing terms that are no longer used in 46 CFR Part 16 or 49 CFR Part 40; by revising terms to conform to the definitions in 49 CFR Part 40; and by adding terms found in 49 CFR Part 40 that are currently not found in 46 CFR Part 16.

### New Sections

We would add § 16.107 *Waivers*. This section would contain existing waivers as well as the new DOT waiver for stand-down of crewmembers following a confirmed positive test.

We propose adding a § 16.109 describing DOT's new Public Interest Exclusion (PIE) in 49 CFR Part 40, subpart R.

We propose adding § 16.115 *Penalties*. to inform the public of the penalties prescribed by 46 U.S.C. 2115 for violation of dangerous drug and alcohol testing regulations.

We also propose adding § 16.203 *Employer responsibilities*. to restate DOT's general requirements for employers in 49 CFR Part 40, subpart B.

### Revisions

*Section 16.201 Application*. In § 16.201 we propose revising paragraph (a) by requiring all chemical drug tests to be conducted as detailed in the

procedures found in 49 CFR 40. We would revise paragraph (c) to require a sponsoring organization, like employers and prospective employers, to report a mariner's positive chemical drug test to the nearest Coast Guard Officer in Charge, Marine Inspection. We would update the cross-reference to § 16.370 in paragraph (e).

*Section 16.207 Conflict with foreign laws*. We propose to remove the section heading and paragraph (a) of this section because it is obsolete. The delayed date for testing vessels operating in foreign jurisdictions has expired and this paragraph is no longer needed.

*Section 16.260 Records*. We propose to revise § 16.260(a) by adding a cross-reference to DOT recordkeeping requirements in 49 CFR 40.333.

*Subpart C*. Most of the requirements in Subpart C are now covered in detail by the revised 49 CFR Part 40 and these sections are no longer needed in Part 16. In Subpart C, § 16.301, § 16.350(b), and § 16.370(d) are not covered in detail by 49 CFR Part 40. We propose to redesignate these paragraphs.

Section 16.370(d) currently requires an MRO to determine when an individual is ready to return to work after testing positive and allows the MRO to prescribe follow-up testing for up to 60 months as appropriate. In order to ensure intermodal consistency, DOT has prescribed a mandatory minimum number of follow-up tests after return to work. We propose to revise § 16.370(d) to include the new DOT requirement for a minimum of 6 follow-up drug tests during the first year after an individual returns to work. This new requirement would be in addition to all other Coast Guard requirements for rehabilitation and education following a positive drug test. Revised § 16.370(d) would be redesignated and we propose to remove the remaining provisions in Subpart C.

### Regulatory Evaluation

DOT has assessed the economic impacts of this proposed rulemaking. Because this proposed rule makes conforming changes to align Coast Guard regulations with the revised 49 CFR Part 40, DOT determined that it has no additional costs to industry. Their analysis is published in their December 19, 2000, final rule, Procedures for Transportation Workplace Drug and Alcohol Testing Programs [OST 1999-6578].

### Analyses Under Other Executive Orders

DOT also found no significant impact that would warrant further analysis of this rulemaking in accordance to the Small Business Regulatory Enforcement

Fairness Act of 1996, the Paperwork Reduction Act of 1995, Federalism impacts under Executive Order 13132, the Unfunded Mandates Reform Act of 1995, Enhancing the Intergovernmental Partnership under Executive Order 12875, Taking of Private Property under Executive Order 12630, Civil Justice Reform under Executive Order 12988, and the Protection of Children from Environmental Health Risks and Safety Risks under Executive Order 13045.

It is well settled that States are precluded from regulation in categories that are reserved for regulation by the Coast Guard. It is also well settled, now, that all of the categories covered in 46 U.S.C. 3306, 3703(a), 7101 and 8101 (design, construction, repair, alteration, maintenance, operation, equipping, personnel qualification and manning of vessels) as well as casualty reporting and any other categories where Congress intended the Coast Guard to be the sole source of a vessel's obligations are within the field foreclosed from State regulation. (See the decision of the Supreme Court in the consolidated cases of *United States v. Locke and Intertanko v. Locke*, 529 U.S. 89, 120 S.Ct 1135 (March 6, 2000). Rules regarding drug and alcohol testing for merchant marine personnel fall into the covered category of personnel certification rules, with the Coast Guard intended to be the sole source of those rules, thereby precluding States from regulation. Because States may not promulgate rules within these categories, preemption is not an issue under Executive Order 13132.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental

jurisdiction and you have questions concerning its provisions or options for compliance, please consult LT Jennifer Ledbetter, Coast Guard, telephone 202-267-0684.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247).

**Environment**

We considered the environmental impact of this proposed rule and concluded that, under figure 2-1, paragraphs (34)(a), of Commandant Instruction M16475.JC, this rule is categorically excluded from further environmental documentation. The proposed rule would be promulgated to comply with new DOT regulations. The promulgation of new regulations by the Coast Guard would be editorial or procedural in nature. A "Categorical Exclusion Determination" is available in the docket where indicated under

**ADDRESSES.**

**List of Subjects**

*46 CFR Part 4*

Administrative practice and procedure, Alcohol abuse, Drug abuse, Drug testing, Investigations, Marine safety, National Transportation Safety Board, Nuclear vessels, Reporting and recordkeeping requirements, Safety, Transportation.

*46 CFR Part 5*

Administrative practice and procedure, Alcohol abuse, Drug abuse, Investigations, Seamen.

*46 CFR Part 16*

Drug testing, Marine safety, Penalties, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR Parts 4, 5, and 16 as follows:

**PART 4—MARINE CASUALTIES AND INVESTIGATIONS**

1. The citation of authority for part 4 continues 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. Authority for subpart 4.40: 49 U.S.C. 1903(a)(1)(E); 49 CFR 1.46.

**§ 4.06 [Amended]**

- 2. In § 4.06-1(f) remove "and 16.207".
- 3. In § 4.06-20(b) revise "\$ 16.330 of this part" to read "49 CFR part 40".
- 4. In § 4.06-40(b) revise "\$ 16.310" to read "\$ 16.113" and revise "\$ 16.320" to read "49 CFR part 40, subpart D,".
- 5. In § 4.06-50(b) in the first sentence revise "49 CFR 40.33" to read "49 CFR 40.121" and in the second sentence revise "49 CFR 40.33" to read "49 CFR part 40, subpart G,".

**PART 5—MARINE INVESTIGATION REGULATIONS—PERSONNEL ACTION**

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

**Authority:** 46 U.S.C. 2103, 7101, 7301, and 7701; 49 CFR 1.46.

7. In § 5.569 in Table 5.569 revise the entry for "Violation of Regulation:" to read as follows:

**§ 5.569 Selection of an appropriate order.**

\* \* \* \* \*

TABLE 5.569.—SUGGESTED RANGE OF AN APPROPRIATE ORDER

Type of offense	Range of order (in months)
* * * * *	
Violation of Regulation:	
Refusal to take chemical drug test .....	12-24.
Refusal to take required alcohol test .....	12-24.
* * * * *	

**PART 16—CHEMICAL TESTING**

8. The citation of authority for part 16 continues to read as follows:

**Authority:** 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; 49 CFR 1.46.

9. In § 16.105 remove the definition for “Dangerous drug level”, “Intoxicant”, and “Medical Review Officer”, revise the definitions for “Fails a chemical test for dangerous drugs” and “Refuse to submit”, and add in alphabetical order definitions for “Consortium/Third party administrator”, “Medical Review Officer (MRO)”, “Service agent”, and “Stand down” to read as follows:

**§ 16.105 Definitions of terms used in this part.**

\* \* \* \* \*

*Consortium/Third party administrator (C/TPA)* means a service agent who provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers’ drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members.

\* \* \* \* \*

*Fails a chemical test for dangerous drugs* means that the result of a chemical test conducted in accordance with 49 CFR 40 was reported as “positive” by a Medical Review Officer because the chemical test indicated the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR part 40.

\* \* \* \* \*

*Medical Review Officer (MRO)* means a person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer’s drug testing program and evaluating medical explanations for certain drug test results.

\* \* \* \* \*

*Refuse to submit* means you refused to take a drug test as set out in 49 CFR 40.191.

\* \* \* \* \*

*Service agent* means any person or entity that provides services specified under this part or 49 CFR part 40 to employers and/or crewmembers in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the

qualifications set forth in applicable sections of 49 CFR part 40. Service agents are not employers for purposes of this part.

\* \* \* \* \*

*Stand-down* means the practice of temporarily removing a crewmember from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

10. Add § 16.107 to subpart A to read as follows:

**§ 16.107 Waivers.**

(a) To obtain a waiver from 49 CFR 40.21 or from this part you must send your request for a waiver to the Commandant (G–MOA).

(b) Employers for whom compliance with this part would violate the domestic laws or policies of another country may request an exemption from the drug testing requirements of this part by submitting a written request to Commandant (G–MOA), at the address listed in § 16.500(a).

(c) An employer may request a waiver from the Coast Guard in order to stand-down a crewmember following the Medical Review Officer’s receipt of a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test pertaining to the crewmember. Consistent with 49 CFR 40.21, the request for a waiver must include as a minimum: information about the organization and the proposed written company policy concerning stand-down. Specific elements required in the written waiver request are contained in 49 CFR 40.21(c).

11. Add § 16.109 to subpart A to read as follows:

**§ 16.109 Public Interest Exclusion (PIE).**

Service agents are subject to Public Interest Exclusion (PIE) actions in accordance with 49 CFR part 40, subpart R. The PIE is an action which excludes from participation in DOT’s drug and alcohol testing program any service agent who, by serious noncompliance with this part or with 49 CFR part 40, has shown that it is not currently acting in a responsible manner.

12. Add § 16.115 to subpart A to read as follows:

**§ 16.115 Penalties.**

Violation of this part is subject to the civil penalties set forth in 46 U.S.C. 2115. Any person who fails to implement or conduct, or who otherwise fails to comply with the

requirements for chemical testing for dangerous drugs as prescribed under this part, is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation. Each day of a continuing violation will constitute a separate violation.

13. In § 16.201 revise paragraphs (a), (c), and (e), and add paragraph (f) to read as follows:

**§ 16.201 Application.**

(a) Chemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40.

\* \* \* \* \*

(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, prospective employer, or sponsoring organization must report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual must be denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel as soon as practicable and is subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner’s document under 46 CFR part 5.

\* \* \* \* \*

(e) An individual who has failed a required chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (g) of this section and 46 CFR Part 5, if applicable, have been satisfied.

(f) Medical Review Officers (MRO) may report positive test results of unemployed, self-employed, or individual mariners to the Coast Guard.

14. Add § 16.203 to read as follows:

**§ 16.203 Employer responsibilities.**

(a) Employers must ensure that they and their crewmembers meet the requirements of this part.

(b) Employers are responsible for all the actions of their officials, representatives, and agents in carrying out the requirements of this part.

(c) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

**§ 16.207 [Removed]**

15. Remove § 16.207.  
16. In § 16.260 revise paragraph (a) to read as follows:

**§ 16.260 Records.**

(a) Employers must maintain records of chemical tests as provided in 49 CFR 40.333 and must make these records available to Coast Guard officials upon request.

\* \* \* \* \*

**§ 16.301 [Redesignated as § 16.113]**

17. Redesignate § 16.301 as § 16.113 and transfer it to subpart A.

**§ 16.310 [Removed]**

18. Remove § 16.310.

**§ 16.320 [Removed]**

19. Remove § 16.320.

**§ 16.330 [Removed]**

20. Remove § 16.330.

**§ 16.340 [Removed]**

21. Remove § 16.340.  
22. In newly redesignated § 16.113, revise the section heading, designate the existing text as paragraph (a), and add paragraph (b) to read as follows:

**§ 16.113 Chemical drug testing.**

\* \* \* \* \*

(b) Each specimen collected in accordance with this part will be tested, as provided in 49 CFR 40.85, for the following:

- (1) Marijuana;
- (2) Cocaine;
- (3) Opiates;
- (4) Phencyclidine (PCP); and
- (5) Amphetamines.

**§ 16.350 [Removed]**

23. Remove § 16.350.

**§ 16.360 [Removed]**

24. Remove § 16.360.  
25. Redesignate § 16.370(d) as § 16.201(g) and revise it to read as follows:

**§ 16.201 Application.**

\* \* \* \* \*

(g) Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO must 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 must agree to be subject to increased unannounced testing—

(1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR part 40; and

(2) For any additional period as determined by the MRO up to a total of 60 months.

**§ 16.370 [Removed]**

26. Remove § 16.370.

**§ 16.380 [Removed]**

27. Remove § 16.380.  
28. Remove and reserve subpart C.

Dated: November 22, 2000.

**Joseph J. Angelo,**

*Director of Standards, Acting Assistant Commandant for Marine Safety and Environmental Protection.*

[FR Doc. 01-9411 Filed 4-27-01; 8:45 am]

BILLING CODE 4910-15-U

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration****49 CFR Part 199**

[Docket No. RSPA-00-8417; Notice 1]

RIN 2137-AD55

**Drug and Alcohol Testing for Pipeline Facility Employees**

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** We propose to conform the pipeline facility drug and alcohol testing regulations with corresponding DOT regulations (Procedures for Transportation Workplace Drug and Alcohol Testing Programs). We also propose miscellaneous changes to the pipeline facility drug and alcohol testing regulations to make them easier to apply and understand. The proposals are intended to ensure the pipeline facility drug and alcohol testing regulations are clear and consistent with the DOT regulations.

**DATES:** Persons interested in submitting written comments on the proposed rules must do so by June 14, 2001. Late filed comments will be considered so far as practicable.

**ADDRESSES:** You may submit written comments by mailing or delivering an original and two copies to the Dockets Facility, U.S. Department of Transportation, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. The Dockets Facility is open from 10:00 a.m. to 5:00 p.m., Monday through Friday, except on Federal holidays when the facility is closed. Or you may submit written comments to the docket electronically at the following Web address: <http://dms.dot.gov>. See the **SUPPLEMENTARY**

**INFORMATION** section for additional filing information.

**FOR FURTHER INFORMATION CONTACT:** L. M. Furrow by phone at 202-366-4559, by fax at 202-366-4566, by mail at U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC, 20590, or by e-mail at [buck.furrow@rspa.dot.gov](mailto:buck.furrow@rspa.dot.gov).

**SUPPLEMENTARY INFORMATION:****Filing Information, Electronic Access, and General Program Information**

All written comments should identify the docket and notice numbers stated in the heading of this notice. Anyone who wants confirmation of mailed comments must include a self-addressed stamped postcard. To file written comments electronically, after logging onto <http://dms.dot.gov>, click on "Electronic Submission." You can read comments and other material in the docket at this Web address: <http://dms.dot.gov>. General information about our pipeline safety program is available at this address: <http://ops.dot.gov>.

**Background**

On April 29, 1996, DOT issued an advance notice of proposed rulemaking (61 FR 18713) concerning changes to its regulations called Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR Part 40). These regulations prescribe requirements applicable to all employers who must conduct drug and alcohol testing under separate regulations administered by DOT agencies such as RSPA. Subsequently, on December 9, 1999, DOT issued a notice of proposed rulemaking (64 FR 69076) to change Part 40 comprehensively. The Final Rule document revising Part 40 has now been published (65 FR 79462; December 19, 2000). Consequently, we are proposing to amend the drug and alcohol testing regulations for pipeline facilities (49 CFR Part 199) to conform them to revised Part 40.

**Common Preamble**

Elsewhere is today's **Federal Register**, DOT is publishing a preamble related to the notices of proposed rulemaking that RSPA and other DOT agencies are publishing to conform their drug and alcohol testing regulations to revised Part 40. This common preamble provides an overview of the issues involved.

**Proposed Amendments to Part 199****Structure and Organization**

When the rules in Subpart B-Alcohol Misuse Prevention Program were added

to Part 199, the drug testing requirements in §§ 199.1 through 199.25 were designated as Subpart A. However, § 199.1, "Scope and compliance," § 199.3, "Definitions," and § 199.5, "DOT procedures," are relevant to Part 199 in general. So we propose to designate § 199.1 through § 199.5 as Subpart A—General. Sections 199.7 through 199.25 would be designated as Subpart B—Drug Testing and redesignated as §§ 199.101 through 199.119, respectively. The heading "Subpart B—Alcohol Misuse Prevention Program" would be redesignated as "Subpart C—Alcohol Misuse Prevention Program."

Another section that relates to Part 199 in general is § 199.207, "Preemption of state and local laws." We propose to transfer this section to Subpart A—General as § 199.7.

In § 199.1, the first sentence of paragraph (a) would be revised to state that the scope of Part 199 includes both drug and alcohol testing. And the second sentence of paragraph (a), concerning the exclusion from Part 199 of master meter and petroleum gas systems, would be clarified and transferred to new § 199.2. In view of these proposed changes concerning the scope and applicability of Part 199 in general, § 199.201, concerning the applicability of Subpart B, would be removed as superfluous.

Sections 199.1(b) and 199.213, which provide compliance dates, would be removed because the dates have expired.

The first sentence of § 199.5 now provides that the "anti-drug program" required by Part 199 must be conducted according to the requirements of Part 199 and DOT Procedures (or 49 CFR part 40). To make this sentence apply to the Part 199 alcohol program as well, we propose to change "anti-drug program" to "anti-drug and alcohol programs." In view of this proposed change, § 199.203, which makes DOT Procedures applicable to alcohol tests under Part 199, would be removed as superfluous. The definition of "DOT Procedures" in § 199.3 would be revised similarly.

Under § 199.9(b)(2) [or redesignated § 199.103(b)(2)], a medical review officer's recommendation for return to duty is one of three conditions an employee must meet to escape the consequences of failing or refusing a drug test. We propose to make this condition consistent with § 199.11(e) [or redesignated § 199.105(e)] and DOT Procedures. First, the reference to the medical review officer's recommendation for return to duty would be deleted. Under Part 40 substance abuse professionals, not

medical review officers, play the lead role in the return to duty process. Secondly, this point would be emphasized by adding that a substance abuse professional must have determined that the employee has successfully completed any required education or treatment.

Sections 199.225(a)(2)(ii) and 199.225(b)(4)(ii) require operators to submit certain post-accident and reasonable-suspicion test records for the years 1995, 1996, and 1997. Because the deadlines for compliance with these reporting requirements have expired, we propose to remove §§ 199.225(a)(2)(ii) and 199.225(b)(4)(ii).

#### Definitions

The definitions in Part 199 are now stated in two sections: §§ 199.3 and 199.205. To make it easier to find and use Part 199 definitions and to eliminate unnecessary repetition within Part 199 and with Part 40, we propose to transfer to § 199.3 those definitions in § 199.205 that are not duplicated in either § 199.3 or Part 40. Section 199.205 would then be removed.

Section 199.205 contains definitions of the following terms that also are defined in § 199.3: accident, administrator, covered employee, covered function, operator, and state agency. The proposed transfer would make this repetition unnecessary. In addition, § 199.205 defines the following terms that also are defined in 49 CFR 40.3: alcohol, alcohol concentration, alcohol use, confirmation test, consortium, DOT agency, employer, and screening test. Because § 199.5 provides that terms and concepts used in Part 199 have the same meaning as in Part 40, it is unnecessary to transfer these definitions to § 199.3. Consequently, only definitions of the following two terms in § 199.205 would be transferred to § 199.3: performing a covered function, and refuse to submit to an alcohol test. The definition of "performing a covered function" would be revised for clarity.

The definitions of "covered employee" and "covered function" included in §§ 199.3 and 199.205 may be unclear because similar terms are used in both definitions. So we propose to clarify these definitions. The term "covered employee" (and "employee" or "individual to be tested") would be defined as a person who performs a covered function, including persons employed by operators, contractors engaged by operators, and persons employed by such contractors. The term "covered function" would be defined as an operations, maintenance, or emergency-response function regulated

by [49 CFR] part 192, 193, or 195 that is performed on a pipeline or LNG facility. The statement in the present definition of "covered employee" that covered functions do not include clerical, truck driving, accounting, or other functions not subject to part 192, 193, or 195 would be deleted as unnecessary.

The definition of "prohibited drug" in § 199.3 would be revised by removing the second sentence, which authorizes operators, under certain conditions, to test for drugs other than marijuana, cocaine, opiates, amphetamines, and phencyclidine. This revision is necessary because specimens collected for purposes of drug testing under Part 199 may not be tested for any other drugs (49 CFR 40.85). As indicated by 49 CFR 40.13, operators may collect other specimens to test for other drugs.

The definition of "refuse to submit" in § 199.3 would be clarified to explain that it applies equally to the terms "refuse" and "refuse to take" a drug test. Moreover, the definition would be revised to refer to DOT procedures on refusal to take a drug test (49 CFR 40.191(b)). Under these procedures, refusal to take a drug test includes submission of an adulterated or substituted specimen. The definition would be further revised to include a similar definition proposed to be transferred from § 199.205 regarding alcohol testing and to refer to DOT procedures on refusal to take an alcohol test (49 CFR 40.261).

#### Enforcing DOT Procedures

Part 199 refers to the drug and alcohol testing procedures in Part 40 as "DOT Procedures" and incorporates these procedures by reference (§ 199.5). Our practice is to enforce compliance with Part 40 as if it were a Part 199 regulation. To remove any uncertainty about this enforcement practice, we propose to amend § 199.5 to make it clear that a violation of Part 40 is a violation of Part 199. In addition, to further the enforceability of Part 40, we propose to remove from § 199.5 the statement that in the event of conflict with Part 40, Part 199 prevails. If there is a substantive difference between Part 40 and Part 199, we will state the difference explicitly in Part 199.

#### Drug Tests Required

DOT Procedures (49 CFR 40.61) cover the appropriate steps to collect urine specimens from employees who need medical attention. Moreover, § 40.61(b)(3) specifically forbids collection from an unconscious employee. Therefore, we propose to delete the following sentence from

§ 199.11(b) [or redesignated § 199.105(b)]: “If an employee is injured, unconscious, or otherwise unable to evidence consent to the drug test, all reasonable steps must be taken to obtain a urine sample.”

Section 199.11(e) prescribes the role of a substance abuse professional in returning to duty a covered employee who refuses or fails a drug test. For consistency with Part 40, § 199.11(e) [or redesignated § 199.105(e)] would be revised to refer to DOT Procedures.

#### *Medical Review Officers*

Section 199.15(b) loosely defines the qualifications required of a medical review officer (MRO). To assure consistency and compliance with the detailed MRO qualifications stated in 49 CFR 40.121, we propose to revise § 199.15(b) [or redesignated § 199.109(b)] to refer to those qualifications.

Section 199.15(c) states a few functions of medical review officers, focusing primarily on the review of positive and negative test results. In contrast, Part 40 covers MRO functions comprehensively, including the review of reports of tests not performed for reasons including adulterated or substituted specimens. Therefore, we propose to amend § 199.15(c) [or redesignated § 199.109(c)] to state that the MRO must provide functions for the operator as required by DOT Procedures.

Section 199.15(d)(1) provides that MROs are not required to take further action if they determine there is a legitimate medical explanation for a confirmed positive test result other than the unauthorized use of prohibited drugs. However, Part 40 does require MROs to take further action in these circumstances. Under § 40.163, MROs must report all test results to employers. Also, § 199.15(d)(2) is jumbled and could be misinterpreted to require MROs to refer individuals with verified positive test results to a substance abuse professional, when under Part 40 employers make such referrals. So we propose to amend § 199.15(d) [or redesignated § 199.109(d)] to state that MROs must report all test results to operators in accordance with DOT Procedures. Because other Part 40 requirements describe what employers must do after receiving MRO reports, the existing provisions in § 199.15(d) regarding further proceedings and evaluation by a substance abuse professional would be deleted as superfluous.

#### *Retention of Samples and Retesting*

Under § 199.17(b), if an 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. This provision is inconsistent with 49 CFR 40.153(b), which allows employees only 72 hours to make a timely request for an additional test, and the request need not be in writing. So we propose to revise § 199.17(b) [or redesignated § 199.111(b)] to require additional testing if the employee makes a timely request for additional testing according to DOT Procedures.

Revised Part 40 requires split specimen collections (49 CFR 40.71(a)). And the reference to DOT Procedures in §§ 199.5 and 199.7 will make split specimen collections mandatory under Part 199. Under the Part 40 split specimen collection process, employers divide each collected urine specimen into a primary specimen and a split specimen. If a covered employee requests additional testing, Part 40 requires that the test be done only on the split specimen (49 CFR 40.153).

In view of this requirement, we are concerned about the appropriateness of the term “original sample” in § 199.17(b). We believe “original sample” could be misunderstood to mean “primary specimen.” We propose to amend § 199.17(b) [or redesignated § 199.111(b)] to indicate that the split specimen must be tested when a covered employee requests additional testing. Also, since the concept of “retesting” is no longer suitable under this section, the term would be dropped and replaced by “testing” or “additional testing”.

#### *Pre-Employment Alcohol Testing*

Part 199 does not require operators to conduct pre-employment tests for alcohol. However, § 199.209 makes it clear that Part 199 does not affect the authority of operators to conduct tests for alcohol that are not required by Part 199. We are proposing to amend § 199.209 to require that if operators conduct pre-employment tests for alcohol, the tests must be done according to DOT Procedures.

#### *Stand-Down Waivers*

Revised Part 40 prohibits employers from temporarily removing employees from performing safety-sensitive functions based on an unverified positive drug test result (49 CFR

40.21(a)). At the same time, Part 40 permits employers to petition DOT agencies to waive this stand-down restriction (49 CFR 40.21(b)). To facilitate this waiver process, we are proposing a new procedural rule, § 199.9, for operators to follow when seeking from RSPA a waiver of the Part 40 stand-down restriction. The proposed rule advises operators how they should prepare stand-down waiver requests and to whom the requests should be sent.

#### *Checking Previous Test Results*

Under revised Part 40, employers may not hire or use any person in a safety-sensitive position unless they seek to obtain from previous DOT-regulated employers of the person certain drug and alcohol testing information (49 CFR 40.25). To call attention to this new requirement, we propose to refer to it in new § 199.11. In addition, consistent with § 40.25, we propose to require operators to remove employees from covered functions, pending successful completion of the return-to-duty process, if after reviewing the information the operator learns the employee violated a DOT agency drug or alcohol testing rule.

#### *Release of Information*

New Part 40 authorizes employers to release employee-specific drug and alcohol testing information without the employee’s consent in connection with certain legal proceedings (§ 40.323). However, § 199.23(b) does not permit releases of drug information in legal proceedings without employee consent. And although § 199.231(g) permits releases of alcohol information without employee consent in certain legal proceedings, § 199.231(g) is not consistent with § 40.323 in several respects. In addition, § 199.23(b) limits the drug test information operators must furnish RSPA or a state pipeline safety agency regardless of employee consent to information related to accident investigations. A similar limitation is not in § 199.231(d) governing the release to RSPA and state agencies of alcohol test information, nor is it in § 40.331 governing the release of name-specific alcohol and drug information to DOT and state agencies. Consequently, we propose to amend § 199.23(b) [redesignated § 199.117(b)] to provide that operators may or are required to release information without the employee’s consent as provided by DOT Procedures. Section 199.231(g) would be amended to permit releases without consent in legal proceedings as provided by DOT Procedures.

**Regulatory Analyses and Notices***Executive Order 12866 and DOT Policies and Procedures*

RSPA does not consider this proposed rulemaking to be a significant regulatory action under Section 3(f) of Executive Order 12866 (58 FR 51735; Oct. 4, 1993). Therefore, the Office of Management and Budget (OMB) has not received a copy of this rulemaking to review. RSPA also does not consider this proposed rulemaking to be significant under DOT regulatory policies and procedures (44 FR 11034; February 26, 1979).

The proposed rules are non-significant because they would merely change Part 199 to conform it to revised 49 CFR part 40, which has already had extensive comment and analysis. The economic impacts of the underlying Part 40 changes were analyzed in connection with the Part 40 rulemaking, and the proposed rules would not have any incremental economic impacts on their own. Regarding the clarifying and organizational changes we are proposing that are not directly due to revised Part 40, our assessment of these changes is that the economic impact would be too minimal to warrant the preparation of a Regulatory Evaluation.

*Regulatory Flexibility Act*

The proposed rules are consistent with revised Part 40 and have no incremental economic impacts of their own. Therefore, based on the facts available about the anticipated impacts of this proposed rulemaking, I certify, pursuant to Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605), that the proposed rules, if adopted as final, would not have a significant impact on a substantial number of small entities.

*Paperwork Reduction Act*

All the information collection requirements of Part 40 have been analyzed and approved by OMB. These proposed rules would impose no information collection requirements that have not already been reviewed in the Part 40 rulemaking. So no further Paperwork Reduction Act review is necessary.

*Executive Order 12612*

The proposed rules would not have a substantial direct effect on states, on the relationship between the Federal 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 (52 FR 41685; October 30, 1987), we

have determined that the proposed rules would not have sufficient federalism implications to warrant preparation of a federalism assessment.

*Executive Order 13084*

The proposed rules have been analyzed in accordance with the principles and criteria contained in Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments." Because the proposed rules would not significantly or uniquely affect the communities of the Indian tribal governments and would not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

*Executive Order 13132*

Revised Part 40 has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). The proposed rules have no incremental Federalism impacts for purposes of Executive Order 13132. So no further analysis is needed for Federalism purposes.

*Impact on Business Processes and Computer Systems*

We do not want to impose new requirements that would mandate business process changes when the resources necessary to implement those requirements would otherwise be applied to "Y2K" or related computer problems. The proposed rules would not mandate business process changes or require modifications to computer systems. Because the proposed rules would not affect the ability of organizations to respond to those problems, we are not proposing to delay the effectiveness of the requirements.

*Unfunded Mandates Reform Act of 1995*

The proposed rules would not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. The rules would not result in costs of \$100 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and would be the least burdensome alternative that achieves the objective of the rules.

*National Environmental Policy Act*

We have analyzed the proposed rules for purposes of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). Because the proposed rules parallel present requirements of revised Part 40 or involve clarifying or organizational changes, we have preliminarily determined that the proposed rules would not significantly

affect the quality of the human environment. A final determination on environmental impact will be made after the end of the comment period.

**List of Subjects in 49 CFR Part 199**

Drug testing, Pipeline safety, Reporting and recordkeeping requirements, Safety, Transportation.

In consideration of the foregoing, we propose to amend 49 CFR Part 199 as follows:

**PART 199—DRUG AND ALCOHOL TESTING**

1. The authority citation for part 199 continues to read as follows:

**Authority:** 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

2. The heading for subpart A is revised to read as follows:

**Subpart A—General**

3. In § 199.1, paragraph (a) is revised, paragraph (b) is removed, and paragraphs (c) and (d) are redesignated as paragraphs (b) and (c), respectively, to read as follows:

**§ 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 covered employees for the presence of prohibited drugs and alcohol.

\* \* \* \* \*

4. Section 199.2 is added to read as follows:

**§ 199.2 Applicability.**

This part does not apply to covered functions performed on—

(a) Master meter systems, as defined in § 191.3 of this chapter; or

(b) Pipeline systems that transport only petroleum gas or petroleum gas/air mixtures.

5. In § 199.3, the introductory text is revised, the definitions of "Covered employee" and "Refuse to submit" are removed, the definitions of "Covered function," "DOT Procedures," and "Prohibited drug" are revised, and definitions of "Covered employee, employee, or individual to be tested," "Performs a covered function," and "Refuse to submit, refuse, or refuse to take" are added in alphabetical order, to read as follows:

**§ 199.3 Definitions.**

As used in this part—

\* \* \* \* \*

*Covered employee, employee, or individual to be tested* means a person who performs a covered function, including persons employed by operators, contractors engaged by

operators, and persons employed by such contractors.

Covered function means an operations, maintenance, or emergency-response function regulated by part 192, 193, or 195 of this chapter that is performed on a pipeline or LNG facility.

DOT Procedures means the Procedures for Transportation Workplace Drug and Alcohol Testing Programs published by the Office of the Secretary of Transportation in part 40 of this title.

\* \* \* \* \*

Performs a covered function includes actually performing, ready to perform, or immediately available to perform a covered function.

\* \* \* \* \*

Prohibited drug means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act (21 U.S.C. 812): marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP).

\* \* \* \* \*

Refuse to submit, refuse, or refuse to take means behavior consistent with DOT Procedures concerning refusal to take a drug test or refusal to take an alcohol test.

\* \* \* \* \*

6. Section 199.5 is revised to read as follows:

§ 199.5 DOT procedures.

The anti-drug and alcohol programs required by this part must be conducted according to the requirements of this part and DOT Procedures. Terms and concepts used in this part have the same meaning as in DOT Procedures. Violations of DOT Procedures with respect to anti-drug and alcohol programs required by this part are violations of this part.

6a. Subpart B is redesignated as subpart C.

7. Existing §§ 199.7, 199.9, 199.11, 199.13, 199.15, 199.17, 199.19, 199.21, 199.23, and 199.25 are redesignated as §§ 199.101, 199.103, 199.105, 199.107, 199.109, 199.111, 199.113, 199.115, 199.117, and 199.119, respectively, in new subpart B, and a subpart B heading is added to read as follows:

Subpart B—Drug Testing

8. New § 199.9 is added to subpart A to read as follows:

§ 199.9 Stand-down waivers.

(a) Each operator who seeks a waiver under § 40.21 of this title from the stand-down restriction shall submit an application for waiver in duplicate to the Associate Administrator for Pipeline

Safety, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590.

(b) Each application must:

(1) Identify § 40.21 of this title as the rule from which the waiver is sought;

(2) Explain why the waiver is requested and describe the employees to be covered by the waiver;

(3) Contain the information required by § 40.21 of this title and any other information or arguments available to support the waiver requested; and

(4) Unless good cause is shown in the application, be submitted at least 60 days before the proposed effective date of the waiver.

(c) No public hearing or other proceeding is held directly on an application before its disposition under this section. If the Associate Administrator determines that the application contains adequate justification, he or she grants the waiver. If the Associate Administrator determines that the application does not justify granting the waiver, he or she denies the application. The Associate Administrator notifies each applicant of the decision to grant or deny an application.

9. New § 199.11 is added to subpart A to read as follows:

§ 199.11 Checking Previous Test Results.

(a) As required by DOT Procedures, no operator may hire or use any person to perform a covered function unless the operator has sought to obtain from previous DOT-regulated employers of the person certain drug and alcohol testing information.

(b) If, after reviewing the information, the operator learns the employee violated a DOT agency drug or alcohol testing rule, the operator shall remove the employee from covered functions, pending successful completion of the return-to-duty process.

10. In redesignated § 199.103, paragraph (a)(1) is amended by removing the term “§ 199.15(d)(2)” and adding “DOT Procedures” in its place, and by revising paragraph (b)(2) to read as follows:

§ 199.103 Use of persons who fail or refuse a drug test.

\* \* \* \* \*

(b) \* \* \*

(2) Been considered by the medical review officer in accordance with DOT Procedures and been determined by a substance abuse professional to have successfully completed required education or treatment; and

\* \* \* \* \*

11. In redesignated § 199.105, paragraph (b) is revised, paragraphs

(c)(3) and (c)(4) are amended by removing the term “§ 199.25” and adding “§ 199.119” in its place wherever the term appears, and paragraph (e) is revised, to read as follows:

§ 199.105 Drug tests required.

\* \* \* \* \*

(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, it is not likely that a drug test would reveal whether the performance was affected by drug use.

\* \* \* \* \*

(e) Return to duty testing. A covered employee who refuses to take or has a positive drug test may not return to duty in the covered function until the covered employee has complied with DOT Procedures on return to duty and the role of a substance abuse professional.

\* \* \* \* \*

12. In redesignated § 199.109, paragraphs (b), (c), and (d) are revised to read as follows:

§ 199.109 Review of drug testing results.

\* \* \* \* \*

(b) MRO qualifications. Each MRO must be a licensed physician who has the qualifications required by DOT Procedures.

(c) MRO duties. The MRO shall perform functions for the operator as required by DOT Procedures.

(d) MRO reports. The MRO shall report all drug test results to the operator in accordance with DOT Procedures.

\* \* \* \* \*

13. In redesignated § 199.111, the section heading and the first sentence of paragraph (b) are revised, the second sentence of paragraph (b) and paragraph (c) are amended by removing the term “retesting” and adding “testing” in its place wherever the term appears, and the last sentence of paragraph (b) is amended by removing the term “retest” and adding “additional test” in its place, to read as follows:

**§ 199.111 Retention of samples and additional testing.**

\* \* \* \* \*

(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, and if timely additional testing is requested by the employee according to DOT Procedures, the split specimen must be tested. \* \* \*

\* \* \* \* \*

14. The first sentence of redesignated § 199.117(b) is revised to read as follows:

**§ 199.117 Recordkeeping.**

\* \* \* \* \*

(b) Information regarding an individual's drug testing results or rehabilitation may be released only upon the written consent of the individual, except as provided by DOT Procedures. \* \* \*

**§ 199.201 [Removed and Reserved]**

15. Section 199.201 is removed and reserved.

16. In § 199.202, the first sentence is revised to read as follows:

**§ 199.202 Alcohol misuse plan.**

Each operator shall maintain and follow a written alcohol misuse plan that conforms to the requirements of this part and DOT Procedures concerning alcohol testing programs. \* \* \*

**§§ 199.203, 199.205 [Removed and Reserved]**

17. Sections 199.203 and 199.205 are removed and reserved.

18. Section 199.207 is redesignated as new § 199.7 and transferred to subpart A, and redesignated § 199.7 is amended by removing the term "subpart" and adding "part" in its place wherever the term appears.

19. In § 199.209, the existing text is designated as paragraph (a) and new paragraph (b) is added to read as follows:

**§ 199.209 Other requirements imposed by operators.**

\* \* \* \* \*

(b) As an operator, you may, but are not required to, conduct pre-employment alcohol testing under this part. If you choose to conduct pre-employment alcohol testing, you must comply with the following requirements:

(1) You must conduct a pre-employment alcohol test before the first performance of covered functions by every covered employee (whether a new employee or someone who has

transferred to a position involving the performance of covered functions).

(2) You must treat all covered employees the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

(3) You must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) You must conduct all pre-employment alcohol tests using the alcohol testing procedures in DOT Procedures.

(5) You must not allow a covered employee to begin performing covered functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

**§ 199.213 [Removed and Reserved]**

20. Section 199.213 is removed and reserved.

**§ 199.225 [Amended]**

21. In § 199.225, paragraphs (a)(2)(ii) and (b)(4)(ii) are removed and reserved.

22. Section 199.231(g) is revised to read as follows:

**§ 199.231 Access to facilities and records.**

\* \* \* \* \*

(g) An operator may disclose information without employee consent as provided by DOT Procedures concerning certain legal proceedings. \* \* \*

Issued in Washington, DC, on March 30, 2001.

**Stacey L. Gerard,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 01-9412 Filed 4-27-01; 8:45 am]

**BILLING CODE 4910-60-P**

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 219**

[FRA Docket No. RSOR-6, Notice No. 48]

RIN 2130-AB43

**Control of Alcohol and Drug Use: Proposed Changes To Conform With New DOT Transportation Workplace Testing Procedures**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT or Department).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** On December 19, 2000, DOT published a final rule comprehensively

changing its procedures for transportation workplace drug and alcohol testing programs. These amendments to the DOT drug and alcohol testing rule became effective on January 18, 2001; the revised DOT testing rule will become effective on August 1, 2001. The new DOT testing rule uses a plain language, question-and-answer format to make the Department's procedures clearer, more comprehensive, and more up-to-date.

FRA and the other DOT agencies with substance abuse programs governed by DOT testing procedures (the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the Research and Special Programs Administration (RSPA), and the United States Coast Guard (USCG)) are publishing NPRMs in today's **Federal Register** proposing changes that would conform their individual regulations to the new DOT procedures. See the Department's Common Preamble to this NPRM for an additional discussion of the changes proposed in this NPRM.

**DATES:** Written comments must be received by June 14, 2001. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

**ADDRESSES:** Anyone wishing to file a comment should refer to the FRA docket and notice numbers (FRA Docket No. RSOR-6, Notice No. 48). You may submit your comments and related material by only one of the following methods:

By mail to the Docket Management System, U.S. Department of Transportation, room PL-401, 400 7th Street, SW., Washington, DC 20590-0001; or Electronically through the Web site for the Docket Management System at <http://dms.dot.gov>. For instructions on how to submit comments electronically, visit the Docket Management System Web site and click on the "Help" menu.

The Docket Management Facility maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room PL-401 on the plaza level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS-11, 1120 Vermont Avenue, NW., Mail Stop

25, Washington, DC 20590 (telephone 202-493-6313); or Patricia V. Sun, Trial Attorney, Office of the Chief Counsel, RCC-11, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590 (telephone 202-493-6038).

#### SUPPLEMENTARY INFORMATION:

##### Background

In this NPRM, FRA proposes changes that would conform its drug and alcohol testing regulations (49 CFR part 219) to the recently published revision of DOT's procedures for transportation workplace drug and alcohol testing programs (49 CFR part 40) (December 19, 2000, 65 FR 79462). FRA (concurrently with FAA, FMCSA, FTA, RSPA, and USCG, which also have programs governed by part 40 procedures), is publishing an NPRM that would reference the new part 40 in its own drug and alcohol testing rule.

FRA will not hold a public hearing on this proposal. This NPRM is nonsignificant and proposes only changes to update this part and conform it to the new part 40. The changes in part 40 were fully discussed at three Department listening sessions held earlier this year.

FRA proposes to delete from part 219 provisions that are also covered in the new part 40. Railroad employers and employees, along with others affected by part 219, have always been required to read and understand *both* part 219 and part 40 to comply with FRA's drug and alcohol workplace requirements. Referring the reader directly to part 40 instead of duplicating part 40 rule text in part 219 would promote both drafting economy and consistency of interpretation.

Deleting part 40 material from part 219 would affect only certain subparts of FRA's rule. Part 40 procedures do not cover FRA post-accident toxicological testing (subpart C of part 219), which predates part 40, has always used separate procedures, and is explicitly exempted from the new part 40 in § 40.1. Most of the general requirements (subpart A) and prohibitions (subpart B) in part 219 would remain unchanged since they are specific to the rail industry (with the exception of the return-to-duty, follow-up testing and Substance Abuse Professional (SAP) requirements in § 219.104, which would be deleted since they now duplicate those in part 40). Employee referral and assistance (subpart E), annual report (subpart I) and recordkeeping (subpart J) requirements would remain in part 219, but most of the procedural provisions in subparts D, F, G, and H (respectively, mandatory reasonable suspicion, Federal reasonable cause, pre-employment, and random testing)

would be deleted from part 219 since these types of testing use part 40 procedures.

Although the primary purpose of this NPRM is to conform part 219 with the new part 40, FRA would also make corrections to comply with **Federal Register** format requirements and delete outdated rule text references (e.g., past implementation dates, former accident reporting thresholds, old contact information) that can currently be found throughout part 219. FRA would also delete Appendix D, which reprints the Management Information System (MIS) reporting forms for railroad drug and alcohol programs; these forms have been in use since 1994 and are now available electronically. Following plain language principles, FRA would also substitute "must" for "shall" throughout this document, to make clear that FRA intends for the word "shall," as currently used in part 219, to impose a requirement, not to express futurity or any other notion. Because part 40 already authorizes saliva alcohol testing, and may eventually authorize other testing methodologies, FRA would also remove the references in subparts D, F, G, and H to "urine drug testing" and "breath alcohol testing" and replace these, where appropriate, with more generic terms such as "alcohol testing," "drug testing," and "breath or body fluid testing."

Finally, part 219 contains citations to the Federal Railroad Safety Act of 1970 and the Hours of Service Act, which were repealed in 1994 as part of a broad recodification of the transportation laws and then reenacted without substantive change as positive law in title 49 of the United States Code. See Public Law 103-272. Throughout this document, FRA would replace these references to repealed statutes with references to the proper sections or chapters in title 49 of the United States Code. FRA does not intend to alter the substantive meaning of a provision by making technical changes to its statutory citations.

For ease of reference, FRA is publishing part 219 in its entirety with the proposed amendments discussed below. FRA intends to time publication of the final rule so that its conforming changes to part 219 become effective concurrently with most of part 40 on August 1, 2001.

#### Section-by-Section Analysis

##### Subpart A—General

##### Section 219.5 Definitions

Since part 219 would incorporate by reference all of part 40, FRA proposes to delete from part 219 those definitions that can now be found in § 40.3:

*Alcohol, Alcohol concentration, Alcohol use, Consortium, DOT agency, Drug(s), and Medical Review Officer*; FRA would also delete *Refuse to submit* (to a drug test) and *Refuse to submit* (to an alcohol test), which are defined in §§ 40.191 and 40.261, respectively. Definitions specific to part 219, the rail industry, or both, such as *Covered employee* and *Railroad* would remain in this rule.

The definition of *Class I, Class II, and Class III* has been revised by deleting ", as those regulations may be revised and applied by order of the Board (including modifications in class thresholds based on revenue deflator adjustments)." The purpose of this change is to conform to **Federal Register** requirements; no substantive change is intended.

FRA would also delete the outdated references to the 1991 through 1999 accident reporting thresholds from these definitions: *Impact accident, Reporting threshold, and Train accident*. See the discussion of § 219.201 for a further discussion of the proposed changes to these definitions.

##### Section 219.7 Waivers

##### Paragraph (b)

Section 40.21 maintains the Departmental policy of prohibiting employers from standing employees down; that is, removing employees from safety-sensitive service after the Medical Review Officer (MRO) has received a laboratory report of confirmed positive test results, adulterated test results, or substituted test results, before the results have been verified by the MRO. DOT agencies may, however, waive this prohibition if an employer can demonstrate that a waiver would effectively enhance safety while protecting employee fairness and confidentiality. FRA's Railroad Safety Board would determine each petition for stand down in accordance with § 40.21 and subpart C of 49 CFR part 211, which subpart contains the rules of practice governing petitions for waiver of FRA safety rules, regulations or standards.

##### Section 219.11 General Conditions for Chemical Tests

##### Paragraph (b)

In § 219.11, FRA would delete the last two sentences of (b)(2), which address the use of catheterization to obtain urine samples for testing, and would delete subparagraph (b)(4), which makes tampering with a sample through adulteration, dilution, or substitution a refusal to provide a sample. DOT addresses the use of catheterization in § 40.61(b)(3), what constitutes a refusal to provide a sample in § 40.191, and

what an employer must do following a verified adulterated or substituted test result in § 40.23.

#### Section 219.21 Information Collection

FRA would update the list of information collection requirements in this section by adding §§ 219.801, 219.803, 219.901, and 219.903 from the annual report and recordkeeping requirements found in subparts I and J, respectively, of this part; which were approved by the Office of Management and Budget before their implementation in 1994. FRA would also add an information collection requirement for § 219.502, which authorizes pre-employment alcohol testing, and would delete the requirements for §§ 219.307 and 219.309, which have already been deleted from this rule, and §§ 219.703, 219.705, 219.707, 219.709, 219.711, and 219.713, which FRA proposes to delete in this rulemaking.

#### Section 219.23 Railroad Policies

##### Paragraph (b)

FRA would add new language reiterating the prohibition in § 40.47 against the use of DOT custody and control forms for non-DOT testing. Section 219.23 would otherwise remain the same.

##### *Subpart B—Prohibitions*

#### Section 219.102 Prohibitions on Abuse of Controlled Substances

FRA would delete the 1989 implementation date from this section.

#### Section 219.104 Responsive Action

##### Paragraph (d)

FRA would delete its return-to-service and follow-up testing requirements, and its Substance Abuse Professional (SAP) conflict-of-interest prohibitions, and instead reference the sections in part 40 that cover these requirements (§§ 40.305, 40.307, and 40.299, respectively) in amended paragraph (d). FRA would also delete paragraphs (e) and (f) of this section, which would then be made unnecessary, and paragraph (g) of this section, which mandated a 1995 implementation date for certain requirements in this section.

##### *Subpart C—Post-Accident Toxicological Testing*

As stated above, part 40 procedures do not apply to FRA post-accident toxicological testing, which has always followed its own unique procedures. Section 40.1(c) explicitly states that nothing in part 40 supersedes or conflicts with FRA's post-accident testing program. Since this subpart does not need to be conformed to part 40, the

only proposals are minor technical changes to update this subpart.

One change would streamline FRA's procedures for notification after post-accident events. One-stop notification to the National Response Center (NRC) would be sufficient for problems in obtaining samples from an injured employee (§ 219.203(d)(2)) or an employee fatality (§ 219.207(b)), although FRA would still require railroads to notify both the NRC and FRA whenever post-accident testing is conducted (§ 219.209). The remaining technical changes are discussed below.

#### Section 219.201 Events for Which Testing Is Required

##### Paragraph (a)

In its annual adjustment of the accident reporting threshold, FRA decided to leave the \$6,600 accident reporting threshold unchanged for calendar year 2001 (November 21, 2000, 65 FR 69884). The reporting threshold final rule, which becomes effective January 1, 2001, amends this section and the definitions of *Impact accident*, *Reporting Threshold*, and *Train Accident* found in § 219.5.

In this NPRM, FRA proposes to "clean up" part 219 by removing the outdated references to the accident reporting thresholds listed for the years 1991–1999. To streamline this part, FRA would incorporate the accident reporting threshold set annually in § 225.19(e) of its accident reporting rule (49 CFR part 225) instead of listing the threshold for each year in this section and in the definitions listed above in § 219.5.

#### Section 219.211 Analysis and Follow-up

##### Paragraph (i)

FRA would amend this paragraph, which currently allows an employee the right to request a retest of his or her post-accident samples. This right no longer exists, since FRA incorporated split sample testing into its post-accident testing procedures in 1994; the employee would still have up to 60 days from the date of the toxicology report (instead of 72 hours from notification by the MRO as in § 40.171) to request that his or her split samples be tested.

##### *Subpart D—Testing for Cause*

#### Section 219.300 Mandatory Reasonable Suspicion Testing

##### Paragraph (a)

FRA would remove the 1995 implementation date from this paragraph.

#### Paragraph (d)(2)

FRA would delete this paragraph which contains reporting requirements that expired on March 15, 1998.

#### Section 219.303 Alcohol Test Procedures and Safeguards

FRA would delete this section, since alcohol testing conducted under this subpart now follows part 40 procedures.

#### Section 219.305 Urine Test Procedures and Safeguards

FRA would delete this section since it would be made unnecessary by revised § 219.701, which would combine all of the sections in the current rule that require tests conducted under part 219 authority (except for subpart C post-accident testing) to follow part 40 procedures.

##### *Subpart E—Identification of Troubled Employees*

Other than the proposed amendment to § 219.403 discussed below, this subpart would remain unchanged.

#### Section 219.403 Voluntary Referral Policy

##### Subparagraph (b)(5)

With respect to a certified locomotive engineer and a candidate for certification, § 240.119(e) of FRA's regulations on qualification and certification of locomotive engineers (49 CFR part 240) requires the railroad to waive its policy of confidentiality and suspend or revoke the engineer's certificate if the SAP reports that the engineer has failed to cooperate with a course of recommended treatment. For ease of reference, FRA would add a new subparagraph cross-referencing this requirement, which applies to all voluntary referral policies.

##### *Subpart F—Pre-Employment Tests*

#### Section 219.501 Pre-Employment Drug Testing

#### Section 219.502 Pre-Employment Alcohol Testing

FRA would revise this subpart to delete an outdated implementation schedule and separately address pre-employment drug testing and pre-employment alcohol testing. Section 219.501 would be revised to address only pre-employment drug testing requirements, which would remain unchanged. FRA would create a new § 219.502 to incorporate Departmental language reauthorizing pre-employment alcohol testing, which was suspended in May 1995 (May 10, 1995, 60 FR 24766). Pre-employment alcohol testing, unlike pre-employment drug testing, would be authorized but not mandatory.

See the Common Preamble to this NPRM for a discussion of § 40.25, which requires employers to ask applicants whether there were any situations in which they tested positive on a pre-employment test for an employer that subsequently did not hire them.

#### Section 219.503 Notification; Records

For the reasons discussed above, FRA proposes to remove the references in this section to “urine and breath tests” and replace these with more generic references to “drug and alcohol tests.”

#### Subpart G—Random Alcohol and Drug Testing Programs

##### Section 219.601 Railroad Random Drug Testing Programs

###### Paragraph (a) and Subparagraph (d)(2)

FRA would delete the outdated implementation schedule from this section because random drug testing is fully implemented in the rail industry. New railroads must submit a random testing program for FRA approval within 60 days after commencing operations, and implement the program as approved within 60 days of receiving approval.

##### Section 219.605 Positive Drug Test Results; Procedures

Paragraph (a) of this section would be removed and reserved, since it has been superseded by the MRO verification requirements in § 40.129. FRA would also delete the now unnecessary reference to a “retest” from paragraph (b) of this section.

##### Section 219.607 Railroad Random Alcohol Testing Programs

###### Paragraph (a) and Subparagraph (c)(2)

As with § 219.601, FRA would delete the outdated implementation schedule and specify the implementation requirements for new railroads.

##### Section 219.608 Administrator's Determination of Random Alcohol Testing Rate

###### Subparagraph (b)(1)(i)

This subparagraph specifies the implementation requirements for new railroads.

#### Subpart H—Drug and Alcohol Testing Procedures

##### Section 219.701 Standards for Drug and Alcohol Testing

FRA would revise this section to consolidate in one section the requirement that testing under subparts B, D, F, and G of this part comply with part 40 procedures. In new paragraph (c) of this section, FRA would expand the

requirement (currently found in § 219.715(a), which would be deleted) that an employee proceed to the testing site immediately upon notification of selection apply to random drug testing as well as to random alcohol testing. FRA would delete the rest of this subpart (§§ 219.703–219.715), since it has been superseded by part 40.

#### Subpart I—Annual Report

FRA does not propose to change the reporting requirements of its Management Information System (MIS).

#### Subpart J—Recordkeeping Requirements

##### Section 219.901 Retention of Alcohol Testing Records

##### Section 219.903 Retention of Drug Testing Records

FRA would streamline these sections by deleting any recordkeeping requirements that duplicate those contained in various sections of part 40. In addition to the employer recordkeeping requirements in § 40.333, part 40 now requires service agents to maintain copies of records that were formerly required to be kept by employers (e.g., SAPs are now required to maintain copies of their evaluation and follow-up reports to employers for five years), so that some of the recordkeeping responsibilities currently in §§ 219.901 and 219.903 would shift from railroads to their service agents.

#### Appendix A to Part 219—Schedule of Civil Penalties

FRA proposes to clarify its schedule of civil penalties by reorganizing the schedule and listing more guideline penalty amounts for violations of part 219. The examples provided are illustrative, not comprehensive, as stated in footnote 1, FRA reserves the right to assess a penalty of up to \$22,000 for any violation of this rule, including violations not listed in this penalty schedule.

For the most part, FRA does not propose to raise its guideline penalty amounts above their current levels. The additional violations listed have proposed assessments equivalent to violations already listed in the penalty schedule. The only exceptions are those violations currently listed at the statutory minimum of \$500 (see § 209.409 in FRA's railroad safety enforcement procedures (49 CFR part 209)); FRA would raise the penalties for these violations to \$1,000.

#### Appendix D to Part 219—Management Information System Collection Forms

As discussed above, FRA would delete Appendix D, which reprints MIS forms that have been in use since 1994.

### Regulatory Analyses and Notices

While the Department's final rule amending part 40 is significant for purposes of Executive Order 12866, this NPRM is not. Although the part 40 rule contains major policy changes, the proposed amendments in this NPRM would make policy changes only to the extent necessary to conform this rule to the changes already made in part 40. The other purpose of this NPRM is to update part 219 by deleting outdated references.

The Department's regulatory analysis of part 40 determined that the final rule is not economically significant since its reworking of existing requirements would not result in significant new costs. This NPRM, which would conform part 219 to part 40, is likewise not economically significant. FRA has therefore not prepared a Regulatory Evaluation of the costs and benefits of this proposal.

See the Department of Transportation's common preamble, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs,” for a regulatory evaluation summary of this and the other operating administration NPRMs proposing changes to conform to the new part 40.

### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, FRA has determined that there are no new requirements for information collection associated with this proposed rule.

### Request for Public Comment

In accordance with Executive Order 12866, FRA is allowing members of the public 60 days to comment on this proposed rule. FRA may make changes to the final rule based on comments received in response to this NPRM.

### List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

### The Proposal

For the reasons stated above, FRA proposes to revise part 219 to read as follows:

**PART 219—CONTROL OF ALCOHOL AND DRUG USE****Subpart A—General**

- Sec.  
 219.1 Purpose and scope.  
 219.3 Application.  
 219.5 Definitions.  
 219.7 Waivers.  
 219.9 Responsibility for compliance.  
 219.11 General conditions for chemical tests.  
 219.13 Preemptive effect.  
 219.15 [Reserved]  
 219.17 Construction.  
 219.19 [Reserved]  
 219.21 Information collection.  
 219.23 Railroad policies.

**Subpart B—Prohibitions**

- 219.101 Alcohol and drug use prohibited.  
 219.102 Prohibition on abuse of controlled substances.  
 219.103 Prescribed and over-the-counter drugs.  
 219.104 Responsive action.  
 219.105 Railroad's duty to prevent violations.  
 219.107 Consequences of unlawful refusal.

**Subpart C—Post-Accident Toxicological Testing**

- 219.201 Events for which testing is required.  
 219.203 Responsibilities of railroads and employees.  
 219.205 Sample collection and handling.  
 219.206 FRA access to breath test results.  
 219.207 Fatality.  
 219.209 Reports of tests and refusals.  
 219.211 Analysis and follow-up.  
 219.213 Unlawful refusals; consequences.

**Subpart D—Testing for Cause**

- 219.300 Mandatory reasonable suspicion testing.  
 219.301 Testing for reasonable cause.  
 219.302 Prompt sample collection; time limitation.

**Subpart E—Identification of Troubled Employees**

- 219.401 Requirement for policies.  
 219.403 Voluntary referral policy.  
 219.405 Co-worker report policy.  
 219.407 Alternate policies.

**Subpart F—Pre-employment Tests**

- 219.501 Pre-employment drug testing.  
 219.502 Pre-employment alcohol testing.  
 219.503 Notification; records.  
 219.505 Refusals.

**Subpart G—Random Alcohol and Drug Testing Programs**

- 219.601 Railroad random drug testing programs.  
 219.602 FRA Administrator's determination of random drug testing rate.  
 219.603 Participation in drug testing.

- 219.605 Positive drug test results; procedures.  
 219.607 Railroad random alcohol testing programs.  
 219.608 FRA Administrator's determination of random alcohol testing rate.  
 219.609 Participation in alcohol testing.  
 219.611 Test result indicating prohibited alcohol concentration; procedures.

**Subpart H—Drug and Alcohol Testing Procedures**

- 219.701 Standards for drug and alcohol testing.

**Subpart I—Annual Report**

- 219.801 Reporting alcohol misuse prevention program results in a management information system.  
 219.803 Reporting drug misuse prevention program results in a management information system.

**Subpart J—Recordkeeping Requirements**

- 219.901 Retention of alcohol testing records.  
 219.903 Retention of drug testing records.  
 219.905 Access to facilities and records.  
**Appendix A to Part 219** Schedule of Civil Penalties  
**Appendix B to Part 219** Designation of Laboratory for Post-Accident Toxicological Testing  
**Appendix C to Part 219** Post-Accident Testing Sample Collection  
**Authority:** 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

**Subpart A—General****§ 219.1 Purpose and scope.**

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

(b) This part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

**§ 219.3 Application.**

(a) Except as provided in paragraphs (b) and (c) of this section, this part applies to—

(1) Railroads that operate rolling equipment on standard gage track which is part of the general railroad system of transportation; and (2) Railroads that provide commuter or other short-haul rail passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102). (b)(1) This part does not apply to a railroad that operates only on track inside an installation which is not

part of the general railroad system of transportation.

(2) Subparts D, E, F and G of this part do not apply to a railroad that employs not more than 15 employees covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, 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.

(3) Subpart I of this part does not apply to a railroad that has fewer than 400,000 total manhours.

(c) Subparts E, F and G of this part do not apply to operations of a foreign railroad conducted by covered service employees whose primary place of service ("home terminal") for rail transportation services is located outside the United States. Such operations and employees are subject to subparts A, B, C, and D of this part when operating in United States territory.

**§ 219.5 Definitions.**

As used in this part—

*Class I*, *Class II*, and *Class III* have the meaning assigned by regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1–1).

*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 parts 1301–1316).

*Covered employee* means a person who has been assigned to perform service subject to the hours of service laws (49 U.S.C. ch. 211) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service. (An employee is not "covered" within the meaning of this part exclusively by reason of being an employee for purposes of 49 U.S.C. 21106.) For the purposes of pre-employment testing only, the term "covered employee" includes a person applying to perform covered service.

*Co-worker* means another employee of the railroad, including a working supervisor directly associated with a yard or train crew, such as a conductor or yard foreman, but not including any other railroad supervisor, special agent, or officer.

*DOT Agency* means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol or controlled substance testing (14 CFR parts 61, 63, 65, 121 and 135; 49 CFR parts 199, 219, 382 and 655) in accordance with part 40 of this title.

*Drug* means any substance (other than alcohol) that has known mind- or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

*FRA* means the Federal Railroad Administration, United States Department of Transportation.

*FRA representative* means the Associate Administrator for Safety of FRA, the Associate Administrator's delegate (including a qualified State inspector acting under part 212 of this chapter), the Chief Counsel of FRA, or the Chief Counsel's delegate.

*Hazardous material* means a commodity designated as a hazardous material by part 172 of this title.

*Impact accident* means a train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold (see § 225.19(e) of this chapter)) consisting of a head-on collision, a rear-end collision, a side collision (including a collision at a railroad crossing at grade), a switching collision, or impact with a deliberately-placed obstruction such as a bumping post. The following are not impact accidents:

- (1) An accident in which the derailment of equipment causes an impact with other rail equipment;
- (2) Impact of rail equipment with obstructions such as fallen trees, rock or snow slides, livestock, etc.; and
- (3) Raking collisions caused by derailment of rolling stock or operation of equipment in violation of clearance limitations.

*Independent* with respect to a medical facility, means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad. The fact that the railroad pays for services rendered by a medical facility or laboratory, selects that entity for performing tests under this part, or has a standing contractual relationship with that entity to perform tests under this part or perform other medical examinations or tests of railroad employees does not, by itself, remove the facility from this definition.

*Medical facility* means a hospital, clinic, physician's office, or laboratory where toxicological samples can be collected according to recognized professional standards.

*Medical practitioner* means a physician or dentist licensed or otherwise authorized to practice by the state.

*NTSB* means the National Transportation Safety Board.

*Passenger train* means a train transporting persons (other than employees, contractors, or persons riding equipment to observe or monitor railroad operations) in intercity passenger service, commuter or other short-haul service, or for excursion or recreational purposes.

*Positive rate* means the number of positive results for random drug tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals of random tests required by this part.

*Possess* means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property.

*Railroad* means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, and any person providing such transportation, including—

- (1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
- (2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

*Railroad property damage* or *damage to railroad property* refers to damage to railroad property, including railroad on-track equipment, signals, track, track structures (including bridges and tunnels), or roadbed, including labor costs and all other costs for repair or replacement in kind. Estimated cost for replacement of railroad property must be calculated as described in the FRA Guide for Preparing Accident/Incident Reports. (See § 225.21 of this chapter.) However, replacement of passenger equipment is calculated based on the cost of acquiring a new unit for comparable service.

*Reportable injury* means an injury reportable under part 225 of this chapter.

*Reporting threshold* means the amount specified in § 225.19(e) of this chapter, as adjusted from time to time in accordance with appendix B to part 225 of this chapter.

*Supervisory employee* means an officer, special agent, or other employee of the railroad who is not a co-worker and who is responsible for supervising or monitoring the conduct or performance of one or more employees.

*Train*, except as context requires, means a locomotive, or more than one locomotive coupled, with or without cars. (A locomotive is a self-propelled unit of equipment which can be used in train service.)

*Train accident* means a passenger, freight, or work train accident described in § 225.19(c) of this chapter (a "rail equipment accident" involving damage in excess of the current reporting threshold), including an accident involving a switching movement.

*Train incident* means an event involving the movement of railroad on-track equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

*Violation rate* means the number of covered employees (as reported under § 219.801) found during random tests given under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the industry given random alcohol tests under this part plus the total reported number of employees in the industry who refuse a random test required by this part.

#### § 219.7 Waivers.

(a) A person subject to a requirement of this part may petition the FRA for a waiver of compliance with such requirement.

(b) Each petition for waiver under this section must be filed in a manner and contain the information required by part 211 of this chapter. A petition for waiver of the part 40 prohibition against stand down of an employee before the Medical Review Officer has completed the verification must also comply with § 40.21 of this title.

(c) If the FRA Administrator finds that waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any necessary conditions.

#### § 219.9 Responsibility for compliance.

(a) Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing

goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500 and not more than \$11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which must be construed to qualify the responsibility of a railroad for the unauthorized conduct of an employee that violates §§ 219.101 or 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

(b)(1) In the case of joint operations, primary responsibility for compliance with this part with respect to determination of events qualifying for breath or body fluid testing under subparts C and D of this part rests with the host railroad, and all affected employees must be responsive to direction from the host railroad consistent with this part. However, nothing in this paragraph (b)(1) restricts the ability of the railroads to provide for an appropriate assignment of responsibility for compliance with this part as among those railroads through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with applicable portions of this part against the host railroad, the employing railroad, or both.

(2) Where an employee of one railroad is required to participate in breath or body fluid testing under subpart C or D of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad must be made available to the employee on a reasonable basis.

(c) Any independent contractor or other entity that performs covered service for a railroad has the same responsibilities as a railroad under this part, with respect to its employees who perform covered service. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad's treating

the entity's employees who perform covered service as if they were its own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of such a clear delineation of responsibility, FRA will hold the railroad and the other entity jointly and severally liable for compliance.

#### **§ 219.11 General conditions for chemical tests.**

(a) Any employee who performs covered service for a railroad is deemed to have consented to testing as required in subparts B, C, D, and G of this part; and consent is implied by performance of such service.

(b)(1) Each such employee must participate in such testing, as required under the conditions set forth in this part by a representative of the railroad.

(2) In any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid sample(s).

(3) Failure to remain available following an accident or casualty as required by company rules (i.e., being absent without leave) is considered a refusal to participate in testing, without regard to any subsequent provision of samples.

(c) A covered employee who is required to be tested under subpart C or D of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid sample taken by the treating facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such sample;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the treating facility on such sample;

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time samples were taken by the treating facility or prior to the time samples were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the treating facility.

(d) An employee required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) or testing subject

to subpart H of this part shall, if requested by the representative of the railroad or the medical facility (including, under subpart H of this part, a non-medical contract collector), evidence consent to taking of samples, their release for toxicological analysis under pertinent provisions of this part, and release of the test results to the railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. 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. Any consent provided consistent with this section may be construed to extend only to those actions specified in this section.

(e) Nothing in this part may be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing.

(f) Any railroad employee who performs service for a railroad is deemed to have consented to removal of body fluid and/or tissue samples necessary for toxicological analysis from the remains of such employee, if such employee dies within 12 hours of an accident or incident described in subpart C of this part as a result of such event. This consent is specifically required of employees not in covered service, as well as employees in covered service.

(g) Each supervisor responsible for covered employees (except a working supervisor within the definition of co-worker under this part) must be trained in the signs and symptoms of alcohol and drug influence, intoxication and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol and the major drug groups on the controlled substances list. The program must also provide training on the qualifying criteria for post-accident testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C and appendix C of this part. The duration of such training may not be less than 3 hours.

(h) Nothing in this subpart restricts any discretion available to the railroad to request or require that an employee

cooperate in additional body fluid testing. However, no such testing may be performed on urine or blood samples provided under this part. For purposes of this paragraph (h), all urine from a void constitutes a single sample.

**§ 219.13 Preemptive effect.**

(a) Under section 20106 of title 49, United States Code, issuance of the regulations in this part preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of the regulations in this part to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

**§ 219.15 [Reserved]**

**§ 219.17 Construction.**

Nothing in this part—

(a) Restricts the power of FRA to conduct investigations under sections 20107, 20108, 20111, and 20112 of title 49, United States Code; or

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or for damages resulting from noncompliance with this part.

**§ 219.19 [Reserved]**

**§ 219.21 Information collection.**

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) and have been assigned OMB control number 2130-0526.

(b) The information collection requirements are found in the following sections: 219.7, 219.23, 219.104, 219.201, 219.203, 219.205, 219.207, 219.209, 219.211, 219.213, 219.303, 219.401, 219.403, 219.405, 219.407, 219.501, 219.502, 219.503, 219.601, 219.605, 219.701, 219.801, 219.803, 219.901, and 219.903.

**§ 219.23 Railroad policies.**

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations. Use of the mandated DOT form for drug or alcohol testing satisfies the requirements of this paragraph (a).

(b) Whenever a breath or body fluid test is required of an employee under this part, the railroad must provide clear, unequivocal written notice of the basis or bases upon which the test is required (e.g., reasonable suspicion, violation of a specified operating/safety rule enumerated in subpart D of this part, random selection, follow-up, etc.). Completion of the DOT alcohol or drug testing form indicating the basis of the test (prior to providing a copy to the employee) satisfies the requirement of this paragraph (b). Use of the DOT form for non-Federal tests is prohibited.

(c) Use of approved forms for mandatory post-accident toxicological testing under subpart C of this part provides the notifications required under this section with respect to such tests. Use of those forms for any other test is prohibited.

(d) Each railroad must provide educational materials that explain the requirements of this part, and the railroad's policies and procedures with respect to meeting those requirements.

(1) The railroad must ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under the railroad's alcohol misuse prevention program and to each person subsequently hired for or transferred to a covered position.

(2) Each railroad must provide written notice to representatives of employee organizations of the availability of this information.

(e) *Required content.* The materials to be made available to employees must include detailed discussion of at least the following:

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

(2) The classes or crafts of employees who are subject to the provisions of this part.

(3) Sufficient information about the safety-sensitive functions performed by those employees to make clear that the period of the work day the covered employee is required to be in compliance with this part is that period when the employee is on duty and is required to perform or is available to perform covered service.

(4) Specific information concerning employee conduct that is prohibited under subpart B of this part.

(5) In the case of a railroad utilizing the accident/incident and rule violation reasonable cause testing authority provided by this part, prior notice (which may be combined with the notice required by §§ 219.601(d)(1) and 219.607(d)(1)), to covered employees of the circumstances under which they will be subject to testing.

(6) The circumstances under which a covered employee will be tested under this part.

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

(8) The requirement that a covered employee submit to alcohol and drug tests administered in accordance with this part.

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

(10) The consequences for covered employees found to have violated subpart B of this part, including the requirement that the employee be removed immediately from covered service, and the procedures under § 219.104.

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

(12) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem (the employee's or a coworker's); and available methods of evaluating and resolving problems associated with the misuse of alcohol, including utilization of the procedures set forth in subpart E of this part and the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(f) *Optional provisions.* The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration, that are based on the railroad's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

**Subpart B—Prohibitions**

**§ 219.101 Alcohol and drug use prohibited.**

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service.

(2) No employee may report for covered service, or go or remain on duty in covered service while—

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 or more alcohol concentration in the breath or blood; or  
 (iii) Under the influence of or impaired by any controlled substance.

(3) No employee may use alcohol for whichever is the lesser of the following periods:

(i) Within four hours of reporting for covered service; or

(ii) After receiving notice to report for covered service.

(4) No employee tested under the provisions of this part whose test result indicates an alcohol concentration of .02 or greater but less than .04 may perform or continue to perform covered service functions for a railroad, nor may a railroad permit the employee to perform or continue to perform covered service, until the start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(5) If an employee tested under the provisions of this part has a test result indicating an alcohol concentration below 0.02, the test must be considered negative and is not evidence of alcohol misuse. A railroad may not use a federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may take further action to compel cooperation in other breath or body fluid testing only if it has an independent basis for doing so.

(b) *Controlled substance.* "Controlled substance" is defined by § 219.5. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine), stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section may not be construed to prohibit the presence of an unopened container of an alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor may it be construed to

restrict a railroad from prohibiting such presence under its own rules.

**§ 219.102 Prohibition on abuse of controlled substances.**

No employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.

**§ 219.103 Prescribed and over-the-counter drugs.**

(a) This subpart does not prohibit the use of a controlled substance (on Schedules II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use, if—

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the 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;

(2) The substance is used at the dosage prescribed or authorized; and

(3) In the event the employee is being treated by more than one medical practitioner, at least one treating medical practitioner has been informed of all medications authorized or prescribed and has determined that use of the medications is consistent with the safe performance of the employee's duties (and the employee has observed any restrictions imposed with respect to use of the medications in combination).

(b) This subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.

**§ 219.104 Responsive action.**

(a) *Removal from covered service.* (1) If the railroad determines that an employee has violated § 219.101 or § 219.102, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from covered service and the procedures described in paragraphs (b) through (e) of this section apply.

(2) If an employee refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part, the railroad must immediately remove the employee from covered service, and the procedures described in paragraphs (b) through (e) of this section apply.

(3)(i) This section does not apply to actions based on breath or body fluid

tests for alcohol or drugs that are conducted exclusively under authority other than that provided in this part (e.g., testing under a company medical policy, for-cause testing policy wholly independent of subpart D of this part, or testing under a labor agreement).

(ii) This section and the information requirements listed in § 219.23 do not apply to applicants who refuse to submit to a pre-employment test or who have a pre-employment test with a result indicating the misuse of alcohol or controlled substances.

(b) *Notice.* Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice to the employee of the reason for this action.

(c) *Hearing procedures.* (1) If the employee denies that the test result is valid evidence of alcohol or drug use prohibited by this subpart, the employee may demand and must be provided an opportunity for a prompt post-suspension hearing before a presiding officer other than the charging official. This hearing may be consolidated with any disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer must make separate findings as to compliance with § 219.101 and § 219.102.

(2) The hearing must be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of the suspension or, in the case of an employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the employee becomes available for hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under sec. 3 of the Railway Labor Act (49 U.S.C. 153), satisfies the procedural requirements of this paragraph (c).

(4) Nothing in this part may 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 a positive test result in a test authorized or required by this part.

(5) Nothing in this part restricts the discretion of the railroad to treat an employee's denial of prohibited alcohol

or drug use as a waiver of any privilege the employee would otherwise enjoy to have such prohibited alcohol or drug use treated as a non-disciplinary matter or to have discipline held in abeyance.

(d) The railroad must comply with the return-to-service and follow-up testing requirements, and the Substance Abuse Professional conflict-of-interest prohibitions, contained in §§ 40.305, 40.307, and 40.299 of this title, respectively.

**§ 219.105 Railroad's duty to prevent violations.**

(a) A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the knowledge imputed to the railroad must be limited to that of a railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(b) A railroad must exercise due diligence to assure compliance with § 219.101 and § 219.102 by each covered employee.

**§ 219.107 Consequences of unlawful refusal.**

(a) An employee who refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part must be deemed disqualified for a period of nine (9) months.

(b) Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice of the reason for this action, and the procedures described in § 219.104(c) apply.

(c) The disqualification required by this section applies with respect to employment in covered service by any railroad with notice of such disqualification.

(d) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in § 219.104(d), and the employee must be subject to follow-up tests, as provided by that section.

**Subpart C—Post-Accident Toxicological Testing**

**§ 219.201 Events for which testing is required.**

(a) *List of events.* Except as provided in paragraph (b) of this section, post-accident toxicological tests must be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (4) of this section:

(1) *Major train accident.* Any train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) that involves one or more of the following:

(i) A fatality;  
(ii) A release of hazardous material lading from railroad equipment accompanied by—

(A) An evacuation; or  
(B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of \$1,000,000 or more.

(2) *Impact accident.* An impact accident (i.e., a rail equipment accident defined as an "impact accident" in § 219.5) that involves damage in excess of the current reporting threshold, resulting in—

(i) A reportable injury; or  
(ii) Damage to railroad property of \$150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

(4) *Passenger train accident.* Reportable injury to any person in a train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train.

(b) *Exceptions.* No test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. No test may be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

(c) *Good faith determinations.* (1)(i) The railroad representative responding to the scene of the accident/incident must determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make

reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative must consider the need to obtain samples as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgement in making the required determinations.

(ii) The railroad representative making the determinations required by this section may not be a person directly involved in the accident/incident. This section does not prohibit consultation between the responding railroad representative and higher level railroad officials; however, the responding railroad representative must make the factual determinations required by this section.

(iii) Upon specific request made to the railroad by the Associate Administrator for Safety, FRA (or the Associate Administrator's delegate), the railroad must provide a report describing any decision by a person other than the responding railroad representative with respect to whether an accident/incident qualifies for testing. This report must be affirmed by the decision maker and must be provided to FRA within 72 hours of the request. The report must include the facts reported by the responding railroad representative, the basis upon which the testing decision was made, and the person making the decision.

(iv) Any estimates of railroad property damage made by persons not at the scene must be based on descriptions of specific physical damage provided by the on-scene railroad representative.

(v) In the case of an accident involving passenger equipment, a host railroad may rely upon the damage estimates provided by the passenger railroad (whether present on scene or not) in making the decision whether testing is required, subject to the same requirement that visible physical damage be specifically described.

(2) A railroad must not require an employee to provide blood or urine specimens under the authority or procedures of this subject unless the railroad has made the determinations required by this section, based upon reasonable inquiry and good faith judgment. A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but it is later determined, after investigation, that one

or more of the conditions thought to have required testing were not, in fact, present. However, this section does not excuse the railroad for any error arising from a mistake of law (e.g., application of testing criteria other than those contained in these regulations).

(3) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(4) An accident/incident with respect to which the railroad has made reasonable inquiry and exercised good faith judgment in determining the facts necessary to apply the criteria contained in paragraph (a) of this section is deemed a qualifying event for purposes of sample analysis, reporting, and other purposes.

(5) In the event samples are collected following an event determined by FRA not to be a qualifying event within the meaning of this section, FRA directs its designated laboratory to destroy any sample material submitted and to refrain from disclosing to any person the results of any analysis conducted.

### **§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* (1)(i) Following each accident and incident described in § 219.201, the railroad (or railroads) must take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA. Such employees must cooperate in the provision of samples as described in this part and appendix C to this part.

(ii) If the conditions for mandatory toxicological testing exist, the railroad may also require employees to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required samples.

(2) Such employees must specifically include each and every operating employee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees must also be required to provide samples.

(3) An employee must be excluded from testing under the following circumstances: In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) (an

“impact accident”), § 219.201(a)(3) (“fatal train incident”), or § 219.201(a)(4) (a “passenger train accident with injury”) if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) or severity of the accident/incident. The railroad representative must consider any such information immediately available at the time the qualifying event determination is made under § 219.201.

(4) The following provisions govern accidents/incidents involving non-covered employees:

(i) Surviving non-covered employees are not subject to testing under this subpart.

(ii) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(b) *Timely sample collection.* (1) The railroad must make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

(2) This paragraph (b) must not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad must utilize other employees to perform such duties.

(3) In the case of a passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) Covered employees who may be subject to testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete the sample collection procedure. An employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad, except that an employee may be immediately recalled for testing if—

(i) The employee could not be retained in duty status because the employee went off duty under normal carrier procedures prior to being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (e.g., in the case of a dispatcher or signal maintainer remote

from the scene of an accident who was unaware of the occurrence at the time the employee went off duty);

(ii) The railroad's preliminary investigation (contemporaneous with the determination required by § 219.201) indicates a clear probability that the employee played a major role in the cause or severity of the accident/incident; and

(iii) The accident/incident actually occurred during the employee's duty tour. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave); but subsequent testing does not excuse such refusal by the employee timely to provide the required specimens.

(c) *Place of sample collection.* (1) Employees must be transported to an independent medical facility where the samples must be obtained. The railroad must pre-designate for such testing one or more such facilities in reasonable proximity to any location where the railroad conducts operations. Designation must be made on the basis of the willingness of the facility to conduct sample collection and the ability of the facility to complete sample collection promptly, professionally, and in accordance with pertinent requirements of this part. In all cases blood may be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

(2) In the case of an injured employee, the railroad must request the treating medical facility to obtain the samples.

(d) *Obtaining cooperation of facility.*

(1) In seeking the cooperation of a medical facility in obtaining a sample under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood samples after having been acquainted with the requirements of this subpart, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8801 or (800) 424-8802, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required sample.

(e) *Discretion of physician.* Nothing in this subpart may be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

**§ 219.205 Sample collection and handling.**

(a) *General.* Urine and blood samples must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart, and the technical specifications set forth in appendix C to this part.

(b) *Information requirements.* In order to process samples, analyze the significance of laboratory findings, and notify the railroads and employees of test results, it is necessary to obtain basic information concerning the accident/incident and any treatment administered after the accident/incident. Accordingly, the railroad representative must complete the information required by Form FRA 6180.73 (revised) for shipping with the samples. Each employee subject to testing must cooperate in completion of the required information on Form FRA F 6180.74 (revised) for inclusion in the shipping kit and processing of the samples. The railroad representative must request an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. One Form 6180.73 must be forwarded in the shipping kit with each group of samples. One Form 6180.74 must be forwarded in the shipping kit for each employee who provides samples. Forms 6180.73 and 6180.74 may be ordered from the laboratory specified in appendix B to this part; the forms are also provided to railroads free of charge in the shipping kit. (See paragraph (c) of this section.)

(c) *Shipping kit.* (1) FRA and the laboratory designated in appendix B to this part make available for purchase a limited number of standard shipping kits for the purpose of routine handling of toxicological samples under this subpart. Whenever possible, samples must be placed in the shipping kit prepared for shipment according to the instructions provided in the kit and appendix C to this part.

(2) Kits may be ordered directly from the laboratory designated in appendix B to this part.

(3) FRA maintains a limited number of kits at its field offices. A Class III railroad may utilize kits in FRA's possession, rather than maintaining such kits on its property.

(d) *Shipment.* Samples must be shipped as soon as possible by pre-paid air express or air freight (or other means adequate to ensure delivery within twenty-four (24) hours from time of shipment) to the laboratory designated in appendix B to this part. Where express courier pickup is available, the railroad must request the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the samples are collected or for any other reason prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the samples to the most expeditious point of shipment via air express, air freight or equivalent means. The railroad must maintain and document secure chain of custody of the kit from release by the medical facility to delivery for transportation, as described in appendix C to this part.

**§ 219.206 FRA access to breath test results.**

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart, and the technical specifications set forth in appendix C to this part.

**§ 219.207 Fatality.**

(a) In the case of an employee fatality in an accident or incident described in § 219.201, body fluid and/or tissue samples must be obtained from the remains of the employee for toxicological testing. To ensure that samples are timely collected, the railroad must immediately notify the appropriate local authority (such as a coroner or medical examiner) of the fatality and the requirements of this subpart, making available the shipping kit and requesting the local authority to assist in obtaining the necessary body fluid or tissue samples. The railroad must also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8801 or (800) 424-8802 by providing the following information:

- (1) Date and location of the accident or incident;
- (2) Railroad;
- (3) Name of the deceased;
- (4) Name and telephone number of custodian of the remains; and

(5) Name and telephone number of local authority contacted.

(c) A coroner, medical examiner, pathologist, Aviation Medical Examiner, or other qualified professional is authorized to remove the required body fluid and/or tissue samples from the remains on request of the railroad or FRA pursuant to this part; and, in so acting, such person is the delegate of the FRA Administrator under §§ 20107 and 20108 of title 49, United States Code (but not the agent of the Secretary for purposes of the Federal Tort Claims Act (chapter 171 of title 28, United States Code)). Such qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under these rules.

(d) Appendix C to this part specifies body fluid and tissue samples required for toxicological analysis in the case of a fatality.

**§ 219.209 Reports of tests and refusals.**

(a)(1) A railroad that has experienced one or more events for which samples were obtained must provide prompt telephonic notification summarizing such events. Notification must immediately be provided to the duty officer at the National Response Center (NRC) at (800) 424-8802 and to the Office of Safety, FRA, at (202) 493-6313.

(2) Each telephonic report must contain:

- (i) Name of railroad;
- (ii) Name, title and telephone number of person making the report;
- (iii) Time, date and location of the accident/incident;
- (iv) Brief summary of the circumstances of the accident/incident, including basis for testing; and
- (v) Number, names and occupations of employees tested.

(b) If the railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain a sample and cause it to be provided to FRA as required by this subpart, the railroad must make a concise narrative report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report must be appended to the report of the accident/incident required to be submitted under part 225 of this chapter.

(c) If a test required by this section is not administered within four hours following the accident or incident, the railroad must prepare and maintain on file a record stating the reasons the test was not promptly administered. Records must be submitted to FRA upon request

of the FRA Associate Administrator for Safety.

**§ 219.211 Analysis and follow-up.**

(a) The laboratory designated in appendix B to this part undertakes prompt analysis of samples provided under this subpart, consistent with the need to develop all relevant information and produce a complete report. Samples are analyzed for alcohol and controlled substances specified by FRA under protocols specified by FRA, summarized in appendix C to this part, which have been submitted to Health and Human Services for acceptance. Samples may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

(b) Results of post-accident toxicological testing under this subpart are reported to the railroad's Medical Review Officer and the employee. The MRO and the railroad must treat the test results and any information concerning medical use or administration of drugs provided under this subpart in the same confidential manner as if subject to subpart H of this part, except where publicly disclosed by FRA or the National Transportation Safety Board.

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance by the designated laboratory must be reviewed by the railroad's Medical Review Officer with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. The Medical Review Officer must promptly report the results of each review to the Associate Administrator for Safety, FRA, Washington, DC 20590. Such report must be in writing and must reference the employing railroad, accident/incident date, and location, and the envelope must be marked "ADMINISTRATIVELY CONFIDENTIAL: ATTENTION ALCOHOL/DRUG PROGRAM MANAGER." The report must state whether the MRO reported the test result to the employing railroad as positive or negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (including a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the Medical Review Officer may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the railroad Medical Review Officer's

determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

(d) To the extent permitted by law, FRA treats test results indicating medical use of controlled substances consistent with § 219.103 (and other information concerning medically authorized drug use or administration provided incident to such testing) as administratively 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, as further provided in this section, FRA may provide results of testing under this subpart and supporting documentation to the National Transportation Safety Board.)

(e) An employee may respond in writing to the results of the test prior to the preparation of any final investigation report concerning the accident or incident. An employee wishing to respond may do so by letter addressed to the Alcohol/Drug Program Manager, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 within 45 days of receipt of the test results. Any such submission must refer to the accident date, railroad and location, must state the position occupied by the employee on the date of the accident/incident, and must identify any information contained therein that the employee requests be withheld from public disclosure on grounds of personal privacy (but the decision whether to honor such request will be made by the FRA on the basis of controlling law).

(f)(1) The toxicology report may contain a statement of pharmacological significance to assist FRA and other parties in understanding the data reported. No such statement may be construed as a finding of probable cause in the accident or incident.

(2) The toxicology report is a part of the report of the accident/incident and therefore subject to the limitation of 49 U.S.C. 20903 (prohibiting use of the report for any purpose in a civil action for damages resulting from a matter mentioned in the report).

(g)(1) It is in the public interest to ensure that any railroad disciplinary actions that may result from accidents and incidents for which testing is required under this subpart are disposed of on the basis of the most complete and reliable information available so that responsive action will be appropriate. Therefore, during the interval between an accident or incident and the date that the railroad receives notification of the

results of the toxicological analysis, any provision of collective bargaining agreements establishing maximum periods for charging employees with rule violations, or for holding an investigation, may not be deemed to run as to any offense involving the accident or incident (i.e., such periods must be tolled).

(2) This provision may not be construed to excuse the railroad from any obligation to timely charge an employee (or provide other actual notice) where the railroad obtains sufficient information relating to alcohol or drug use, impairment or possession or other rule violations prior to the receipt to toxicological analysis.

(3) This provision does not authorize holding any employee out of service pending receipt of toxicological analysis; nor does it restrict a railroad from taking such action in an appropriate case.

(h) Except as provided in § 219.201 (with respect to non-qualifying events), each sample (including each split sample) provided under this subpart is retained for not less than three months following the date of the accident or incident (two years from the date of the accident or incident in the case of a sample testing positive for alcohol or a controlled substance). Post-mortem specimens may be made available to the National Transportation Safety Board (on request).

(i) An employee (donor) may, within 60 days of the date of the toxicology report, request that his or her split sample be tested by the designated laboratory or by another laboratory certified by Health and Human Services under that Department's Guidelines for Federal Workplace Drug Testing Programs that has available an appropriate, validated assay for the fluid and compound declared positive. Since some analytes may deteriorate during storage, detected levels of the compound shall, as technically appropriate, be reported and considered corroborative of the original test result. Any request for a retest shall be in writing, specify the railroad, accident date and location, be signed by the employee/donor, be addressed to the Associate Administrator for Safety, Federal Railroad Administration, Washington, DC 20590, and be designated "ADMINISTRATIVELY CONFIDENTIAL: ATTENTION ALCOHOL/DRUG PROGRAM MANAGER." The expense of any employee-requested split sample test at a laboratory other than the laboratory designated under this subpart shall be borne by the employee.

**§ 219.213 Unlawful refusals; consequences.**

(a) *Disqualification.* An employee who refuses to cooperate in providing breath, blood or urine samples following an accident or incident specified in this subpart must be withdrawn from covered service and must be deemed disqualified for covered service for a period of nine (9) months in accordance with the conditions specified in § 219.107.

(b) *Procedures.* Prior to or upon withdrawing the employee from covered service under this section, the railroad must provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. The employee is entitled to the procedural protection set out in § 219.104(d).

(c) *Subject of hearing.* The hearing required by this section must determine whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representative of the railroad. In determining whether a disqualification is required, the hearing official shall, as appropriate, also consider the following:

(1) Whether the railroad made a good faith determination, based on reasonable inquiry, that the accident or incident was within the mandatory testing requirements of this subpart; and

(2) In a case where a blood test was refused on the ground it would be inconsistent with the employee's health, whether such refusal was made in good faith and based on medical advice.

**Subpart D—Testing for Cause****§ 219.300 Mandatory reasonable suspicion testing.**

(a) *Requirements.* (1) A railroad must require a covered employee to submit to an alcohol test when the railroad has reasonable suspicion to believe that the employee has violated any prohibition of subpart B of this part concerning use of alcohol. The railroad's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.

(2) A railroad must require a covered employee to submit to a drug test when the railroad has reasonable suspicion to believe that the employee has violated the prohibitions of subpart B of this part concerning use of controlled substances. The railroad's determination that reasonable suspicion exists to require the covered employee to undergo a drug test must be based on specific,

contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.

(b)(1) With respect to an alcohol test, the required observations must be made by a supervisor trained in accordance with § 219.11(g). The supervisor who makes the determination that reasonable suspicion exists may not conduct testing on that employee.

(2) With respect to a drug test, the required observations must be made by two supervisors, at least one of whom is trained in accordance with § 219.11(g).

(c) Nothing in this section may be construed to require the conduct of alcohol testing or drug testing when the employee is apparently in need of immediate medical attention.

(d)(1) If a test required by this section is not administered within two hours following the determination under this section, the railroad must prepare and maintain on file a record stating the reasons the test was not properly administered. If a test required by this section is not administered within eight hours of the determination under this section, the railroad must cease attempts to administer an alcohol test and must state in the record the reasons for not administering the test. Records must be submitted to FRA upon request of the FRA Administrator.

(2) [Reserved].

**§ 219.301 Testing for reasonable cause.**

(a) *Authorization.* A railroad may, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or body fluid testing, or both, to determine compliance with §§ 219.101 and 219.102 or a railroad rule implementing the requirements of §§ 219.101 and 219.102. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section. Section 219.23 prescribes the notice to an employee that is required when an employee is required to provide a breath or body fluid sample under this part. A railroad may not require an employee to be tested under the authority of this subpart unless reasonable cause, as defined in this section, exists with respect to that employee.

(b) *For cause breath testing.* In addition to reasonable suspicion as

described in § 219.300, the following circumstances constitute cause for the administration of alcohol tests under this section:

(1) [Reserved]

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under part 225 of this chapter, and a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves—

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consistent with § 218.37 of this chapter (including failure to protect a train that is fouling an adjacent track, where required by the railroad's rules);

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under a train, or unauthorized running through a switch;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes, as required;

(vii) Entering a crossover before both switches are lined for movement; or

(viii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

(c) *For cause drug testing.* In addition to reasonable suspicion as described in § 219.300, each of the conditions set forth in paragraphs (b)(2) ("accident/

incident”) and (b)(3) (“rule violation”) of this section as constituting cause for alcohol testing also constitutes cause with respect to drug testing.

(d) [Reserved]

(e) *Limitation for subpart C events.* The compulsory drug testing authority conferred by this section does not apply with respect to any event subject to post-accident toxicological testing as required by § 219.201. However, use of compulsory breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of samples under subpart C of this part.

**§ 219.302 Prompt sample collection; time limitation.**

(a) Testing under this subpart may only be conducted promptly following the observations or events upon which the testing decision is based, consistent with the need to protect life and property.

(b) No employee may be required to participate in alcohol or drug testing under this section after the expiration of an eight-hour period from—

(1) The time of the observations or other events described in this section; or

(2) In the case of an accident/incident, the time a responsible railroad supervisor receives notice of the event providing reasonable cause for conduct of the test.

(c) An employee may not be tested under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave).

(d) As used in this subpart, a “responsible railroad supervisor” means any responsible line supervisor (e.g., a trainmaster or road foreman of engines) or superior official in authority over the employee to be tested.

(e) In the case of a drug test, the eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the drug testing specimens within that period.

(f) [Reserved]

(g) Section 219.23 prescribes the notice to an employee that is required to provide breath or a body fluid sample under this part.

**Subpart E—Identification of Troubled Employees**

**§ 219.401 Requirement for policies.**

(a) The purpose of this subpart is to prevent the use of alcohol and drugs in connection with covered service.

(b) Each railroad must adopt, publish and implement—

(1) A policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before those problems manifest themselves in detected violations of this part (hereafter “voluntary referral policy”); and

(2) A policy designed to foster employee participation in preventing violations of this subpart and encourage co-worker participation in the direct enforcement of this part (hereafter “co-worker report policy”).

(c) A railroad may comply with this subpart by adopting, publishing and implementing policies meeting the specific requirements of §§ 219.403 and 219.405 or by complying with § 219.407.

(d) If a railroad complies with this part by adopting, publishing and implementing policies consistent with §§ 219.403 and 219.405, the railroad must make such policies, and publications announcing such policies, available for inspection and copying by FRA.

(e) Nothing in this subpart may be construed to—

(1) Require payment of compensation for any period an employee is out of service under a voluntary referral or co-worker report policy;

(2) Require a railroad to adhere to a voluntary referral or co-worker report policy in a case where the referral or report is made for the purpose, or with the effect, of anticipating the imminent and probable detection of a rule violation by a supervising employee; or

(3) Limit the discretion of a railroad to dismiss or otherwise discipline an employee for specific rule violations or criminal offenses, except as specifically provided by this subpart.

**§ 219.403 Voluntary referral policy.**

(a) *Scope.* This section prescribes minimum standards for voluntary referral policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a voluntary referral policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad’s responsibility to prevent violations of §§ 219.101 and 219.102.

(b) *Required provisions.* A voluntary referral policy must include the following provisions:

(1) A covered employee who is affected by an alcohol or drug use problem may maintain an employment relationship with the railroad if, before the employee is charged with conduct deemed by the railroad sufficient to warrant dismissal, the employee seeks assistance through the railroad for the employee’s alcohol or drug use problem or is referred for such assistance by another employee or by a representative of the employee’s collective bargaining unit. The railroad must specify whether, and under what circumstances, its policy provides for the acceptance of referrals from other sources, including (at the option of the railroad) supervisory employees.

(2) Except as may be provided under paragraph (c) of this section, the railroad treats the referral and subsequent handling, including counseling and treatment, as confidential.

(3) The railroad will, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee’s alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(4) Except as may be provided under paragraph (c)(2) of this section, the employee will be returned to service on the recommendation of the substance abuse professional. Approval to return to service may not be unreasonably withheld.

(5) With respect to a certified locomotive engineer or a candidate for certification, the railroad must meet the requirements of § 240.119(e) of this chapter.

(c) *Optional provisions.* A voluntary referral policy may include any of the following provisions, at the option of the railroad:

(1) The policy may provide that the rule of confidentiality is waived if—

(i) The employee at any time refuses to cooperate in a recommended course of counseling or treatment; and/or

(ii) The employee is later determined, after investigation, to have been involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct.

(2) The policy may require successful completion of a return-to-service medical examination as a further condition on reinstatement in covered service.

(3) The policy may provide that it does not apply to an employee who has previously been assisted by the railroad under a policy or program substantially consistent with this section or who has previously elected to waive investigation under § 219.405 (co-worker report policy).

(4) The policy may provide that, in order to invoke its benefits, the employee must report to the contact designated by the railroad either:

- (i) During non-duty hours (i.e., at a time when the employee is off duty); or
- (ii) While unimpaired and otherwise in compliance with the railroad's alcohol and drug rules consistent with this subpart.

#### § 219.405 Co-worker report policy.

(a) *Scope.* This section prescribes minimum standards for co-worker report policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad's responsibility to prevent violations of §§ 219.101 and 219.102.

(b) *Employment relationship.* A co-worker report policy must provide that a covered employee may maintain an employment relationship with the railroad following an alleged first offense under these rules or the railroad's alcohol and drug rules, subject to the conditions and procedures contained in this section.

(c) *General conditions and procedures.* (1) The alleged violation must come to the attention of the railroad as a result of a report by a co-worker that the employee was apparently unsafe to work with or was, or appeared to be, in violation of this part or the railroad's alcohol and drug rules.

(2) If the railroad representative determines that the employee is in violation, the railroad may immediately remove the employee from service in accordance with its existing policies and procedures.

(3) The employee must elect to waive investigation on the rule charge and must contact the substance abuse professional within a reasonable period specified by the policy.

(4) The substance abuse professional must schedule necessary interviews with the employee and complete an evaluation within 10 calendar days of the date on which the employee contacts the professional with a request for evaluation under the policy, unless it becomes necessary to refer the employee for further evaluation. In each case, all necessary evaluations must be

completed within 20 days of the date on which the employee contacts the professional.

(d) *When treatment is required.* If the substance abuse professional determines that the employee is affected by psychological or chemical dependence on alcohol or a drug or by another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation, the following conditions and procedures apply:

(1) The railroad must, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee's alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(2) The employee must agree to undertake and successfully complete a course of treatment deemed acceptable by the substance abuse professional.

(3) The railroad must promptly return the employee to service, on recommendation of the substance abuse professional, when the employee has established control over the substance abuse problem. Return to service may also be conditioned on successful completion of a return-to-service medical examination. Approval to return to service may not be unreasonably withheld.

(4) Following return to service, the employee, as a further condition on withholding of discipline, may, as necessary, be required to participate in a reasonable program of follow-up treatment for a period not to exceed 60 months from the date the employee was originally withdrawn from service.

(e) *When treatment is not required.* If the substance abuse professional determines that the employee is not affected by an identifiable and treatable mental or physical disorder—

(1) The railroad must return the employee to service within 5 days after completion of the evaluation.

(2) During or following the out-of-service period, the railroad may require the employee to participate in a program of education and training concerning the effects of alcohol and drugs on occupational or transportation safety.

(f) *Follow-up tests.* A railroad may conduct return-to-service and/or follow-up tests (as described in § 219.104) of an employee who waives investigation and is determined to be ready to return to service under this section.

#### § 219.407 Alternate policies.

(a) In lieu of a policy under § 219.403 (voluntary referral) or § 219.405 (co-worker report), or both, a railroad may adopt, publish and implement, with respect to a particular class or craft of covered employees, an alternate policy or policies having as their purpose the prevention of alcohol or drug use in railroad operations, if such policy or policies have the written concurrence of the recognized representatives of such employees.

(b) The concurrence of recognized employee representatives in an alternate policy may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate policy applies. The agreement or other document must make express reference to this part and to the intention of the railroad and employee representatives that the alternate policy applies in lieu of the policy required by § 219.403, § 219.405, or both.

(c) The railroad must file the agreement or other document described in paragraph (b) of this section with the Associate Administrator for Safety, FRA. If the alternate policy is amended or revoked, the railroad must file a notice of such amendment or revocation at least 30 days prior to the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing and implementing the policies required by §§ 219.403 and 219.405 with respect to any group of covered employees not within the coverage of an appropriate alternate policy.

#### Subpart F—Pre-employment Tests

##### § 219.501 Pre-employment drug testing.

(a) Prior to the first time a covered employee performs covered service for a railroad, the employee must undergo testing for drugs. No railroad may allow a covered employee to perform covered service, unless the employee has been administered a test for drugs with a result that did not indicate the misuse of controlled substances. This requirement applies to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service.

(b) As used in subpart H of this part with respect to a test required under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

**§ 219.502 Pre-employment alcohol testing.**

(A) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

(b) As used in subpart H of this part, with respect to a test authorized under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

**§ 219.503 Notification; records.**

The railroad must provide for medical review of drug test results as provided in subpart H of this part. The railroad must notify the applicant of the results of the drug and alcohol tests in the same manner as provided for employees in subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

**§ 219.505 Refusals.**

An applicant who has refused to submit to pre-employment testing under this section may not be employed in covered service based upon the application and examination with

respect to which such refusal was made. This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

**Subpart G—Random Alcohol and Drug Testing Programs****§ 219.601 Railroad random drug testing programs.**

(a) *Submission.* Each railroad must submit for FRA approval a random testing program meeting the requirements of this subpart. A railroad commencing operations must submit such a program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval by the FRA Administrator. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A railroad already subject to this subpart that becomes subject to this subpart with respect to one or more additional employees must amend its program not later than 60 days after these employees become subject to this subpart and 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 may not be implemented prior to approval.

(b) *Form of programs.* Random testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must 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. 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 must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date

upon which the particular samples were collected.

(2)(i) The program must select for testing a sufficient number of employees so that, during the first 12 months—

(A) The random testing program is spread reasonably through the 12-month period.

(B) [Reserved]

(ii) During the subsequent 12-month period, the program must 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 must be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety, FRA. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(3) Railroad random testing programs must ensure to the maximum extent practicable that each employee perceives the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection may 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 must include testing procedures and safeguards, and procedures for action based on positive test results, consistent with this part.

(6) An employee must be subject to testing only while on duty. Only employees who perform covered service for the railroad are subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program must specify the extent to which, and the circumstances under which they are subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(7) Each time an employee is notified for random drug testing the employee will be informed that selection was made on a random basis.

(c) *Approval.* The Associate Administrator for Safety, FRA, will

notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Associate Administrator for Safety determines that the program does not conform to those criteria, the Associate Administrator for Safety will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions. The railroad must 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 must publish to each of its covered employees, individually, a written notice that he or she will be subject to random drug testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must 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 (1) creates a defense to a violation of § 219.102.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

**§ 219.602 FRA Administrator's determination of random drug testing rate.**

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing must be 50 percent of covered employees.

(b) The FRA Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the

industry positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.803 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 219.803 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as a result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process.

(f) The railroad must randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the railroad conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual railroad or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(g) Each railroad must ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(h) If a given covered employee is subject to random drug testing under the

drug testing rules of more than one DOT agency for the same railroad, the employee must be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(i) If a railroad is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

**§ 219.603 Participation in drug testing.**

A railroad shall, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in urine testing to determine compliance with § 219.102, and the employee must provide the required sample and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

**§ 219.605 Positive drug test results; procedures.**

(a) [Reserved]

(b) Procedures for administrative handling by the railroad in the event a sample provided under this subpart is reported as positive by the MRO are set forth in § 219.104. The responsive action required in § 219.104 is not stayed pending the result of a retest or split sample test.

**§ 219.607 Railroad random alcohol testing programs.**

(a) Each railroad must submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A railroad commencing operations must submit a random alcohol testing program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad must 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 may not be implemented prior to approval.

(b) *Form of programs.* Random alcohol testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular samples were collected.

(2) The program must include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated § 219.101.

(3) The program must ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(4) The program must ensure to the maximum extent practicable that each covered employee perceives the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of covered service).

(5) An employee may be subject to testing only while on duty. Only employees who perform covered service for the railroad may be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program may specify the extent to which, and the circumstances under which they are subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(6) Testing must be conducted promptly, as provided in § 219.701(b)(1).

(7) Each time an employee is notified for random alcohol testing the employee must be informed that selection was made on a random basis.

(8) Each railroad must ensure that each covered employee who is notified of selection for random alcohol testing proceeds to the test site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the railroad must instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(c) *Implementation.* (1) No later than 45 days prior to commencement of random alcohol testing, the railroad must publish to each of its covered employees, individually, a written notice that the employee will be subject to random alcohol testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.101 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must 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 (c)(1) creates a defense to a violation of § 219.101. This notice may be combined with the notice or policy statement required by § 219.23.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

**§ 219.608 FRA Administrator's determination of random alcohol testing rate.**

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing must be 25 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for the determination is drawn from the alcohol MIS reports required by this part. In order to ensure reliability of the data, the Administrator

considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.801 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.801 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 219.801 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 219.801 for any calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The railroad must randomly select and test a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the railroad conducts random alcohol testing through a consortium, the number of employees to

be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random testing at the same minimum annual percentage rate under this part or any DOT alcohol testing rule.

(f) If a railroad is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

#### **§ 219.609 Participation in alcohol testing.**

A railroad must, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with § 219.101, and the employee must provide the required breath and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

#### **§ 219.611 Test result indicating prohibited alcohol concentration; procedures.**

Procedures for administrative handling by the railroad in the event an employee's confirmation test indicates an alcohol concentration of .04 or greater are set forth in § 219.104.

### **Subpart H—Drug and Alcohol Testing Procedures**

#### **§ 219.701 Standards for drug and alcohol testing.**

(a) Drug testing required or authorized by subparts B, D, F, and G of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(b) Alcohol testing required or authorized by subparts B, D, F, and G of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(c) Each covered employee who is notified of selection for testing and who

is not performing covered service at the time of notification must proceed to the testing site immediately. The railroad must ensure that an employee who is performing covered service at the time of notification shall, as soon as possible without affecting safety, cease to perform covered service and proceed to the testing site.

### **Subpart I—Annual Report**

#### **§ 219.801 Reporting alcohol misuse prevention program results in a management information system.**

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse prevention program.

(b) A railroad that is subject to more than one DOT agency alcohol regulation must identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the railroad must determine which DOT agency regulation or rule authorizes or requires the test. The test result information must be directed to the appropriate DOT agency or agencies.

(c) Each railroad must ensure the accuracy and timeliness of each report submitted. The report must be submitted on one of the two forms specified by the FRA.

(d) Each report required by this section that contains information on an alcohol screening test result of .02 or greater or a violation of the alcohol misuse provisions of subpart B of this part must include the following elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3)(i) Number of screening tests by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up) and employee category.

(ii) Number of confirmation tests, by type of test and employee category.

(4) Number of confirmation alcohol tests indicating an alcohol concentration equal of .02 or greater but less than .04, by type of test and employee category.

(5) Number of confirmation alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of .04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d)).

(8) For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of .02 or greater but less than .04, and the number of confirmation test results of .04 or greater.

(9) For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of .02 or greater but less than .04, and the number of confirmation test results of .04 or greater.

(10) Number of covered employees who were found to have violated other provisions of subpart B of this part, and the action taken in response to the violation.

(11) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.

(12) Number of covered employees who refused to submit to a random alcohol test required under this part.

(13) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(14) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use during the reporting period.

(e) Each report required by this section that contains information on neither a screening test result of 0.02 or greater nor a violation of the alcohol misuse provisions of subpart B of this part must include the following informational elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3) Number of screening tests by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up) and employee category.

(4) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of .04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d)).

(5) For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted.

(6) For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted.

(7) Number of covered employees who refused to submit to a random alcohol test required under this part.

(8) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(9) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use during the reporting period.

**§ 219.803 Reporting drug misuse prevention program results in a management information system.**

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA an annual report covering the calendar year, summarizing the results of its drug misuse prevention program.

(b) A railroad that is subject to more than one DOT agency drug regulation must identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any drug test on a covered employee subject to the regulations of more than one DOT agency, the railroad must determine which DOT agency regulation or rules authorizes or requires the test. The test result information must be directed to the appropriate DOT agency or agencies.

(c) Each railroad must ensure the accuracy and timeliness of each report submitted by the railroad or a consortium.

(d) Each railroad must submit the required annual reports no later than March 15 of each year. The report must be submitted on one of the forms specified by the FRA. A railroad with no positive test result must submit the "Drug Testing Management Information System Zero Positives Data Collection Form." All other railroads must submit the "Drug Testing Management Information System Data Collection Form."

(e) A railroad submitting the "Drug Testing Management Information System Data Collection Form" must address each of the following data elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug regulations of more than one DOT agency, identified by each agency.

(3) Number of specimens collected by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up), and employee category.

(4) Number of specimens verified negative by a Medical Review Officer (MRO) by type of test, and employee category.

(5) Number of specimens verified positive for one or more of the five drugs by a MRO by type of test, employee category, and type of drug. If a test has been verified positive by a MRO for multiple drugs, the employer should report the result as a positive for each type of drug.

(6) Number of applicants or transfers denied employment or transfer to a covered service position following a verified positive pre-employment drug test.

(7) Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during the reporting period.

(8) For cause drug testing, the number of specimens collected by reason for test (i.e., accident/injury, rules violation, or reasonable suspicion), type of authority (railroad or FRA), employee category and type of drug, including drugs tested for under railroad authority only.

(9) For cause drug testing, the number of specimens verified negative by a MRO by reason for test, type of authority, employee category and type

of drug, including drugs tested for under railroad authority only.

(10) For cause drug testing, the number of specimens verified positive by a MRO by reason for test, type of authority, employee category and type of drug, including drugs tested for under railroad authority only.

(11) For cause breath alcohol testing under railroad authority, by reason for test, the number of tests conducted, the number of tests with a positive result (i.e., breath alcohol concentration (BAC) = or > .02), and the number of refusals.

(12) For cause urine alcohol testing under railroad authority, by reason for test, the number of tests conducted, the number of tests with a positive result, and the number of refusals.

(13) For cause breath alcohol testing under FRA authority, by reason for test, the number of tests conducted, the number of tests with a positive result, and the number of refusals.

(14) Total number of covered employees observed in documented operational tests and inspections related to enforcement of the railroad's rules on alcohol and drug use.

(15) Based on the tests and inspections described in paragraph (e)(14) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on drugs.

(16) Based on the tests and inspections described in paragraph (e)(14) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on alcohol.

(17) Number of specimens verified positive for more than one drug, by employee category and type of drug.

(18) Number of covered employees who refused to submit to a random drug test required under FRA authority.

(19) Number of covered employees who refused to submit to a non-random drug test required under FRA authority.

(20) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use during the reporting period.

(f) A railroad authorized to submit the "Drug Testing Management Information System Zero Positives Data Collection Form" must address each of the following data elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug regulations of more than

one DOT agency, identified by each agency.

(3) Number of specimens collected and verified negative by type of test (i.e., pre-employment and covered service transfer, random, for cause due to accident/incident, for cause due to rules violation, reasonable suspicion, post-positive return to service, and follow-up), and employee category.

(4) For cause breath alcohol testing under railroad authority, the number of tests conducted by reason for test (i.e., accident/injury, rules violation, or reasonable suspicion).

(5) For cause urine alcohol testing under railroad authority, the number of tests conducted by reason for test.

(6) For cause breath alcohol testing under FRA authority, the number of tests conducted by reason for test.

(7) Total number of covered employees observed in documented operational tests and inspections related to enforcement of the railroad's rules on alcohol and drug use.

(8) Based on the tests and inspections described in paragraph (f)(7) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on drugs.

(9) Based on the tests and inspections described in paragraph (f)(7) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on alcohol.

(10) Number of covered employees who refused to submit to a random drug test required under FRA authority.

(11) Number of covered employees who refused to submit to a non-random drug test required under FRA authority.

(12) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use during the reporting period.

#### Subpart J—Recordkeeping Requirements

##### § 219.901 Retention of alcohol testing records.

(a) General requirement. In addition to the records required to be kept by part 40 of this title, each railroad must maintain alcohol misuse prevention program records in a secure location with controlled access as set out in this section.

(b) Each railroad must maintain the following records for a minimum of five years:

(1) A summary record of each covered employee's test results; and

(2) A copy of the annual report summarizing the results of its alcohol

misuse prevention program (if required to submit the report under § 219.801(a)).

(c) Each railroad must maintain the following records for a minimum of two years:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(iv) Documents generated in connection with decisions on post-accident testing.

(v) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide an adequate sample.

(2) Records related to test results:

(i) The railroad's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on alcohol abuse awareness, including a copy of the railroad's policy on alcohol abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

##### § 219.903 Retention of drug testing records.

(a) General requirement. In addition to the records required to be kept by part 40 of this title, each railroad must maintain drug abuse prevention program records in a secure location with controlled access as set forth in this section.

(b)(1) Each railroad must maintain the following records for a minimum of five years:

(i) A summary record of each covered employee's test results; and

(ii) A copy of the annual report summarizing the results of its drug misuse prevention program (if required to submit under § 219.803(a)).

(2) Each railroad must maintain the following records for a minimum of two years.

(c) *Types of records.* The following specific records must be maintained:

(1) Records related to the collection process:

(i) Documents relating to the random selection process.

(ii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iii) Documents generated in connection with decisions on post-accident testing.

(iv) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a sample.

(2) Records related to test results:

(i) The railroad's copy of the drug test custody and control form, including the results of the test.

(ii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on drug abuse awareness, including a copy of the railroad's policy on drug abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

##### § 219.905 Access to facilities and records.

(a) Release of covered employee information contained in records required to be maintained under §§ 219.901 and 219.903 must be in accordance with part 40 of this title and with this section. (For purposes of this section only, urine drug testing records are considered equivalent to breath alcohol testing records.)

(b) Each railroad must permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, United States Department of Transportation, or any DOT agency with regulatory authority over the railroad or any of its covered employees.

(c) Each railroad must make available copies of all results for railroad alcohol and drug testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention

program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or covered employee.

### Appendix A to Part 219—Schedule of Civil Penalties<sup>1</sup>

The following chart lists the schedule of civil penalties:

Section <sup>2</sup>	Violation	Willful violation
Subpart A—General		
<b>219.3 Application.</b>		
Railroad does not have required program .....	\$5,000	\$7,500
<b>219.11 General conditions for chemical tests.</b>		
A. Employee unlawfully refuses to participate in testing .....	\$2,500	\$5,000
B. Employer fails to give priority to medical treatment .....	3,000	8,000
C. Employee fails to remain available .....	2,500	5,000
D. Employee tampers with sample .....	2,500	5,000
E. Failure to meet supervisory training requirements .....	2,500	5,000
F. Program of instruction not available .....	2,500	5,000
G. Program not complete .....	2,500	5,000
<b>219.23 Railroad policies.</b>		
A. Failure to provide written notice of FRA test .....	\$1,000	\$4,000
B. Failure to provide written notice of basis for FRA test .....	1,000	4,000
C. Use of subpart C form for other test .....	1,000	4,000
D. Failure to provide educational materials .....	1,000	4,000
E. Educational materials fail to explain requirements of this part and/or include required content .....	1,000	4,000
F. Non-Federal provisions not clearly described as independent authority .....	1,000	4,000
Subpart B—Prohibitions		
<b>219.101 Alcohol and drug use prohibited.</b>		
Employee violates prohibition(s) .....		\$10,000
<b>219.103 Prescribed and over-the-counter drugs.</b>		
A. Failure to train employee properly on requirements .....	\$2,500	\$5,000
B. Employee failure to comply .....	2,500	5,000
<b>219.104 Responsive action.</b>		
A. Failure to remove employee from covered service immediately .....	\$3,000	\$8,000
B. Failure to provide notice for removal .....	1,000	4,000
C. Failure to provide prompt hearing .....	2,000	7,000
D. Employee improperly returned to service .....	2,000	7,000
E. Failure to administer proper number of follow-up tests .....	2,500	5,000
<b>219.105 Railroad's duty to prevent violations.</b>		
A. Employee improperly permitted to remain in covered service .....	\$7,000	\$10,000
B. Failure to exercise due diligence to assure compliance with prohibition .....	2,500	5,000
<b>219.107 Consequences of unlawful refusal.</b>		
A. Employee not disqualified for nine months .....	\$5,000	\$7,500
B. Employee unlawfully returned to service .....	5,000	7,500
Subpart C—Post-Accident Toxicological Testing		
<b>219.201 Events for which testing is required.</b>		
A. Failure to test after qualifying event .....	\$5,000	\$7,500
B. Testing performed after non-qualifying event .....	5,000	10,000
C. Failure to make good faith determination .....	2,500	5,000
D. Failure to provide requested decision report to FRA .....	1,000	3,000
<b>219.203 Responsibilities of railroads and employees.</b>		
A. Failure to properly test/exclude from testing .....	\$2,500	\$5,000
B. Non-covered service employee tested .....	2,500	5,000
C. Delay in obtaining samples due to failure to make every reasonable effort .....	2,500	5,000
D. Testing not conducted in accordance with Appendix C requirements .....	2,500	5,000
E. Independent medical facility not utilized .....	2,500	5,000
F. Failure to report event or contact FRA when FRA intervention required .....	1,000	3,000
<b>219.205 Sample collection and handling.</b>		
A. Failure to observe requirements with respect to sample collection, marking and handling .....	\$2,500	\$5,000
B. Failure to provide properly prepared forms with samples .....	1,000	2,000
C. Failure to promptly or properly forward samples .....	2,500	5,000
<b>219.207 Fatality.</b>		
A. Failure to test .....	\$5,000	\$7,500
B. Failure to request assistance when necessary .....	2,500	5,000
C. Failure to ensure timely collection and shipment of required specimens .....	2,500	5,000
<b>219.209 Reports of tests and refusals.</b>		
A. Failure to provide telephonic report .....	\$1,000	\$2,000
B. Failure to provide written report of refusal to test .....	1,000	2,000
C. Failure to maintain report explaining why test not conducted within 4 hours .....	1,000	2,000
<b>219.211 Analysis and follow-up.</b>		
A. Failure to promptly forward specimens to designated FRA laboratory .....	\$2,500	\$5,000
B. Failure of MRO to report review of positive results to FRA .....	2,500	5,000
Subpart D—Testing for Cause		
<b>219.300 Mandatory reasonable suspicion testing.</b>		
A. Failure to test when reasonable suspicion criteria met .....	\$5,000	\$7,500

Section <sup>2</sup>	Violation	Willful violation
B. Tested when reasonable suspicion criteria not met .....	5,000	7,500
C. Testing did not comply with part 40 procedures .....	5,000	7,500
<b>219.301 Testing for reasonable cause.</b>		
A. Tested when accident/incident criteria not met .....	\$5,000	\$7,500
B. Tested when operating rules violation criteria not met .....	5,000	7,500
C. Testing did not comply with part 40 procedures .....	5,000	7,500
D. Event did not occur during duty tour .....	2,500	5,000
E. Employee not provided with notice .....	2,500	5,000
<b>219.302 Prompt sample collection.</b>		
Sample collection not conducted promptly .....	\$2,500	\$5,000
Subpart E—Identification of Troubled Employees		
<b>219.401 Requirement for policies.</b>		
A. Failure to publish and/or implement required policy .....	\$2,500	\$5,000
B. Failure to implement policy with respect to individual employee .....	2,500	5,000
<b>219.407 Alternate policies.</b>		
Failure to file agreement or other document or provide timely notice of revocation .....	\$2,500	\$5,000
Subpart F—Pre-Employment Tests		
<b>219.501 Pre-employment tests.</b>		
A. Failure to perform pre-employment drug test before first time employee performs covered service .....	\$2,500	\$5,000
B. Failure to give proper notice .....	2,500	5,000
Subpart G—Random Testing Programs		
<b>219.601 Railroad random drug programs.</b>		
A. Failure to file a random program .....	\$2,500	\$5,000
B. Failure to file amendment to program .....	2,500	5,000
C. Failure to meet random criteria .....	2,500	5,000
D. Failure to use a neutral selection process .....	2,500	5,000
E. Testing not spread throughout the year .....	2,500	5,000
F. Total number of tests below minimum random drug testing rate .....	2,500	5,000
G. Testing not distributed throughout the day .....	2,500	5,000
H. Advance notice provided to employee .....	2,500	5,000
I. Testing when employee not on duty .....	2,500	5,000
J. Testing continued after employee's duty tour expired .....	2,500	5,000
K. Failure to provide proper notice .....	2,500	5,000
L. Failure to include covered service employee in pool .....	2,500	5,000
M. Random testing not performed in a timely manner .....	2,500	5,000
<b>219.603 Participation in drug testing.</b>		
Failure to document reason for not testing selected employee .....	\$2,500	\$5,000
<b>219.607 Railroad random alcohol programs.</b>		
A. Failure to file a random alcohol program .....	\$2,500	\$5,000
B. Failure to file amendment to program .....	2,500	5,000
C. Failure to meet random criteria .....	2,500	5,000
D. Failure to use a neutral selection process .....	2,500	5,000
E. Total number of tests below minimum random alcohol testing rate .....	2,500	5,000
F. Advance notice provided to employee .....	2,500	5,000
G. Testing when employee not on duty .....	2,500	5,000
H. Testing continued after employee's duty tour expired .....	2,500	5,000
I. Failure to provide proper notice .....	2,500	5,000
J. Failure to include covered service employee in pool .....	2,500	5,000
K. Random testing not performed in a timely manner .....	2,500	5,000
<b>219.609 Participation in alcohol testing.</b>		
Failure to document reason for not testing selected employee .....	\$2,500	\$5,000
Subpart H—Drug and Alcohol Testing Procedures		
<b>219.701 Standards for drug and alcohol testing.</b>		
A. Failure to comply with part 40 procedures in subpart B, D, F, or G testing .....	\$2,500	\$5,000
B. Failure to perform timely notification and testing .....	-5,000	-7,500
Subpart I—Annual Report	2,500	5,000
<b>219.801 Reporting alcohol misuse prevention program results in a management information system.</b>		
A. Failure to submit MIS report on time .....	\$2,500	\$5,000
B. Failure to submit accurate MIS report .....	2,500	5,000
C. Failure to include required data .....	2,500	5,000
<b>219.803 Reporting drug misuse prevention program results in a management information system.</b>		
A. Failure to submit MIS report on time .....	\$2,500	\$5,000
B. Failure to submit accurate MIS report .....	2,500	5,000
C. Failure to include required data .....	2,500	5,000
Subpart J—Recordkeeping Requirements		
<b>219.901 Retention of Alcohol Testing Records.</b>		
A. Failure to keep records for required period .....	\$2,500	\$5,000
B. Failure to keep required documentation, materials or certification .....	2,500	5,000
<b>219.903 Retention of Drug Testing Records.</b>		
A. Failure to keep records for required period .....	\$2,500	\$5,000
B. Failure to retain required documentation, materials or certification .....	2,500	5,000
<b>219.905 Access to facilities and records.</b>		

Section <sup>2</sup>	Violation	Willful violation
A. Failure to release records in this subpart in accordance with part 40 .....	\$2,500	\$5,000
B. Failure to permit access to appropriate authorities .....	2,500	5,000
C. Failure to provide access to results of railroad alcohol and drug testing programs .....	2,500	5,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The FRA Administrator reserves the right to assess a penalty of up to \$22,000 for any violation, including ones not listed in this penalty schedule, where circumstances warrant. See 49 CFR part 209, appendix A.

<sup>2</sup> The penalty schedule uses section numbers from 49 CFR part 219; and if more than one item is listed as a type of violation of a given section, each item is also designated by a "penalty code" (e.g., "A"), which is used to facilitate assessment of civil penalties. For convenience, penalty citations will cite the CFR section and the penalty code, if any (e.g., "§219.11A") FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation.

## Appendix B to Part 219—Designation of Laboratory for Post-Accident Toxicological Testing

The following laboratory is currently designated to conduct post-accident toxicological analysis under subpart C of this part: NWT Inc., 1141 E. 3900 South, Suite A-110, Salt Lake City, UT 84124, Telephone: (801) 268-2431 (Day), (801) 483-3383 (Night/Weekend).

## Appendix C to Part 219—Post-Accident Testing Sample Collection

### 1.0 General

This appendix prescribes procedures for collection of samples for mandatory post-accident testing pursuant to subpart C of this part. Collection of blood and urine samples is required to be conducted at an independent medical facility.

#### (Surviving Employees)

### 2.0 Surviving Employees

This unit provides detailed procedures for collecting post-accident toxicological samples from surviving employees involved in train accidents and train incidents, as required by subpart C of this part. Subpart C of this part specifies qualifying events and employees required to be tested.

#### 2.1 Collection Procedures; General

a. All forms and supplies necessary for collection and transfer of blood and urine samples for three surviving employees can be found in the FRA post-accident shipping box, which is made available to the collection site by the railroad representative.

b. Each shipping box contains supplies for blood/urine collections from three individuals, including instructions and necessary forms. The railroad is responsible for ensuring that materials are fresh, complete and meet FRA requirements.

##### 2.1.1 Responsibility of the Railroad Representative

a. In the event of an accident/incident for which testing is required under subpart C of this part, the railroad representative shall follow the designated set of instructions, and, upon arrival at the independent medical facility, promptly present to the collection facility representative a post-accident shipping box or boxes with all remaining sets of instructions. (Each box contains supplies to collect samples from three employees.) The railroad representative shall request the collection facility representative to review

the instructions provided and, through qualified personnel, provide for collection of the samples according to the procedures set out.

b. The railroad representative shall undertake the following additional responsibilities—

1. Complete Form FRA 6180.73 (revised), Accident Information Required for Post-Accident Toxicological Testing (49 CFR part 219), describing the testing event and identifying the employees whose samples are to be deposited in the shipping box.

2. As necessary to verify the identity of individual employees, affirm the identity of each employee to the medical facility personnel.

3. Consistent with the policy of the collection facility, monitor the progress of the collection procedure.

Warning: Monitor but do not directly observe urination or otherwise disturb the privacy of urine or blood collection. Do not handle sample containers, bottles or tubes (empty or full). Do not become part of the collection process.

##### 2.1.2 Employee Responsibility

a. An employee who is identified for post-accident toxicological testing shall cooperate in testing as required by the railroad and personnel of the independent medical facility. Such cooperation will normally consist of the following, to be performed as requested:

1. Provide a blood sample, which a qualified medical professional or technician will draw using a single-use sterile syringe. The employee should be seated for this procedure.

2. Provide, in the privacy of an enclosure, a urine sample into a plastic collection cup. Deliver the cup to the collector.

3. Do not let the blood and urine samples that you provided leave your sight until they have been properly sealed and initialed by you.

4. Certify the statement in Step 4 of the Post-Accident Testing Blood/Urine Custody and Control Form (49 CFR 219) (Form FRA F 6180.74 (revised)).

5. If required by the medical facility, complete a separate consent form for taking of the samples and their release to FRA for analysis under the FRA rule.

Note: The employee may not be required to complete any form that contains any waiver of rights the employee may have in the employment relationship or that releases or holds harmless the medical facility with respect to negligence in the collection.

## 2.2 The Collection

Exhibit C-1 contains instructions for collection of samples for post-accident toxicology from surviving employees. These instructions shall be observed for each collection. Instructions are also contained in each post-accident shipping box and shall be provided to collection facility personnel involved in the collection and/or packaging of samples for shipment.

#### (Post Mortem Collection)

### 3.0 Fatality

This unit provides procedures for collecting post-accident body fluid/tissue samples from the remains of employees killed in train accidents and train incidents, as required by subpart C of this part. Subpart C specifies qualifying events and employees required to be tested.

#### 3.1 Collection

In the event of a fatality for which testing is required under subpart C of this part, the railroad shall promptly make available to the custodian of the remains a post-accident shipping box. The railroad representative shall request the custodian to review the instructions contained in the shipping box and, through qualified medical personnel, to provide the samples as indicated.

#### (Surviving Employees and Fatalities)

### 4.0 Shipment

a. The railroad is responsible for arranging overnight transportation of the sealed shipping box containing the samples. When possible without incurring delay, the box should be delivered directly from the collection personnel providing the samples to an overnight express service courier. If it becomes necessary for the railroad to transport the box from point of collection to point of shipment, then—

1. Individual kits and the shipping box shall be sealed by collection personnel before the box is turned over to the railroad representative;

2. The railroad shall limit the number of persons handling the shipping box to the minimum necessary to provide for transportation;

3. If the shipping box cannot immediately be delivered to the express carrier for transportation, it shall be maintained in secure temporary storage; and

4. The railroad representatives handling the box shall document chain of custody of the shipping box and shall make available such documentation to FRA on request.

### Exhibit C-1—Instructions for Collection of Blood and Urine Samples: Mandatory Post-Accident Toxicological Testing

#### A. Purpose

These instructions are for the use of personnel of collection facilities conducting collection of blood and urine samples from surviving railroad employees following railroad accidents and casualties that qualify for mandatory alcohol/drug testing. The Federal Railroad Administration appreciates the participation of medical facilities in this important public safety program.

#### B. Prepare for Collection

a. Railroad employees have consented to provision of samples for analysis by the Federal Railroad Administration as a condition of employment (§ 219.11). A private, controlled area should be designated for collection of samples and completion of paperwork.

b. Only one sample should be collected at a time, with each employee's blood draw or urine collection having the complete attention of the collector until the specific sample has been labeled, sealed and documented.

c. Please remember two critical rules for the collections:

d. All labeling and sealing must be done in the sight of the donor, with the sample never having left the donor's presence until the sample has been labeled, sealed and initialed by the donor.

e. Continuous custody and control of blood and urine samples must be maintained and documented on the forms provided. In order to do this, it is important for the paperwork and the samples to stay together.

f. To the extent practical, blood collection should take priority over urine collection. To limit steps in the chain of custody, it is best if a single collector handles both collections from a given employee.

g. You will use a single Post-Accident Testing Blood/Urine Custody and Control Form (FRA Form 6108.74 (revised)), consisting of six Steps to complete the collection for each employee. We will refer to it as the Control Form.

#### C. Identify the Donor

a. The employee donor must provide photo identification to each collector, or lacking this, be identified by the railroad representative.

b. The donor should remove all unnecessary outer garments such as coats or jackets, but may retain valuables, including a wallet. Donors should not be asked to disrobe, unless necessary for a separate physical examination required by the attending physician.

#### D. Draw Blood

a. Assemble the materials for collecting blood from each employee: two 10 ml grey-stoppered blood tubes and the Control Form.

b. Ask the donor to complete STEP 1 on the Control Form.

c. With the donor seated, draw two (2) 10 ml tubes of blood using standard medical procedures (sterile, single-use syringe into evacuated gray-top tubes provided).

CAUTION: Do not use alcohol or an alcohol-based swab to cleanse the venipuncture site.

d. Once both tubes are filled and the site of venipuncture is protected, immediately—

1. Seal and label each tube by placing a numbered blood sample label from the label set on the Control Form over the top of the tube and securing it down the sides.

2. Ask the donor to initial each label.

Please check to see that the initials match the employee's name and note any discrepancies in the "Remarks" block of the Control Form.

3. As collector, sign and date each blood tube label at the place provided.

4. Skip to STEP 5 and initiate chain of custody for the blood tubes by filling out the first line of the block to show receipt of the blood samples from the donor.

5. Complete STEP 2 on the form.

6. Return the blood tubes into the individual kit. Keep the paperwork and samples together. If another collector will be collecting the urine sample from this employee, transfer both the form and the individual kit with blood tubes to that person, showing the transfer of the blood tubes on the second line of STEP 5 (the chain of custody block).

#### E. Collect Urine

a. The urine collector should assemble at his/her station the materials for collecting urine from each employee: one plastic collection cup with temperature device affixed enclosed in a heat-seal bag (with protective seal intact), two 90 ml urine sample bottles with caps and one biohazard bag (with absorbent) also enclosed in a heat-seal bag (with protective seal intact), and the Control Form. Blood samples already collected must remain in the collector's custody and control during this procedure.

b. After requiring the employee to wash his/her hands, the collector should escort the employee directly to the urine collection area. To the extent practical, all sources of water in the collection area should be secured and a bluing agent (provided in the box) placed in any toilet bowl, tank, or other standing water.

c. The employee will be provided a private place in which to void. Urination will not be directly observed. If the enclosure contains a source of running water that cannot be secured or any material (soap, etc.) that could be used to adulterate the sample, the collector should monitor the provision of the sample from outside the enclosure. Any unusual behavior or appearance should be noted in the remarks section of the Control Form or on the back of that form.

d. The collector should then proceed as follows:

e. Unwrap the collection cup in the employee's presence and hand it to the employee (or allow the employee to unwrap it).

f. Ask the employee to void at least 60 ml into the collection cup (at least to the line marked).

g. Leave the private enclosure.

IF THERE IS A PROBLEM WITH URINATION OR SAMPLE QUANTITY, SEE THE "TROUBLE BOX" AT THE BACK OF THESE INSTRUCTIONS.

h. Once the void is complete, the employee should exit the private enclosure and deliver the sample to the collector. Both the collector and the employee must proceed immediately to the labeling/sealing area, with the sample never leaving the sight of the employee before being sealed and labeled.

i. Upon receipt of the sample, proceed as follows:

1. In the full view of the employee, remove the wrapper from the two urine sample bottles. Transfer the urine from the collection cup into the sample bottles (at least 30 ml in bottle A and at least 15 ml in bottle B).

2. As you pour the sample into the sample bottles, please inspect for any unusual signs indicating possible adulteration or dilution. Carefully secure the tops. Note any unusual signs under "Remarks" at STEP 3 of the Control Form.

3. Within 4 minutes after the void, measure the temperature of the urine by reading the strip on the bottle. Mark the result at STEP 3 of the Control Form.

IF THERE IS A PROBLEM WITH THE URINE SAMPLE, SEE THE "TROUBLE BOX" AT THE BACK OF THESE INSTRUCTIONS.

4. Remove the urine bottle labels from the Control Form. The labels are marked "A" and "B." Place each label as marked over the top of its corresponding bottle, and secure the label to the sides of the bottle.

5. Ask the donor to initial each label. Please check to see that the initials match the employee name and note any discrepancy in the "Remarks" block of STEP 3.

6. As collector, sign and date each urine label.

7. Skip to STEP 5 and initiate chain-of-custody by showing receipt of the urine samples from the donor. (If you collected the blood, a check under "urine" will suffice. If someone else collected the blood, first make sure transfer of the blood to you is documented. Then, using the next available line, show "Provide samples" under purpose, "Donor" under "released by," check under "urine" and place your name, signature and date in the space provided.)

8. Complete the remainder of STEP 3 on the Control Form.

9. Have the employee complete STEP 4 on the Control Form.

10. Place the filled urine bottles in the individual employee kit. Keep the paperwork and samples together. If another collector will be collecting the blood sample from this employee, transfer both the form and the kit to that person, showing the transfer of the urine samples on the next available line of STEP 5 (the chain of custody block).

#### F. Seal the Individual Employee Kit

a. The blood and urine samples have now been collected for this employee. The blood/urine samples will now be sealed into the individual employee kit, while all paperwork will be retained for further completion. After rechecking to see that each sample is properly labeled and initialed, close the plastic bag to contain any leakage in

transportation, and apply the kit security seal to the small individual kit. As collector, sign and date the kit seal.

b. Before collecting samples from the next employee, complete the next line on the chain-of-custody block showing release of the blood and urine by yourself for the purpose of "Shipment" and receipt by the courier service or railroad representative that will provide transportation of the box, together with the date.

#### G. Complete Treatment Information

Complete STEP 6 of the Control Form. Mark the box if a breath alcohol test was conducted under FRA authority.

#### H. Prepare the Box for Shipment

a. Sealed individual employee kits should be retained in secure storage if there will be a delay in preparation of the shipping box. The shipping box shall be prepared and sealed by a collection facility representative as follows:

1. Inspect STEP 5 of each Control Form to ensure chain-of-custody is continuous and complete for each fluid (showing samples released for shipment). Retain the medical facility copy of each Control Form and the Accident Information form for your records.

2. Place sealed individual employee kits in the shipping box. Place all forms in zip-lock bag and seal securely. Place bag with forms and unused supplies in shipping box.

3. Affix the mailing label provided to the outside of the shipping box.

#### I. Ship the Box

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. Whenever possible without incurring delay, the collector should deliver the box directly into the hands of the express courier or air freight representative.

b. Where courier pickup is not immediately available at the collection facility where the samples are taken, the railroad is required to transport the shipping box for expeditious shipment by air express, air freight or equivalent means.

c. If the railroad is given custody of the box to arrange shipment, please record the name of the railroad official taking custody on the copy of Form 6180.73 retained by the collection site.

#### "TROUBLE BOX"

1. Problem: *The employee claims an inability to urinate, either because he/she has recently voided or because of anxiety concerning the collection.*

Action: The employee may be offered moderate quantities of liquid to assist urination. If the employee continues to claim inability after 4 hours, the urine collection should be discontinued, but the blood samples should be forwarded and all other procedures followed. Please note in area provided for remarks what explanation was provided by the employee.

2. Problem: *The employee cannot provide approximately 60 ml. of sample.*

Action: The employee should remain at the collection facility until as much as possible of the required amount can be given (up to

4 hours). The employee should be offered moderate quantities of liquids to aid urination. The first bottle, if it contains any quantity of urine, should be sealed and securely stored with the blood tubes and Control Form pending shipment. A second bottle should then be used for the subsequent void (using a second Control Form with the words "SECOND VOID—FIRST SAMPLE INSUFFICIENT" in the remarks block and labels from that form). However, if after 4 hours the donor's second void is also insufficient or contains no more than the first insufficient void, discard the second void and send the first void to the laboratory.

3. Problem: *The urine temperature is outside the normal range of 32 deg.-38 deg.C/ 90 deg.-100 deg.F.*, and a suitable medical explanation cannot be provided by an oral temperature or other means; or

4. Problem: *The collector observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample* (e.g., substitute urine in plain view, blue dye in sample presented, etc.) and a collection site supervisor or the railroad representative agrees that the circumstances indicate an attempt to tamper with the sample.

Action (for either Problem No. 3 or Problem No. 4): Document the problem on the Control Form. i. If the collection site supervisor or railroad representative concurs that the temperature of the sample, or other clear and unequivocal evidence, indicates a possible attempt to substitute or alter the sample, another void must be taken under direct observation by a collector of the same gender.

ii. If a collector of the same sex is not available, do NOT proceed with this step.

iii. If a collector of the same gender is available, proceed as follows: A new Control Form must be initiated for the second void. The original suspect sample should be marked "Void" and the follow-up void should be marked "Void 2," with both voids being sent to the laboratory and the incident clearly detailed on the Control Form.

#### Exhibit C-2—Instructions for Collection of Post Mortem Samples: Employee Killed in a Railroad Accident/Incident

To the Medical Examiner, Coroner, or Pathologist:

a. In compliance with Federal safety regulations (49 CFR part 219), a railroad representative has requested that you obtain samples for toxicology from the remains of a railroad employee who was killed in a railroad accident or incident. The deceased consented to the taking of such samples, as a matter of Federal law, by performing service on the railroad (49 CFR 219.11(f)).

b. Your assistance is requested in carrying out this program of testing, which is important to the protection of the public safety and the safety of those who work on the railroads.

##### A. Materials:

The railroad will provide you a post-accident shipping box that contains necessary supplies. If the box is not immediately available, please proceed using supplies available to you that are suitable for forensic toxicology.

B. Samples requested, in order of preference:

a. Blood—20 milliliters or more. Preferred sites: intact femoral vein or artery or peripheral vessels (up to 10 ml, as available) and intact heart (20 ml). Deposit blood in gray-stopper tubes individually by site and shake to mix sample and preservative.

**Note:** If uncontaminated blood is not available, bloody fluid or clots from body cavity may be useful for qualitative purposes; but do not label as blood. Please indicate source and identity of sample on label of tube.

b. Urine—as much as 100 milliliters, if available. Deposit into plastic bottles provided.

c. Vitreous fluid—all available, deposited into smallest available tube (e.g., 3 ml) with 1% sodium fluoride, or gray-stopper tube (provided). Shake to mix sample and preservative.

d. If available at autopsy, organs—50 to 100 grams each of two or more of the following in order preference, as available: liver, bile, brain, kidney, spleen, and/or lung. Samples should be individually deposited into zip-lock bags or other clean, single use containers suitable for forensic samples.

e. If vitreous or urine is not available, please provide—

1. Spinal fluid—all available, in 8 ml container (if available) with sodium fluoride or in gray-stopper tube; or, if spinal fluid cannot be obtained,

2. Gastric content—up to 100 milliliters, as available, into plastic bottle.

##### C. Sample collection:

a. Sampling at time of autopsy is preferred so that percutaneous needle puncturing is not necessary. However, if autopsy will not be conducted or is delayed, please proceed with sampling.

b. Blood samples should be taken by sterile syringe and deposited directly into evacuated tube, if possible, to avoid contamination of sample or dissipation of volatiles (ethyl alcohol).

**Note:** If only cavity fluid is available, please open cavity to collect sample. Note condition of cavity.

c. Please use smallest tubes available to accommodate available quantity of fluid sample (with 1% sodium fluoride).

##### D. Sample identification, sealing:

a. As each sample is collected, seal each blood tube and each urine bottle using the respective blood tube or urine bottle using the identifier labels from the set provided with the Post-Accident Testing Blood/Urine Custody and Control Form (49 CFR part 219) (Form FRA F 6180.74 (revised)). Make sure the unique identification number on the labels match the pre-printed number on the Control Form. Please label other samples with name and sample set identification numbers. You may use labels and seals from any of the extra forms, but annotate them accordingly.

b. Annotate each label with sample description and source (as appropriate) (e.g., blood, femoral vein).

c. Please provide copy of any written documentation regarding condition of body and/or sampling procedure that is available at the time samples are shipped.

##### E. Handling:

a. If samples cannot be shipped immediately as provided below, samples other than blood may be immediately frozen. Blood samples should be refrigerated, but not frozen.

b. All samples and documentation should be secured from unauthorized access pending delivery for transportation.

**F. Information:**

a. If the railroad has not already done so, please place the name of the subject at the top of the Control Form (STEP 1). You are requested to complete STEP 2 of the form, annotating it by writing the word "FATALITY," listing the samples provided, providing any further information under "Remarks" or at the bottom of the form. If it is necessary to transfer custody of the samples from the person taking the samples prior to preparing the box for shipment, please use the blocks provided in STEP 5 to document transfer of custody.

b. The railroad representative will also provide Accident Information Required for Post-Accident Toxicological Testing (49 CFR part 219), Form FRA 6180.73 (revised). Both forms should be placed in the shipping box when completed; but you may retain the designated medical facility copy of each form for your records.

**G. Packing the shipping box:**

a. Place urine bottles and blood tubes in the sponge liner in the individual kit, close the biohazard bag zipper, close the kit and apply the kit custody seal to the kit. You may use additional kits for each tissue sample, being careful to identify sample by tissue, name of deceased, and specimen set identification number. Apply kit security seals to individual kits and initial across all seals. Place all forms in the zip-lock bag and seal securely.

b. Place the bag in the shipping box. Do not put forms in with the specimens. Seal the shipping box with the seal provided and initial and date across the seal.

c. Affix the mailing label to the outside of the box.

**H. Shipping the box:**

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. When possible, but without incurring delay, deliver the sealed shipping box directly to the express courier or the air freight representative.

b. If courier pickup is not immediately available at your facility, the railroad is required to transport the sealed shipping box to the nearest point of shipment via air express, air freight or equivalent means.

c. *If the railroad receives the sealed shipping box to arrange shipment*, please record under "Supplemental Information" on the Control Form, the name of the railroad official taking custody.

**I. Other:**

FRA requests that the person taking the samples annotate the Control Form under "Supplemental Information" if additional toxicological analysis will be undertaken with respect to the fatality. FRA reports are available to the coroner or medical examiner on request.

Issued in Washington, D.C., on April 11, 2001.

**S. Mark Lindsey,**

*Acting Deputy Administrator, Federal Railroad Administration.*

[FR Doc. 01-9413 Filed 4-27-01; 8:45 am]

**BILLING CODE 4910-06-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 382

[Docket No. FMCSA-2000-8456]

RIN 2126-AA58

#### Controlled Substances and Alcohol Use and Testing

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM); request for comments.

**SUMMARY:** The Department of Transportation published a revision of its drug and alcohol testing procedures regulations on December 19, 2000. Consequently, the FMCSA is proposing to amend its controlled substances and alcohol testing regulations to ensure consistency with DOT's revised testing procedures and to avoid duplication. In addition, the FMCSA is proposing to amend its drug and alcohol testing regulations to update outdated provisions and clarify existing rules.

**DATES:** You must submit comments on or before June 14, 2001.

**ADDRESSES:** You can mail or hand deliver written comments to the US Department of Transportation, Docket Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001, or submit on-line at <http://dmses.dot.gov/submit>. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments from 9 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. If you want notification of receipt of comments, please include a self-addressed, stamped envelope or postcard, or after submitting comments electronically, print the acknowledgment page.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kenneth Rodgers, Transportation Specialist, MC-ECE, (202) 366-4016, or Mr. Michael Falk, Attorney-Advisor, MC-CC, (202) 366-0834, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The Department of Transportation published a comprehensive revision to the drug and alcohol testing procedural rules (49 CFR Part 40) (December 19, 2000, 65 FR 79462). The new Part 40 makes numerous changes regarding the way that drug and alcohol testing will be conducted in the future. The majority of the changes in the rule will become effective August 1, 2001. However, some changes will become effective prior to August 1, 2001.

Part 40 is one element of a One-DOT set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. It is important that the six DOT agency rules that cover specific transportation industries be consistent with the revised Part 40, to avoid duplication, conflict, or confusion among DOT regulatory requirements. Therefore, we are proposing to amend our drug and alcohol testing regulations to conform with Part 40.

#### Background

In this NPRM, the FMCSA proposes changes that would conform its drug and alcohol testing regulations (49 CFR Part 382) to the revised DOT procedures for transportation workplace drug and alcohol testing programs (49 CFR Part 40) published on December 19, 2000 (65 FR 79462).

The FMCSA proposes to delete from part 382 provisions that are also covered in the new part 40. Motor carrier employers and employees affected by part 382 have always been required to read and adhere *both* part 382 and part 40 to comply with the FMCSA's drug and alcohol testing requirements. Referring the reader directly to part 40 instead of duplicating part 40 rule text in part 382 would promote both drafting economy and consistency of interpretation. This NPRM proposes to delete from part 382 regulatory text regarding referral, evaluation and treatment requirements; follow-up testing; inquiries for alcohol and controlled substances information from previous employers; and substance abuse professionals. Instead, the regulations would reference the appropriate provisions of part 40 which deal with these issues.

Although the primary purpose of this NPRM is to conform part 382 with the new part 40, FMCSA would also delete outdated rule text references (e.g., past implementation dates and reporting requirements) that can currently be found throughout part 382. This includes replacing references to the Federal Highway Administration with

the Federal Motor Carrier Safety Administration.

For ease of reference, FMCSA is publishing part 382 in its entirety with the proposed amendments discussed below. FMCSA intends to time publication of the final rule so that its conforming changes to part 382 become effective concurrently with most of part 40 on August 1, 2001.

#### **Subpart A—General**

##### *Section 382.107 Definitions*

The following definitions have been added or modified in part 382 in order to conform to the definitions in revised part 40:

*Confirmation or confirmatory test*

*Confirmed drug test*

*Consortium/Third party administrator*

*Controlled substances*

*Designated employer representative (DER)*

*Employer*

*Refuse to submit*

*Screening test (or initial test)*

*Stand-down*

##### *Section 382.115 Starting Date for Testing Programs*

The starting date for testing programs has been modified to reflect that all implementation dates have elapsed. This section now requires all motor carriers, both domestic and foreign to implement the testing program requirements when they begin operating commercial motor vehicles in the United States. The implementation dates for large foreign employers and small foreign employers have been removed.

##### *Section 382.117 Public Interest Exclusion*

This section has been included to ensure consistency with 49 CFR Part 40, subpart R. In an attempt to protect the public interest, and transportation employers and employees, the Department is incorporating the public interest exclusion (PIE) into its regulations. The FMCSA has included this section to inform motor carriers subject to the controlled substances and alcohol testing regulations that they may not use a service agent who has had a PIE issued against it. The Department uses public interest exclusions to exclude service agents who are in serious noncompliance with the drug and alcohol testing regulations from participating in DOT's drug and alcohol testing program.

##### *Section 382.119 Stand-Down Waiver Provision*

This section has been added to include the stand-down waiver

provision contained in 49 CFR Part 40. Section 40.21 maintains the departmental policy of prohibiting employers from standing an employee down, that is, removing the employee from safety-sensitive service after the medical review officer (MRO) has received a laboratory report of either a confirmed positive test result, adulterated test result, or substituted test result before the result has been verified by the MRO. The new section 40.21(d) authorizes each Administrator (or his or her designee) to waive this prohibition if doing so would effectively enhance safety while protecting employee fairness and confidentiality. Therefore, the new § 382.119 stand-down waiver provision outlines the procedures for applying for a waiver to the FMCSA. The FMCSA would review petitions for a waiver and decide to grant or deny the petition based on the requirements established in § 40.21.

##### *Section 382.217 Actual Knowledge*

The FMCSA is proposing to add a new section to the regulations to clarify the term "actual knowledge." Published regulatory guidance previously provided by the FMCSA indicates that actual knowledge may result from the employer's direct observation of the employee, the driver's previous employer(s), the employee's admission of alcohol use, or other occurrences. Some entities believe the reference to an employee's admission or other occurrences are too ambiguous and prevents an employee from coming forward to self-identify that a drug or alcohol problem exists. Since our primary purpose is to deter alcohol misuse or controlled substance use, we encourage employers to have self-identification programs. As a result, we propose to include in the regulations language similar to that in the regulatory guidance, but have provided an exception in proposed § 382.219.

##### *Section 382.219 Employee Admission of Alcohol and Controlled Substances Use*

This section has been developed to allow employers to establish self-identification programs that permit employees to self-identify without DOT consequences. The self-identification program does not allow employees to self-identify in order to avoid DOT testing. The program must prohibit employers from taking adverse actions against an employee making a voluntary admission. Lastly, the program must preserve the intent of the controlled substance and alcohol testing regulations by ensuring that problem drivers are removed from safety-

sensitive positions until the employee has successfully completed an educational or treatment program, as determined by a qualified substance abuse professional.

##### *Section 382.301 Pre-employment Testing*

Since mandatory pre-employment alcohol testing has been suspended as a result of a court decision and subsequent legislation, the FMCSA would eliminate paragraphs (b), (b)(1), (b)(2) and (e), which address pre-employment alcohol testing. Paragraphs (c) and (d) would be redesignated as paragraphs (b) and (c), respectively. The FMCSA would permit, but not require, employers to conduct pre-employment alcohol testing. If an employer chooses to conduct pre-employment alcohol testing, the employer would have to do so in accordance with 49 CFR part 40 and the proposed new paragraph (d) of this section.

##### *Section 382.303 Post-Accident Testing*

This section has been modified to include changes, deletions and updates to the post accident testing requirements. In many instances, motor carriers have conducted either alcohol or controlled substances tests, instead of conducting both tests as required by the regulations. Consequently, we are proposing to modify paragraph (a), which requires an employer to test for alcohol and controlled substances following an occurrence involving a commercial motor vehicle. The change removes controlled substances from paragraph (a) and places the post-accident controlled substances testing requirements in the proposed redesignated paragraph (b). The table previously codified as paragraph (a)(3) is proposed to be redesignated as paragraph (c). The requirements in paragraphs (b)(2) and (b)(3) of the current regulations are obsolete. Therefore, the FMCSA is proposing to delete these paragraphs, which required that certain information be submitted to the FHWA by March 15, 1996, March 15, 1997, and March 15, 1998. Other paragraphs in this section will be redesignated to accommodate the proposed changes.

##### *Section 382.305 Random Testing*

Currently, the random testing regulations require the Administrator to annually publish a Federal Register notice of the minimum annual percentage rates for random alcohol and controlled substances testing. The FMCSA is proposing to revise its random testing regulations to require the Administrator to publish notice of

the minimum annual percentage rates for random testing only in the event of a change in the annual percentage rates.

The FMCSA is seeking comments on the random testing regulations related to motor carriers testing at the applicable rates. Motor carriers may either administer their own random testing programs or rely on consortia/third party administrators (C/TPAs) to provide that service. There appears to be rising concern over how to calculate the testing rates when the motor carrier is in a consortium, especially if the consortium is not testing at the minimum rates, but the motor carrier is. The agency seeks comment whether the regulations codified in § 382.305(j) are sufficiently clear, or do they need clarification?

#### *Section 382.307 Reasonable Suspicion Testing*

The FMCSA is proposing to remove the regulatory test in 382.307(e)(2) requiring employers to submit MIS reports from March 15 1996 through March 15, 1998 respectively. This section will be renumbered accordingly to adjust for the deletion of this paragraph.

#### *Section 382.309 Return-to-Duty Testing*

The FMCSA is proposing to remove the regulatory text regarding return-to-duty testing requirements from part 382 in order to avoid potential duplication and inconsistency with the requirements in part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to the Department of Transportation Final Rule, published elsewhere in this issue of the **Federal Register**.

#### *Section 382.311 Follow-Up Testing*

The FMCSA is proposing to remove the regulatory text regarding follow-up testing requirements from part 382 in order to avoid potential duplication and inconsistency with the requirements in part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

#### *Section 382.401 Retention of Records*

The FMCSA is proposing that employers maintain semi-annual laboratory statistical summaries of urinalysis instead of quarterly summaries, to be consistent with the new part § 40.111(a).

#### *Section 382.403 Reporting of Results in a Management Information System*

The FMCSA is proposing to amend the reporting requirements in paragraphs (c)(8) and (d)(5) to include substituted or adulterated specimens. This would be consistent with part 40 and will provide clarifying information on positive drug test results that are accounted for in the MIS reports.

#### *Section 382.405 Access to Facilities and Records*

The FMCSA is proposing to amend the requirements in paragraph (g) regarding disclosure of information arising from a positive DOT drug or alcohol test or refusal to test also include disclosure of adulterated and substituted test results, consistent with § 40.323(a)(1). Additionally, this section allows an employer to disclose information in criminal or civil actions as provided in § 40.323(a)(2).

#### *Section 382.407 Medical Review Officer Notifications to the Employer*

The FMCSA is proposing to remove the regulatory text regarding requirements for medical review officer notifications to the employer from part 382 in order to avoid potential duplication and inconsistency with the requirements of part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

#### *Section 382.409 Medical Review Officer Record Retention for Controlled Substances*

This section requires the medical review officer to maintain dated records and employer notifications for a period of time. The FMCSA proposes to amend paragraphs (a),(b) and (c) to include third party administrators within this requirement since part 40 now permits third party administrators to transmit the MRO's findings to the employer.

#### *Section 382.411 Employer Notifications*

Paragraphs (b) and (c) has been modified to replace the term designated management official with designated employer representative. In addition, we propose to amend paragraph (c) to require the designated employer representative to immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 72 hours, in order to be consistent with § 40.131.

#### *Section 382.413 Inquiries for Alcohol and Controlled Substances Information from Previous Employers*

The FMCSA is proposing to remove the regulatory text regarding requirements for inquiries for alcohol and controlled substances information from previous employers from Part 382 in order to avoid potential duplication and inconsistency with Part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

#### *Section 382.507 Penalties*

The FMCSA is proposing to add a provision stating that an employer who violates the requirements of part 40 will be subject to the penalties in 49 U.S.C. 521(b). This is a clarification of existing law. Section 382.105 makes the provisions of Part 40 applicable to employers and a violation of part 40 is treated like a violation of part 382 for enforcement purposes.

#### *Section 382.605 Referral, Evaluation, and Treatment*

The FMCSA is proposing to remove the regulatory text regarding the requirements for referral, evaluation, and treatment from Part 382 in order to avoid potential duplication and inconsistency with the requirements of Part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

#### **Rulemaking Analyses and Notices**

##### *Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

These proposed rules have been designated as non-significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. They are non-significant because they merely make changes to conform to the revised 49 CFR part 40, which has already been subject to extensive comment and analysis, or seek to remove obsolete provisions or clarify existing law. The proposed changes would not have any incremental economic impacts on their own. The economic impacts of the underlying part 40 changes were analyzed in connection with the part 40 rulemaking.

*Regulatory Flexibility Act*

Because these proposals have no incremental economic impacts, the FMCSA certifies, under the Regulatory Flexibility Act, that these proposals, if adopted, would not have a significant economic impact on a substantial number of small entities.

*Executive Order 13132 (Federalism)*

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999. The FMCSA has determined this proposed rule would not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States.

*Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FMCSA has determined that there are no new requirements for information collection associated with this proposed rule. All the information collection requirements of part 40 have been analyzed and approved by OMB. These proposed rules would impose no information collection requirements that have not already been reviewed in the context of the part 40 rulemaking, so no further Paperwork Reduction Act review is necessary.

*Unfunded Mandates Reform Act*

This proposed rule would not impose a Federal mandate resulting in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1531 *et seq.*).

*Executive Order 12988 (Civil Justice Reform)*

This proposed action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

*Executive Order 13045 (Protection of Children)*

We have analyzed this proposal under Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks". This proposed rule would not be economically significant and would not concern an environmental risk to health or safety that would disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

The FMCSA certifies that this proposed rule has no taking implications under the Fifth Amendment or Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights.

*Executive Order 12372 (Intergovernmental Review)*

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

*National Environmental Policy Act*

The agency has analyzed this proposal for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have an adverse effect on the quality of the environment.

**List of Subjects in 49 CFR Part 382**

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Reporting and recordkeeping requirements, Safety, Transportation.

Accordingly, the FMCSA proposes to revise Part 382 of 49 CFR to read as follows:

**PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING****Subpart A—General**

- Sec.
- 382.101 Purpose 382.103 Applicability.
  - 382.105 Testing procedures.
  - 382.107 Definitions.
  - 382.109 Preemption of State and local laws.
  - 382.111 Other requirements imposed by employers.
  - 382.113 Requirements for notice.
  - 382.115 Starting date for testing programs
  - 382.117 Public interest exclusion.
  - 382.119 Stand-down waiver provision.

**Subpart B—Prohibitions**

- 382.201 Alcohol concentration.
- 382.205 On-duty use.
- 382.207 Pre-duty use.
- 382.209 Use following an accident.
- 382.211 Refusal to submit to a required alcohol or controlled substances test.
- 382.213 Controlled substances use.
- 382.215 Controlled substances testing.
- 382.217 Actual knowledge.
- 382.219 Employee admission of alcohol and controlled substances use.

**Subpart C—Tests Required**

- 382.301 Pre-employment testing.
- 382.303 Post-accident testing.

- 382.305 Random testing.
- 382.307 Reasonable suspicion testing.
- 382.309 Return-to-duty testing.
- 382.311 Follow-up testing.

**Subpart D—Handling of Test Results, Record Retention, and Confidentiality**

- 382.401 Retention of records.
- 382.403 Reporting of results in a management information system.
- 382.405 Access to facilities and records.
- 382.407 Medical review officer notifications to the employer.
- 382.409 Medical review officer record retention for controlled substances.
- 382.411 Employer notifications.
- 382.413 Inquiries for alcohol and controlled substances information from previous employers.

**Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct**

- 382.501 Removal from safety-sensitive function.
- 382.503 Required evaluation and testing.
- 382.505 Other alcohol-related conduct.
- 382.507 Penalties.

**Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral**

- 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.
- 382.603 Training for supervisors.
- 382.605 Referral, evaluation, and treatment.

**Authority:** 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; and 49 CFR 1.73.

**Subpart A—General****§ 382.101 Purpose.**

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

**§ 382.103 Applicability.**

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

- (1) The commercial driver's license requirements of part 383 of this subchapter;
- (2) The Licencia Federal de Conductor (Mexico) requirements; or
- (3) The commercial driver's license requirements of the Canadian National Safety Code.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement a random alcohol and controlled substances testing program of

two or more covered employees in the random testing selection pool.

(c) The exceptions contained in § 390.3(f) of this subchapter do not apply to this part. The employers and drivers identified in § 390.3(f) of this subchapter must comply with the requirements of this part, unless otherwise specifically provided in paragraph (d) of this section.

(d) *Exceptions.* This part shall not apply to employers and their drivers:

(1) Required to comply with the alcohol and/or controlled substances testing requirements of parts 653 and 655 of this title (Federal Transit Administration alcohol and controlled substances testing regulations); or

(2) Who a State must waive from the requirements of part 383 of this subchapter. These individuals include active duty military personnel; members of the reserves; and members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training and national guard military technicians (civilians who are required to wear military uniforms), and active duty U.S. Coast Guard personnel; or

(3) Who a State has, at its discretion, exempted from the requirements of part 383 of this subchapter. These individuals may be:

(i) Operators of a farm vehicle which is:

(A) Controlled and operated by a farmer;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(C) Not used in the operations of a common or contract motor carrier; and

(D) Used within 241 kilometers (150 miles) of the farmer's farm.

(ii) Firefighters or other persons who operate commercial motor vehicles which are necessary for the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals, and are not subject to normal traffic regulation.

#### § 382.105 Testing procedures.

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

#### § 382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 of this title, except as provided in this section—

*Alcohol* means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

*Alcohol concentration (or content)* means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

*Alcohol use* means the drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

*Commerce* means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States; and

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

*Commercial motor vehicle* means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle—

(1) Has a gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating of more than of 4,536 kilograms (10,000 pounds); or

(2) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR Part 172, subpart F).

*Confirmation (or confirmatory) drug test* means a second analytical procedure performed on a urine specimen to identify and quantify the presence of a specific drug or drug metabolite.

*Confirmation (or confirmatory) validity test* means a second test performed on a urine specimen to further support a validity test result.

*Confirmed drug test* means a confirmation test result received by an MRO from a laboratory.

*Consortium/Third party administrator (C/TPA)* means a service agent that provides or coordinates one or more drug and/or alcohol testing services to DOT-regulated employers. C/TPAs typically provide or coordinate the provision of a number of such services and perform administrative tasks concerning the operation of the

employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (e.g., having a combined random testing pool). C/TPAs are not "employers" for purposes of this part.

*Controlled substances* mean those substances identified in § 40.85 of this title.

*Designated employer representative (DER)* is an individual identified by the employer as able to receive communications and test results from service agents and who is authorized to take immediate actions to remove employees from safety-sensitive duties and to make required decisions in the testing and evaluation processes. The individual must be an employee of the company. Service agents cannot serve as DERs.

*Disabling damage* means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusions.* Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.* (i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlight or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which make them inoperative.

*DOT Agency* means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with Part 40 of this title.

*Driver* means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer.

*Employer* means an entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The

term, as used in these regulations, refers to the entity responsible for overall implementation of DOT drug and alcohol program requirements, as well as those individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part.

*Licensed medical practitioner* means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

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

*Positive rate* means the number of positive results for random controlled substances tests conducted under this part plus the number of refusals of random controlled substances tests required by this part, divided by the total of random controlled substances tests conducted under this part plus the number of refusals of random tests required by this part.

*Refuse to submit (to an alcohol or controlled substances test)* means that a driver:

(1) Fails to show up for any test within a reasonable time after being directed to do so by the employer or to remain at the testing site until the testing process is complete. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a) of this title);

(2) Fails to provide a urine specimen for any drug test required by this part;

(3) In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of the provision of a specimen (§§ 40.67(k) and 40.69(g) of this title);

(4) Fails to provide a sufficient amount of urine when directed, unless it has been determined, through a required medical evaluation, that there was an adequate medical explanation for the failure (see § 40.193(d)(2) of this title);

(5) Fails or declines to take a second test the employer has directed following a negative dilute result (see § 40.197(g) of this title);

(6) Fails to undergo an additional medical examination, as directed by the MRO as part of the verification process, or as directed by the DER concerning

the evaluation as part of the “shy bladder” procedures in part 40, subpart I, of this title; or

(7) Fails to cooperate (e.g., leaves the test site before the collection process is completed, refuses to empty pockets) with any part of the testing process.

*Safety-sensitive function* means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

*Screening test (or initial test)* means:

(1) In drug testing, a test to eliminate “negative” urine specimens from further analysis or to identify a specimen that requires additional testing for the presence of drugs.

(2) In alcohol testing, an analytical procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

*Stand-down* means the practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test results.

*Violation rate* means the number of drivers (as reported under § 382.305) found during random tests given under

this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

#### **§ 382.109 Preemption of State and local laws.**

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement in this part is not possible; or

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

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

#### **§ 382.111 Other requirements imposed by employers.**

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

#### **§ 382.113 Requirement for notice.**

Before performing an alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part.

#### **§ 382.115 Starting date for testing programs.**

(a) All domestic-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations.

(b) All foreign-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations in the United States.

#### **§ 382.117 Public interest exclusion.**

No employer shall use the services of a service agent who is subject to a

public interest exclusion in accordance with 49 CFR part 40, subpart R.

**§ 382.119 Stand-down waiver provision.**

(a) An employer subject to this part who seeks a waiver from the prohibition against standing down an employee before the MRO has completed the verification process shall follow the procedures in 49 CFR 40.21. The employer must send a written request which includes all of the information required by that section to the Federal Motor Carrier Safety Administrator (or the Administrator's designee), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

(b) The final decision whether to grant or deny the application for a waiver will be made by the Administrator or the Administrator's designee.

(c) After a decision is signed by the Administrator or the Administrator's designee, the employer will be sent a copy of the decision, which will include the terms and conditions for the waiver or the reason for denying the application for a waiver.

(d) Questions regarding waiver applications should be directed to the Office of Enforcement and Compliance, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. The telephone number is (202) 366-5720.

**Subpart B—Prohibitions**

**§ 382.201 Alcohol concentration.**

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

**§ 382.205 On-duty use.**

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

**§ 382.207 Pre-duty use.**

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

**§ 382.209 Use following an accident.**

No driver required to take a post-accident alcohol test under § 382.303 shall use alcohol for eight hours following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

**§ 382.211 Refusal to submit to a required alcohol or controlled substances test.**

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substances test required under § 382.307, or a follow-up alcohol or controlled substances test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

**§ 382.213 Controlled substances use.**

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

**§ 382.215 Controlled substances testing.**

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No employer having actual knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

**§ 382.217 Actual knowledge.**

For the purposes of this subpart, an employer can obtain actual knowledge that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under

the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substances use, except as provided in § 382.219.

**§ 382.219 Employee admission of alcohol and controlled substances use.**

(a) Employees who admit to alcohol misuse or controlled substances use are not subject to the referral, evaluation and treatment requirements of this part and part 40 of this title, provided that:

(1) The admission is in accordance with a written employer-established voluntary self-identification program or policy which meets the requirements of paragraph (b) of this section;

(2) The driver does not self-identify in order to avoid testing under the requirements of this part;

(3) The driver makes the admission of alcohol misuse or controlled substances use before performing a safety sensitive function; and

(4) The driver does not perform a safety sensitive function until the employer is satisfied that the employee has been evaluated and has successfully completed education or treatment requirements in accordance with the self-identification program guidelines.

(b) A qualified voluntary self-identification program or policy must contain the following elements:

(1) It must prohibit the employer from taking adverse action against an employee making a voluntary admission of alcohol misuse or controlled substances use within the parameters of the program or policy and paragraph (a) of this section;

(2) It must allow the employee sufficient opportunity to seek evaluation, education or treatment to establish control over the employee's drug or alcohol problem; and

(3) It must permit the employee to return to safety sensitive duties only upon successful completion of an educational or treatment program, as determined by a substance abuse professional.

**Subpart C—Tests Required**

**§ 382.301 Pre-employment testing.**

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO or C/TPA indicating a verified negative test result for that driver.

(b) An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and

(2) While participating in that program, either—

(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer), or

(ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.

(c)(1) An employer who exercises the exception in paragraph (b) of this section shall contact the controlled substances testing program(s) in which the driver participates or participated and shall obtain and retain from the testing program(s) the following information:

(i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(2) An employer who uses, but does not employ, a driver more than once a

year to operate commercial motor vehicles must obtain the information in paragraph (c)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with § 382.401. If the employer cannot verify that the driver is participating in a controlled substances testing program in accordance with this part and part 40 of this title, the employer shall conduct a pre-employment controlled substances test.

(d) An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

**§ 382.303 Post-accident testing.**

(a) As soon as practicable following an occurrence involving a commercial

motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or (2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(c) The following table notes when a post-accident test is required to be conducted by paragraphs (a)(1), (a)(2), (b)(1), and (b)(2) of this section:

TABLE FOR § 382.303(a) AND (b)

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality .....	Yes .....	Yes.
	No .....	Yes.
ii. Bodily injury with immediate medical treatment away from the scene. ....	Yes .....	Yes.
	No .....	No.
iii. Disabling damage to any motor vehicle requiring tow away. ....	Yes .....	Yes.
	No .....	No.

(d)(1) *Alcohol tests.* If a test required by this section is not administered

within two hours following the accident, the employer shall prepare

and maintain on file a record stating the reasons the test was not promptly

administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FMCSA upon request.

(2) *Controlled substance tests.* If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

(e) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(f) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(g)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

(h) *Exception.* This section does not apply to:

(1) An occurrence involving only boarding or alighting from a stationary motor vehicle; or

(2) An occurrence involving only the loading or unloading of cargo; or

(3) An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as

defined in § 571.3 of this title) by an employer unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to be marked or placarded in accordance with § 177.823 of this title.

#### § 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 10 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

(c) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by § 382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the **Federal Register** the new minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication in the **Federal Register**.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FMCSA Administrator may lower this rate to 10 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that

the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(e)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all driver positions.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all driver positions.

(f) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by § 382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the **Federal Register** the new minimum annual percentage rate for controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication in the **Federal Register**.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(h) When the minimum annual percentage rate for random controlled

substances testing is 25 percent, and the data received under the reporting requirements of § 382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled substances testing determined by the FMCSA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a C/TPA, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the C/TPA who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances random testing rule may be calculated for the employer.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive

functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

#### **§ 382.307 Reasonable suspicion testing.**

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603. The person who makes

the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(3) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company

official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

**§ 382.309 Return-to-duty testing.**

The requirements for return-to-duty testing must be performed in accordance with 49 CFR part 40, Subpart O.

**§ 382.311 Follow-up testing.**

The requirements for following-up testing must be performed in accordance with 49 CFR part 40, Subpart O.

**Subpart D—Handling of Test Results, Record Retention, and Confidentiality**

**§ 382.401 Retention of records.**

(a) *General requirement.* Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* The following records shall be maintained for a minimum of five years:

- (i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,
- (ii) Records of driver verified positive controlled substances test results,
- (iii) Documentation of refusals to take required alcohol and/or controlled substances tests,
- (iv) Driver evaluation and referrals,
- (v) Calibration documentation,
- (vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) *Two years.* Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

(3) *One year.* Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

(4) *Indefinite period.* Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

(c) *Types of records.* The following specific types of records shall be

maintained. "Documents generated" are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:

- (i) Collection logbooks, if used;
- (ii) Documents relating to the random selection process;
- (iii) Calibration documentation for evidential breath testing devices;
- (iv) Documentation of breath alcohol technician training;
- (v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;
- (vi) Documents generated in connection with decisions on post-accident tests;

(vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine specimen for testing; and

(viii) Consolidated annual calendar year summaries as required by § 382.403.

(2) Records related to a driver's test results:

- (i) The employer's copy of the alcohol test form, including the results of the test;
- (ii) The employer's copy of the controlled substances test chain of custody and control form;
- (iii) Documents sent by the MRO to the employer, including those required by part 40, subpart G, of this title;
- (iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part;

(v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part; and

(vi) Documents generated in connection with verifications of prior employers' alcohol or controlled substances test results that the employer:

(A) Must obtain in connection with the exception contained in § 382.301, and

(B) Must obtain as required by § 382.413.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse and controlled substance use awareness, including a copy of the employer's policy on alcohol misuse and controlled substance use;

(ii) Documentation of compliance with the requirements of § 382.601, including the driver's signed receipt of education materials;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion;

(iv) Documentation of training for breath alcohol technicians as required by § 40.213(a) of this title; and

(v) Certification that any training conducted under this part complies with the requirements for such training.

(6) Administrative records related to alcohol and controlled substances testing:

(i) Agreements with collection site facilities, laboratories, breath alcohol technicians, screening test technicians, medical review officers, consortia, and third party service providers;

(ii) Names and positions of officials and their role in the employer's alcohol and controlled substances testing program(s);

(iii) Semi-annual laboratory statistical summaries of urinalysis required by § 40.111(a) of this title; and

(iv) The employer's alcohol and controlled substances testing policy and procedures.

(d) *Location of records.* All records required by this part shall be maintained as required by § 390.31 of this subchapter and shall be made available for inspection at the employer's principal place of business within two business days after a request has been made by an authorized representative of the Federal Motor Carrier Safety Administration.

(e) *OMB control number.* (1) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2126-0012.

(2) The information collection requirements of this part are found in the following sections: Sections 382.105, 382.113, 382.301, 382.303, 382.305, 382.307, 382.401, 382.403, 382.405, 382.409, 382.411, 382.601, 382.603.

**§ 382.403 Reporting of results in a management information system.**

(a) An employer shall prepare and maintain a summary of the results of its

alcohol and controlled substances testing programs performed under this part during the previous calendar year, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(b) If an employer is notified, during the month of January, of a request by the Federal Motor Carrier Safety Administration to report the employer's annual calendar year summary information, the employer shall prepare and submit the report to the FMCSA by March 15 of that year. The employer shall ensure that the annual summary report is accurate and received by March 15 at the location that the FMCSA specifies in its request. The report shall be in the form and manner prescribed by the FMCSA in its request. When the report is submitted to the FMCSA by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(c) *Detailed summary.* Each annual calendar year summary that contains information on a verified positive controlled substances test result, an alcohol screening test result of 0.02 or greater, or any other violation of the alcohol misuse provisions of subpart B of this part shall include the following informational elements:

(1) Number of drivers subject to this part;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substances use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of positives verified by a MRO by type of test, and type of controlled substance;

(5) Number of negative controlled substance tests verified by a MRO by type of test;

(6) Number of persons denied a position as a driver following a pre-employment verified positive controlled substances test and/or a pre-employment alcohol test that indicates an alcohol concentration of 0.04 or greater;

(7) Number of drivers with tests verified positive by a medical review officer for multiple controlled substances;

(8) Number of drivers who refused to submit to an alcohol or controlled

substances test required under this subpart, including those who submitted substituted or adulterated specimens;

(9)(i) Number of supervisors who have received required alcohol training during the reporting period; and

(ii) Number of supervisors who have received required controlled substances training during the reporting period;

(10)(i) Number of screening alcohol tests by type of test; and

(ii) Number of confirmation alcohol tests, by type of test;

(11) Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test;

(12) Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test;

(13) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in § 382.503 and part 40, subpart O, of this title), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part;

(14) Number of drivers who were administered alcohol and drug tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater; and

(15) Number of drivers who were found to have violated any non-testing prohibitions of subpart B of this part, and any action taken in response to the violation.

(d) *Short summary.* Each employer's annual calendar year summary that contains only negative controlled substance test results, alcohol screening test results of less than 0.02, and does not contain any other violations of subpart B of this part, may prepare and submit, as required by paragraph (b) of this section, either a standard report form containing all the information elements specified in paragraph (c) of this section, or an "EZ" report form. The "EZ" report shall include the following information elements:

(1) Number of drivers subject to this part;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substance use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of negatives verified by a medical review officer by type of test;

(5) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart, including those who submitted substituted or adulterated specimens;

(6)(i) Number of supervisors who have received required alcohol training during the reporting period; and

(ii) Number of supervisors who have received required controlled substances training during the reporting period;

(7) Number of screen alcohol tests by type of test; and

(8) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in § 382.503 and part 40, subpart O, of this title), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part.

(e) Each employer that is subject to more than one DOT agency alcohol or controlled substances rule shall identify each driver covered by the regulations of more than one DOT agency. The identification will be by the total number of covered functions. Prior to conducting any alcohol or controlled substances test on a driver subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(f) A C/TPA may prepare annual calendar year summaries and reports on behalf of individual employers for purposes of compliance with this section. However, each employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a C/TPA.

#### **§ 382.405 Access to facilities and records.**

(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of alcohol or controlled substances, including any records pertaining to his or her alcohol or controlled substances tests. The employer shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each employer shall permit access to all facilities utilized in complying

with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(d) Each employer shall make available copies of all results for employer alcohol and/or controlled substances testing conducted under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a post-accident alcohol and/or controlled substance test administered following the accident under investigation.

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

(g) An employer may disclose information required to be maintained under this part pertaining to a driver to the decision maker in a lawsuit, grievance, or administrative proceeding initiated by or on behalf of the individual, and arising from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results) of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver.) Additionally, an employer may disclose information in criminal or civil actions in accordance with § 40.323(a)(2) of this title.

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

**§ 382.407 Medical review officer notifications to the employer.**

Medical review officers shall report the results of controlled substances tests to employers in accordance with the requirements of part 40, subpart G, of this title.

**§ 382.409 Medical review officer record retention for controlled substances.**

(a) A medical review officer or third party administrator shall maintain all dated records and notifications, identified by individual, for a minimum of five years for verified positive controlled substances test results.

(b) A medical review officer or third party administrator shall maintain all dated records and notifications, identified by individual, for a minimum of one year for negative and canceled controlled substances test results.

(c) No person may obtain the individual controlled substances test results retained by a medical review officer or third party administrator, and no medical review officer or third party administrator shall release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph (c) shall prohibit a medical review officer or third party administrator from releasing, to the employer or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part, the information delineated in part 40, Subpart G, of this title.

**§ 382.411 Employer notifications.**

(a) An employer shall notify a driver of the results of a pre-employment controlled substances test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.

(b) The designated employer representative shall make reasonable efforts to contact and request each driver who submitted a specimen under the employer's program, regardless of the driver's employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.

(c) The designated employer representative shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 72 hours.

**§ 382.413 Inquiries for alcohol and controlled substances information from previous employers.**

Employers shall request alcohol and controlled substances information from previous employers in accordance with the requirements of part 40, subpart B, of this title.

**Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct**

**§ 382.501 Removal from safety-sensitive function.**

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in part 390 of this subchapter.

**§ 382.503 Required evaluation and testing.**

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title.

**§ 382.505 Other alcohol-related conduct.**

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall

take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

#### **§ 382.507 Penalties.**

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. 521(b). In addition, any employer or driver who violates the requirements of 49 CFR part 40 shall be subject to the penalty provisions of 49 U.S.C. 521(b).

#### **Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral**

##### **§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.**

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting these requirements.

(1) The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under this part and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle.

(2) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under § 382.303(d);

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the

test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by § 382.303(d);

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under part 40, subpart O, of this title;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a co-worker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and or referral to management.

(c) *Optional provision.* The materials supplied to drivers may also include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) *Certificate of receipt.* Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver.

##### **§ 382.603 Training for supervisors.**

Each employer shall ensure that all persons designated to supervise drivers receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo

testing under § 382.307. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

##### **§ 382.605 Referral, evaluation, and treatment.**

The requirements for referral, evaluation, and treatment must be performed in accordance with 49 CFR part 40, subpart O.

Date Issued: March 16, 2001.

**Julie Anna Cirillo,**

*Acting Deputy Administrator, Federal Motor Carrier Safety Administration.*

[FR Doc. 01-9414 Filed 4-27-01; 8:45 am]

BILLING CODE 4910-EX-P

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

#### **49 CFR Parts 653, 654, and 655**

[Docket No. FTA-2000-8513]

RIN 2132-AA71

#### **Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations**

**AGENCY:** Federal Transit Administration, Department of Transportation.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Federal Transit Administration (FTA) proposes to combine its drug and alcohol testing regulations. FTA believes this action will make the rules more "user-friendly" and easier to understand. Also, the new rule will take into account the guidance that FTA has issued in the past several years, including technical assistance, letters of interpretation, audit findings, newsletters, training classes, safety seminars, and public speaking engagements. In addition, this NPRM conforms FTA's rule to the Department of Transportation's (DOT) revised drug and alcohol testing rule published on December 19, 2000.

**DATES:** Comments on this proposed rule must be submitted by June 14, 2001.

**ADDRESSES:** Written comments must refer to the docket number appearing above and must be submitted to the United States Department of Transportation (U.S. DOT), Central Docket Office, PL-401, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday, except Federal holidays. Those desiring

the agency to acknowledge receipt of their comments should include a self-addressed stamped postcard with their comments.

Commenters may also submit their comments electronically. Instructions for electronic submission may be found at the following web address: <http://dms.dot.gov/submit/>. The public may also review docketed comments electronically. The following web address provides instructions and access to the DOT electronic docket: <http://dms.dot.gov/search/>.

**FOR FURTHER INFORMATION CONTACT:** For program issues, Mark Snider, Office of Safety and Security, (202) 366-2896 (telephone); (202) 366-7951 (fax); or [mark.snider@fta.dot.gov](mailto:mark.snider@fta.dot.gov) (e-mail). For legal issues, Bruce Walker, Office of the Chief Counsel, (202) 366-4011 (telephone); (202) 366-3809 (fax); or [Bruce.Walker@fta.dot.gov](mailto:Bruce.Walker@fta.dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

Electronic access to this rule and other safety rules may be obtained through the FTA Office of Safety and Security home page at <http://transit-safety.volpe.dot.gov>.

An electronic copy of this document may be downloaded, using a modem and suitable communications software, from the Government Printing Office's (GPO) Electronic Bulletin Board Service at (202) 512-1661. Internet users may download this document from the **Federal Register's** homepage at <http://www.nara.gov/fedreg> and from the GPO database at <http://www.access.gpo.gov/nara>.

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, via the Dockets Management System (DMS) on the DOT home page at <http://dms.dot.gov>. The DMS is available 24 hours each day, 365 days each year. Please follow the online instructions for more information and help.

**I. Background**

The Omnibus Transportation Employee Testing Act of 1991 (the Act) mandated the Secretary of Transportation to issue regulations to combat prohibited drug use and alcohol misuse in the transportation industry. (Public Law 102-143, October 28, 1991, FTA sections codified at 49 U.S.C. 5331). In December 1992, FTA issued two NPRMs to prevent prohibited drug use and alcohol misuse by "safety-sensitive" employees in the transit industry. In February 1994, FTA adopted drug and alcohol testing rules, which were promulgated at 49 CFR parts 653 and 654.

*Omnibus Transportation Employee Testing Act of 1991*

The Act requires FTA to issue regulations requiring recipients of funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test safety-sensitive employees for the use of alcohol or drugs in violation of law or federal regulation. The Act allows FTA to defer to regulations issued by the Federal Railroad Administration (FRA), for operations covered by that agency.

As a condition of FTA funding, the Act requires recipients to establish alcohol and drug testing programs. The Act mandates four types of testing: Pre-employment, random, reasonable suspicion, and post-accident. In addition, the Act permits return-to-duty and follow-up testing under specific circumstances. The Act requires that recipients follow the testing procedures set out by the Department of Health and Human Services (DHHS).

The Act does not require recipients to follow a particular course of action when they learn that a safety-sensitive employee has violated a law or Federal regulation concerning alcohol or drug use. Rather, the Act directs FTA to issue regulations establishing consequences for the use of alcohol or drugs in violation of FTA regulations. Possible consequences include education, counseling, rehabilitation programs, and suspension or termination from employment.

In authorizing this regulatory scheme, the Act has pre-empted inconsistent State or local laws, rules, regulations, ordinances, standards, or orders. However, provisions of State criminal law, which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, are not pre-empted by the Act.

*Previous Action by FTA*

On December 15, 1992, FTA issued two NPRMs to prevent prohibited drug use and alcohol misuse (49 CFR parts 653 and 654). The rules established a scheme whereby safety-sensitive employees would be tested on a pre-employment, random, reasonable suspicion, post-accident, return-to-duty, and follow-up basis.

In the December 1992 **Federal Register** notice, FTA stated that it was "considering combining the final FTA alcohol and drug testing regulations into one part in the Code of Federal Regulations." At that time, FTA noted that while the drug and alcohol testing rules shared many similarities, there were still enough differences to warrant two distinct CFR Parts. On February 15, 1994, FTA adopted two separate rules—

the drug testing rule, 49 CFR part 653, and the alcohol testing rule, 49 CFR part 654.

Since the rules were first published, there have been two notable amendments as well as several minor (technical) amendments. In December 1998, FTA amended its post-accident regulation to allow an employer to seek post-accident test results from law enforcement agencies in the limited circumstance when the employer has been unable to perform such a test itself. FTA has stressed the limited applicability of this amendment.

In January 1999, FTA amended its definition of "[m]aintaining a revenue service vehicle or equipment," located under safety-sensitive function (§ 653.7 and § 654.7). The new definition includes persons that perform overhaul and rebuilding services of engines, parts, and vehicles. This was a shift from FTA's previous position of not including employees who performed those services. FTA has stressed that this amendment applies both to employees working directly for FTA grantees and to FTA grantees' contractors performing such safety-sensitive work.

When the drug and alcohol rules became effective, FTA began an aggressive outreach effort to assist affected entities in complying with the new rules. FTA offered numerous courses throughout the country on implementation. In addition, in April 1994, FTA published Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit and made them available to any party seeking help in implementing the rules. The Guidelines, which were published virtually concurrently with the rules in the **Federal Register** and several months prior to the effective date of the rule, are a step-by-step manual on how to most effectively comply with Parts 653 and 654. FTA envisions an update to the Guidelines in the near future, to assist employers in implementing Part 655.

FTA has issued hundreds of letters of interpretation on the rules. Public response to these letters, especially since they became available on FTA's external Web page, has been highly favorable. Employers and employees have found that the letters more fully explain the rules, FTA's implementation of the rules, and FTA's reasons for that implementation of the rules. FTA will continue to offer such guidance and to amend its guidance, if necessary, based on the final publication of the rule.

To determine compliance with the rules, FTA's Office of Safety and Security began auditing grantee drug and alcohol testing programs in March

1997. The audits quickly evolved into opportunities for FTA to provide extensive technical assistance. Through the audits, FTA has gained a better understanding of the difficulties that grantees encounter when implementing the rules. In addition, audits have shown FTA where the rules can be strengthened and improved. The impetus to combine Parts 653 and 654 is due, in no small part, to the audit program.

## II. Overview of Proposed Rule

In its broadest sense, proposed Part 655 should be read as a combination of Parts 653 and 654. FTA decided to combine the drug and alcohol testing rules based on its experience since the rules have been implemented. FTA believes that this change will allow the program to be implemented more efficiently and will bring FTA into line with the three other operating administrations that fall under the Omnibus Transportation Employee Testing Act of 1991 (Federal Aviation Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration [formerly the Office of Motor Carrier and Highway Safety within the Federal Highway Administration]), as well as the two other operating administrations that have drug and alcohol testing regulations (Research and Special Programs Administration and U.S. Coast Guard).

The rule, as proposed, applies to recipients of funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4). It requires each transit operator (employer) who receives these funds to establish and conduct a multi-faceted anti-drug and alcohol misuse testing program. The regulation conditions financial assistance on the implementation of a program. Failure of an employer to develop a program and implement the program in compliance with this regulation will result in the suspension of Federal transit funding.

A basic component of the regulation requires the testing of safety-sensitive employees for the use of controlled substances and the misuse of alcohol; however the regulation also requires education and awareness about the problems associated with prohibited drug use and alcohol misuse. In addition, the regulation mandates that each employer have a policy statement describing its program policies and procedures. The statement must include the consequences for prohibited drug use and alcohol misuse.

The regulation specifies that safety-sensitive employees are prohibited from using five illegal substances (marijuana,

cocaine, opiates, amphetamines, and phencyclidine) and are prohibited from misusing alcohol. The NPRM proposes the testing of safety-sensitive employees in five situations: (1) Pre-employment (including transfer to a safety-sensitive position within the organization); (2) Reasonable suspicion; (3) Random; (4) Post-accident; and (5) Return to duty/follow-up (periodic). Drug testing is required in all five situations. Alcohol testing is required for all situations except for pre-employment, in which it is only encouraged.

This NPRM requires the use of the Department-wide drug and alcohol testing procedures contained in 49 CFR part 40 (December 19, 2000, 65 FR 79462). Part 40 is consistent with the Department of Health and Human Services (DHHS) regulation, "Scientific and Technical Guidelines for Drug Testing Programs," which was originally issued on April 11, 1988 and then re-issued on June 9, 1994. The DHHS regulation, which includes the chain of custody procedures to be used when collecting urine samples, provides procedures for ensuring the integrity of the test and maximizing the privacy of the individual being tested.

If a covered employee tests positive for illegal drug use or alcohol misuse or otherwise violates the rule, the employee must be removed from his or her safety-sensitive position. Therefore, the employee must be told, at a minimum, about education and rehabilitation programs. Should the employer decide to retain a covered employee whose test result has been verified positive, the employee must be evaluated by a substance abuse professional. Prior to returning an employee to a safety-sensitive function, the employer must ensure that the employee has successfully completed rehabilitation; the rule does not require the employer to pay for rehabilitation.

This NPRM applies to recipients of federal transit funds, i.e., transit systems, metropolitan planning organizations (MPOs), and States; any enforcement action for noncompliance is against such recipients. MPOs and States are affected by this regulation if (1) they provide transit service or they provide money to a subrecipient who provides transit service and (2) are required to provide certifications of compliance on behalf of the subrecipient. MPO's or States that provide transit service must develop and implement a program, like any other recipient. MPO's or States that fund or manage transit providers, but do not provide transit service, must ensure that transit provider employers provide certifications of compliance.

FTA has its primary relationship with grantees. Many grantees both receive transit funds and operate mass transit services. Typical among these are large transit entities that receive funds under sections 49 U.S.C. 5307, 5309, and 5311. In addition, some grantees (typically States) pass the money they receive to smaller subrecipients within their States. In these situations, the FTA recipient is not the transit operator.

This NPRM eliminates the distinction between large and small operators. The term "employer" is now used to include both small and large operators, as well as entities providing service under contract or other arrangement with the transit operator.

## III. General Discussion about the Rule

### *Today's Proposed Rule*

This rule combines 49 CFR Parts 653 and 654. Both its rule text and its preamble incorporate views expressed in letters of interpretation, policy determinations, amendments, newsletters, and audits. In addition, this NPRM conforms the new part 655 with the new Department of Transportation procedures for drug and alcohol testing, 49 CFR Part 40 (December 19, 2000, 65 FR 79462).

### *The Common Preamble*

Procedures for Transportation Workplace Drug and Alcohol Testing Programs, promulgated at 49 CFR part 40, have been revised. As a result, the modal administrations' have proposed amendments to their drug and alcohol regulations that conform accordingly. A common preamble that outlines the proposed amendments is published elsewhere in the **Federal Register**.

## IV. Section-by-Section Analysis

In this section, FTA will discuss the differences between the existing rules in Parts 653 and 654 and the proposed rules in Part 655. There is no discussion for sections that have remained substantially the same. In addition to seeking comments on the NPRM overall, FTA also requests comments on the specific issues indicated below.

### *Subpart A—General*

#### *A. Definitions (§ 655.4).*

*Employer:* FTA is clarifying the definition of employer. FTA believes that, in addition to direct recipients of FTA funding, the term "employer" includes State recipients that pass the money to subrecipients and grantees that have contractors performing transit operations. State recipients and grantees (that have contractors performing transit operations) are considered employers

under this expanded definition, they will now have access to individual's test records. States need access to an individual's test records, because States are required to certify compliance with all of their subrecipients' drug and alcohol testing programs. Without a comprehensive review of their subrecipients' programs, States cannot, in good faith, sign the certification of compliance. This is also true for grantees whose operations are performed by contractors. The grantee is responsible for ensuring compliance, and without the ability to take a comprehensive look at its contractors' drug and alcohol programs, the grantee is unable to certify compliance.

*Second chance policy:* FTA is adding this definition to the rule; however, FTA would like to clarify that it has no position on whether grantees must adopt a second chance policy, i.e., a policy allowing an employee (who has previously violated the employer's drug and/or alcohol policy) to return to a safety-sensitive position after completing rehabilitation.

*Taxi cab drivers and other transportation providers:* The duties performed by taxicab drivers and other transportation providers can be considered safety-sensitive functions, pursuant to (1) the definition of safety-sensitive function, "operating a revenue service vehicle, including when not in revenue service."

FTA has expressed its policy regarding taxicab drivers and other transportation providers in a series of interpretation letters (see, e.g., Letter to Florida Commission for the Transportation Disadvantaged dated 26 April 1999, Letter to King County in Washington dated 4 February 1999, Letter to AC Transit in Oakland, California dated 30 September 1998). According to the policy, drug and alcohol testing rules do not apply to taxi cab drivers when patrons (using publicly subsidized vouchers) or transportation providers can choose from a variety of taxi cab companies. Alternatively, the rules do apply when a transit patron has to contact one or two specific companies in order to take advantage of certain publicly-financed transportation benefits. This policy is based on the practical difficulty of administering a drug and alcohol testing program to taxi companies that only incidentally provide transit service. FTA proposes to incorporate this reasoning when implementing Part 655.

FTA specifically seeks comment on whether there is a difference between the transit patron choosing the transportation provider from a variety of choices, and the grantee (or its

contracted broker) choosing from a limited number of choices. In the former, the patron chooses, while in the latter, the grantee (or its contracted broker) chooses.

*Dispatchers:* The current rules defines "safety-sensitive function" to include any individual "controlling dispatch or movement of a revenue service vehicle." At least one individual has questioned whether the duties of certain types of transit dispatchers implicate safety. Therefore, FTA welcomes comment on the duties and responsibilities of dispatchers in the different transit systems. FTA seeks to determine whether the duties and responsibilities vary significantly enough to warrant modification of the current blanket rule.

*Maintenance contractors:* The current rules include maintenance work in their definition of safety-sensitive function. In January 1999, FTA amended its definition of maintenance duties. FTA is now clarifying that amendment. The amendment expanded the definition of maintenance work to include all workers (including contractors) who overhaul and rebuild engines, vehicles, and parts. There were few objections to the amendment during the comment period. However, shortly after the rule change became effective, grantees expressed concern that, because overhaul and rebuild work is often contracted out, a particular category of maintenance workers (i.e. contractors who perform overhaul and rebuilding), who were previously not subject to the rules, would now be subject to the rules.

In response, FTA explained that the rules should extend to contractors that perform any type of maintenance work (i.e., the rules should cover both direct recipient employees and contract employees equally). FTA took this position, and maintains that position, for the reasons stated in the preamble to the 1999 rule change, i.e., fairness and safety (64 FR 425, January 5, 1999).

#### *B. Stand-Down Waivers for Drug Testing (§ 655.5)*

In accordance with changes made to 49 CFR part 40, FTA has added a subsection on stand-down waivers. Section 655.5 provides the specific FTA waiver procedures. The DOT-wide regulation, 49 CFR part 40, contains the substantive requirements for obtaining a waiver.

#### *Subpart B—Program Requirements*

##### *A. Policy Statement Contents (§ 655.15)*

In response to current industry practices and FTA audit procedures, FTA is clarifying its Policy Statement requirement. FTA has had numerous

questions as to what is required in a policy. FTA would like to emphasize that the only information required in a Policy Statement is the information listed in § 655.15. A grantee may choose, however, to include additional requirements not mandated by FTA. If a grantee does so, the grantee's policy shall indicate that those additional requirements are the employer's, and not FTA's.

Moreover, in order to comply with § 655.15(e), employers may incorporate by reference 49 CFR Part 40 in their Policy Statements, provided that 49 CFR Part 40 is available for review by employees when requested.

Finally, FTA is clarifying who must approve the policy. In most instances, a grantee will have a governing board that can adopt the policy. However, where there is no governing board or the governing board does not have approval authority, the highest-ranking official with authority to approve the policy can do so, and that will satisfy the regulatory intent.

#### *Subpart E—Types of Testing*

##### *A. Pre-employment Drug Testing (§ 655.41)*

FTA is changing the pre-employment drug testing requirement concerning hiring. In the past, employers had to administer a test and receive a negative test result before they could hire an employee. FTA believes that this provision is too restrictive on employers. FTA will no longer use the word "hire." In the new rule, FTA will instead require that an employer administer the pre-employment test and receive a negative drug test prior to the first time that an employee performs a safety-sensitive function. This change has taken place to better satisfy the intent of this section, which is to ensure that an employer knows that an employee can successfully pass a drug test before allowing the employee to perform a safety-sensitive function.

FTA is also clarifying another pre-employment provision. Numerous affected entities have asked how long an employee can be off from work before he or she must take another pre-employment test; this issue arises most often for seasonal workers. FTA proposes that an employee who is off for more than 90 consecutive calendar days and plans to return to a safety-sensitive function must first successfully pass another pre-employment drug test before returning to work. Likewise, an applicant, who has not commenced performing a safety-sensitive function within 90 consecutive calendar days of the employer's receipt of a negative test

result for that applicant, must successfully pass another pre-employment drug test before performing such safety-sensitive functions. It is FTA's intention that employers assure themselves that employees can successfully pass a drug test before returning them to safety-sensitive functions.

#### *B. Pre-Employment Alcohol Testing (§ 655.42)*

For several years, due to a court decision and subsequent legislation, the pre-employment alcohol testing requirements in FTA's rule have been suspended. In order to better reflect the legislation and to conform with the other DOT agency drug and alcohol testing programs, all six DOT agencies with testing programs are adding this subsection to their respective rules. This subsection allows, but does not require, employers to conduct pre-employment alcohol testing. If an employer chooses to conduct pre-employment alcohol testing, the employer would have to conduct the testing in accordance with all of the requirements of 49 CFR Part 40.

#### *C. Post-Accident Testing (§ 655.44)*

In December 1998, FTA amended its post-accident testing regulation to allow, in extremely limited circumstances, an employer to use the test results from a local law enforcement-administered post-accident test. FTA wants to reiterate that such results may be used only when an employer has been unable to perform a post-accident test within the required time frame. FTA wishes to dispel the idea that employers can simply "count on" local law enforcement to administer post-accident tests and provide test results.

#### *D. Random Testing (§ 655.45)*

FTA is clarifying section 655.45(g), which is concerned with ensuring that random tests are spread reasonably throughout the calendar year. In the course of conducting its audits, FTA has learned that current industry practice is to conduct random testing when it is convenient, e.g., random tests are only performed every Thursday afternoon. The purpose of random testing is deterrence, and the most effective way to achieve the highest level of deterrence is to conduct random drug and alcohol tests in an unpredictable manner. FTA reiterates that the rule requires random testing to be spread out throughout the calendar year. At a minimum, random testing shall be conducted at least quarterly. Random tests must be spread throughout all days

and all hours of service. The testing should be completely unpredictable and encompass all safety-sensitive employees.

#### *Subpart H—Administrative Requirements*

##### *A. Reporting Results In A Management Information System (§ 655.72)*

FTA is changing its Management Information System (MIS) reporting requirement from census reporting to stratified random sampling. FTA has required census reports for six years and believes it now has an accurate portrait of the current state of drug and alcohol testing (including positive rates) in the transit industry. By using sampling, FTA will reduce the paperwork burden on a portion of the industry while still maintaining a high confidence level in the results. Although transit employers will still be required to prepare an MIS form annually, they will only be required to submit an MIS form when requested by FTA. FTA will officially notify employers when they must submit an MIS form and will provide employers with all necessary forms and instructions to prepare an MIS form.

##### *B. Access to Facilities And Records (§ 655.73)*

FTA seeks comment on access to facilities and records. This request has arisen in the context of grantees that, in attempting to exercise oversight responsibility, have been denied access to employee records for confidentiality reasons. On one hand, FTA does not want employee records made available to a potentially unlimited number of individuals. On the other hand, FTA does not want to impede a grantee (such as a State) from properly exercising its oversight role.

FTA seeks comment on a related issue, i.e., whether state regulatory agencies should have access to drug and alcohol testing results. Another DOT agency, the Federal Motor Carrier Safety Administration (FMCSA), has included such a provision in its regulation for quite some time. See 49 CFR 382.405(d). Grantees have expressed concern about the undesirable consequences that result when state regulatory agencies do not have access to drug and alcohol test results. For example, a Department of Motor Vehicles, which is responsible for issuing Commercial Drivers Licenses (CDLs), is not able to obtain the drug and alcohol testing results from transit agencies performing such tests for CDL holders. Thus, a transit employee with a CDL who tests positive on a test and is discharged from his job, can simply find another job requiring a CDL.

Therefore, FTA seeks comment on whether employers should be permitted to release employee data from its drug and alcohol testing programs to State or local officials with regulatory authority over the employer or any of its employees.

Similarly, FTA seeks comment on whether employers should be permitted to release employee data from its drug and alcohol testing programs to local law enforcement officials.

#### **V. Effect of the Americans With Disabilities Act of 1990 on Alcohol Testing Programs**

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on employers' responsibilities toward employees with disabilities. According to Title I, an employer must provide reasonable accommodations for work for persons with disabilities. Some covered workers are considered persons with disabilities for purposes of protection under the ADA. This issue was treated more fully in the 1994 DOT-wide preamble (59 FR 7302, 7311-14, February 15, 1994).

#### **VI. Regulatory Process Matters**

##### *A. Executive Order 12866*

FTA has evaluated the industry costs and benefits of this rule, which requires that transit industry personnel who perform safety-sensitive functions be covered by a program to control illegal drug abuse and alcohol misuse in mass transportation operations. This rule makes no noteworthy substantive changes. Any incremental costs are negligible, and the policy and economic impact will have no significant effect.

##### *B. Departmental Significance*

This rule is a "non-significant regulation" as defined by the Department's Regulatory Policies and Procedures, because, while it involves an important Departmental policy that is likely to generate a great deal of public interest, in the larger scheme, it is simply a combination of two existing regulations (49 CFR parts 653 and 654). It also conforms FTA's drug and alcohol testing regulations with the Department's drug and alcohol testing regulations (49 CFR part 40), to which FTA grantees already are subject.

##### *C. Regulatory Flexibility Act*

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), FTA has made a preliminary assessment of the possible effects of the rule on small businesses. To the extent possible, FTA has made efforts to acknowledge the differences between small and large entities, and has endeavored to make

accommodations when possible. Experience with Parts 653 and 654 has shown that the rule has a significant impact on a substantial number of small entities. FTA believes that this new rule will provide greater clarity and ease of implementation for small entities.

#### D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*) The Office of Management and Budget has approved FTA's PRA request for Parts 653 and 654. This rule includes the same information collection devices; therefore, FTA believes it already has OMB approval. The management information system (MIS) forms currently required by Parts 653 and 654 may be modified in the future, but will continue to be required by FTA, without changes, under Part 655.

#### E. Executive Order 13132

This action has been reviewed under Executive Order 13132, on Federalism. FTA has determined that this action has significant federalism implications to warrant a federalism assessment, however, this rulemaking is mandated by Congress in the Omnibus Transportation Employee Testing Act of 1991. FTA has limited discretion.

The 1991 legislation mandates FTA to issue regulations requiring grantees of funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test their safety-sensitive employees for the use of drugs and the misuse of alcohol in violation of law or federal regulation.

Before passage of the Omnibus Transportation Employee Testing Act of 1991, safety issues were largely handled as a local matter. This Act clarifies the Federal role by including specific Federal pre-emption language. This Act also makes it clear that, in the area of substance abuse testing, Federal regulations are to take precedence over any inconsistent State or local specifications.

Although Congress has pre-empted state or local law, FTA has preserved the role of local entities in mass transit safety. This regulation does not disturb testing programs which were created by virtue of a grantee's own authority and which are not inconsistent with this regulation.

#### List of Subjects

##### 49 CFR Part 653

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

##### 49 CFR Part 654

Alcohol abuse, drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

##### 49 CFR Part 655

Alcohol abuse, Drug abuse, Drug testing, grant programs—transportation, Mass transportation, reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 5331, the agency proposes to amend Chapter VI of Title 49 of the Code of Federal Regulations as set forth below:

#### PART 653—[REMOVED]

1. Remove part 653.

#### PART 654—[REMOVED]

2. Remove part 654.
3. Add part 655 to read as follows:

### PART 655—PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

#### Subpart A—General

Sec.

- 655.1 Purpose.
- 655.2 Overview.
- 655.3 Applicability.
- 655.4 Definitions.
- 655.5 Stand-down waivers for drug testing.
- 655.6 Preemption of state and local laws.
- 655.7 Starting date for testing programs.

#### Subpart B—Program Requirements

- 655.11 Requirement to establish an anti-drug use and alcohol misuse program.
- 655.12 Required elements of an anti-drug use and alcohol misuse program.
- 655.13 Other requirements imposed by an employer.
- 655.14 Education and training programs.
- 655.15 Policy statement contents.
- 655.16 Requirement to disseminate policy.
- 655.17 Notice requirement.

#### Subpart C—Prohibited Drug Use

- 655.21 Drug testing.

#### Subpart D—Prohibited Alcohol Use

- 655.31 Alcohol testing.
- 655.32 On duty use.
- 655.33 Pre-duty use.
- 655.34 Use following an accident.
- 655.35 Other alcohol-related conduct.

#### Subpart E—Types of Testing

- 655.41 Pre-employment drug testing.
- 655.42 Pre-employment alcohol testing.
- 655.43 Reasonable suspicion testing.
- 655.44 Post-accident testing.
- 655.45 Random testing.
- 655.46 Return to duty following refusal to submit to a test, verified positive drug test result and/or breath alcohol test result greater than 0.04.

655.47 Follow-up testing after returning to duty.

655.48 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

655.49 Refusal to submit to an alcohol or drug test.

#### Subpart F—Drug and Alcohol Testing Procedures

655.51 Compliance with testing procedures requirements.

655.52 Substance abuse professional (SAP).

655.53 Supervisor acting as collection site personnel.

#### Subpart G—Consequences

655.61 Action when an employee has a verified positive drug test result or has a confirmed alcohol test result of 0.04 or greater, or refuses to submit to a test.

655.62 Referral, evaluation, and treatment.

#### Subpart H—Administrative Requirements

655.71 Retention of records.

655.72 Reporting of results in a management information system.

655.73 Access to facilities and records.

#### Subpart I—Certifying Compliance

655.81 Grantee oversight responsibility.

655.82 Compliance a condition of financial assistance.

655.83 Requirement to certify compliance.

**Appendix A to Part 655** Drug Testing Management Information System (MIS) Data Collection Form

**Appendix B to Part 655** Drug Testing Management Information System (MIS) "EZ" Data Collection Form

**Appendix C to Part 655** Alcohol Testing Management Information System (MIS) Data Collection Form

**Appendix D to Part 655** Alcohol Testing Management Information System (MIS) "EZ" Data Collection Form

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

#### Subpart A—General

##### § 655.1 Purpose.

The purpose of this part is to establish programs, to be implemented by employers that receive financial assistance from the Federal Transit Administration (FTA) and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions.

##### § 655.2 Overview.

(a) This part includes nine Subparts. Subpart A of this part covers the general requirements of FTA's drug and alcohol testing programs. Subpart B of this part specifies the basic requirements of each employer's alcohol misuse and prohibited drug use program, including the elements required to be in each employer's testing program. Subpart C of this part describes prohibited drug

use. Subpart D of this part describes prohibited alcohol use. Subpart E of this part describes the types of alcohol and drug tests to be conducted. Subpart F of this part addresses the testing procedural requirements mandated by the Omnibus Transportation Employee Testing Act of 1991, and as required in 49 CFR Part 40. Subpart G of this part lists the consequences for covered employees who engage in alcohol misuse or prohibited drug use. Subpart H of this part contains administrative matters, such as reports and recordkeeping requirements. Subpart I of this part specifies how a recipient certifies compliance with the rule.

(b) This part must be read in conjunction with 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

#### § 655.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to:

- (1) Each recipient and subrecipient receiving federal assistance under:
  - (i) 49 U.S.C. 5307, 5309, or 5311; or
  - (ii) 23 U.S.C. 103(e)(4); and
- (2) Any contractor of a recipient or subrecipient of federal assistance under:
  - (i) 49 U.S.C. 5307, 5309, or 5311; or
  - (ii) 23 U.S.C. 103(e)(4).

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR Part 219 and § 655.83 for its railroad operations, and shall follow this part for its non-railroad operations, if any.

#### § 655.4 Definitions.

For this part, the terms listed in this section have the following definitions. The definitions of additional terms used in this part but not listed in this section can be found in 49 CFR Part 40.

*Accident* means an occurrence associated with the operation of a vehicle, if as a result:

- (1) An individual dies; or
- (2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or
- (3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles (including non-FTA funded vehicles) incurs disabling damage as the result of the occurrence and such vehicle or vehicles are transported away from the scene by a tow truck or other vehicle; or
- (4) With respect to an occurrence in which the mass transit vehicle involved

is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from operation.

*Administrator* means the Administrator of the Federal Transit Administration or the Administrator's designee.

*Anti-drug program* means a program to detect and deter the use of prohibited drugs as required by this part.

*Certification* means a recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part. (See § 655.82 and § 655.83 for certification requirements.)

*Contractor* means a person or organization that provides a safety-sensitive service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

*Covered employee* means a person, including an applicant or transferee, who performs a safety-sensitive function for an entity subject to this part. A volunteer is a covered employee if:

- (1) The volunteer is required to hold a commercial driver's license to operate the vehicle; or
- (2) The volunteer performs a safety-sensitive function for an entity subject to this part and works in the expectation of receiving some type of in-kind or tangible benefit. *Disabling damage* means damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusion*. Damage to a motor vehicle, where the vehicle could have been driven, but would have been further damaged if so driven.

(2) *Exclusions*. (i) Damage that can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable.

*DOT* or *The Department* means the United States Department of Transportation.

*DOT agency* means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring drug and alcohol testing. See 14 CFR part 121, appendices I and J; 33 CFR part 95; 46 CFR parts 4, 5, and 16; and 49 CFR parts 199, 219, 382, and 655.

*Employer* means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

*FTA* means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

*Large operator* means a recipient or subrecipient primarily operating in an urbanized area of 200,000 or more in population.

*Performing (a safety-sensitive function)* means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

*Positive rate* means the annual number of positive results for random drug tests conducted under this part divided by the total annual number of random drug tests conducted under this part.

*Railroad* means:

- (1) All forms of non-highway ground transportation that run on rails or electromagnetic guideways, including:
  - (i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979; and
  - (ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.
- (2) Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

*Recipient* means an entity receiving Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311; or under 23 U.S.C. 103(e)(4).

*Refuse to submit* means any circumstance outlined in 49 CFR 40.191 and 40.261.

*Safety-sensitive function* means any of the following duties, when performed by employees of recipients, subrecipients, operators, or contractors:

- (1) Operating a revenue service vehicle, including when not in revenue service;
- (2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
- (3) Controlling dispatch or movement of a revenue service vehicle;
- (4) Maintaining (including repairs, overhaul and rebuilding) a revenue

service vehicle or equipment used in revenue service. This provision does not apply to the following: an employer who receives funding under 49 U.S.C. 5309, is in an area under 50,000 in population, and contracts out such services; and an employer who receives funding under 49 U.S.C. 5311 and contracts out such services;

(5) Carrying a firearm for security purposes.

*Small operator* means a recipient or subrecipient primarily operating in a nonurbanized area or in an urbanized area of less than 200,000 in population.

*Second chance policy* means that an employer's substance abuse policy permits employees who have previously violated that policy to return to work (including performance of a safety-sensitive function) after complying with the return-to-work testing requirements.

*Vehicle* means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A mass transit vehicle is a vehicle used for mass transportation or for ancillary services.

*Violation rate* means the number of covered employees found during random tests given annually under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the transit industry annually given random alcohol tests under this part plus the total reported number of employees in the transit industry who refuse a random test required by this part.

#### **§ 655.5 Stand-down waivers for drug testing.**

(a) An employer subject to this part may petition the Federal Transit Administration for a waiver allowing the employer to stand down an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

(b) Each petition for a waiver must be in writing and include facts and justification to support the waiver. Each petition must satisfy the substantive requirements for obtaining a waiver, as provided in 49 CFR 40.21.

(c) Each petition for a waiver must be submitted to the Office of Safety and Security, Federal Transit Administration, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

(d) The Administrator may grant a waiver subject to 49 CFR 40.21(d).

#### **§ 655.6 Preemption of state and local laws.**

(a) Except as provided in paragraph (b) of this section, this part preempts

any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and any requirement in this Part is not possible; or

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

(b) This part shall not be construed to preempt provisions of State criminal laws that impose sanctions for reckless conduct, attributed to prohibited drug use or alcohol misuse, leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

#### **§ 655.7 Starting date for testing programs.**

An employer must have an anti-drug and alcohol misuse testing program in place by the date the employer begins operations.

### **Subpart B—Program Requirements**

#### **§ 655.11 Requirement to establish an anti-drug use and alcohol misuse program.**

Each employer shall establish an anti-drug use and alcohol misuse program consistent with the requirements of this part.

#### **§ 655.12 Required elements of an anti-drug use and alcohol misuse program.**

An anti-drug use and alcohol misuse program shall include the following:

(a) A statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use and alcohol misuse. This policy statement shall include all of the elements specified in § 655.15. Each employer shall disseminate the policy consistent with the provisions of § 655.16.

(b) An education and training program which meets the requirements of § 655.14.

(c) A testing program, as described in Subparts C and D of this part, which meets the requirements of this part and 49 CFR part 40.

(d) Procedures for referring a covered employee who has a verified positive drug test result or an alcohol concentration of 0.04 or greater to a Substance Abuse Professional, consistent with 49 CFR Part 40.

#### **§ 655.13 Other requirements imposed by an employer.**

An employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

#### **§ 655.14 Education and training programs.**

Each employer shall establish an employee education and training program for all covered employees, including:

(a) *Education.* The education component shall include display and distribution to every covered employee of: informational material and a community service hot-line telephone number for employee assistance, if available.

(b) *Training*—(1) *Covered employees.* Covered employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use.

(2) *Supervisors.* Supervisors who may make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

#### **§ 655.15 Policy statement contents.**

The local governing board of the employer or operator shall adopt an anti-drug and alcohol misuse policy statement. The statement must be made available to each covered employee, and shall include the following:

(a) The identity of the person designated by the employer to answer employee questions about the employer's anti-drug use and alcohol misuse programs.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning the behavior and conduct that is prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs or alcohol misuse under this part.

(e) The procedures that will be used to test for the presence of illegal drugs or alcohol misuse, protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug and alcohol testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to take a drug or alcohol test, and a statement that such a refusal constitutes a violation of the employer's policy.

(h) The consequences for a covered employee who has a verified positive drug or a confirmed alcohol test result with an alcohol concentration of 0.04 or greater, or who refuses to submit to a test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional, as required by 49 CFR part 40.

(i) The consequences, as set forth in § 655.35, for a covered employee who is found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(j) If the employer implements elements of an anti-drug use or alcohol misuse program that are in addition to this part, the employer shall give each covered employee specific information concerning which provisions are mandated by this part and which are not.

#### **§ 655.16 Requirement to disseminate policy.**

Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the employer's anti-drug and alcohol misuse policies and procedures.

#### **§ 655.17 Notice requirement.**

Before performing a drug or alcohol test under this part, each employer shall notify a covered employee that the test is required by this part. No employer shall falsely represent that a test is administered under this part.

### **Subpart C—Prohibited Drug Use**

#### **§ 655.21 Drug testing.**

(a) An employer shall establish a program that provides testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up.

(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:

- (1) Marijuana;
- (2) Cocaine;
- (3) Opiates;
- (4) Amphetamines; and
- (5) Phencyclidine.

(c) Consumption of these products is prohibited at all times.

### **Subpart D—Prohibited Alcohol Use**

#### **§ 655.31 Alcohol testing.**

(a) An employer shall establish a program that provides for testing for alcohol in the following circumstances: post-accident, reasonable suspicion,

random, and return to duty/follow-up. An employer may also conduct pre-employment alcohol testing.

(b) Each employer shall prohibit a covered employee, while having an alcohol concentration of 0.04 or greater, from reporting for duty to perform a safety-sensitive function or remaining on duty while performing a safety-sensitive function.

#### **§ 655.32 On duty use.**

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

#### **§ 655.33 Pre-duty use.**

(a) *General.* Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.

(b) *On-call employees.* An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

#### **§ 655.34 Use following an accident.**

Each employer shall prohibit alcohol use by any covered employee required to take a post-accident alcohol test under § 655.44 for eight hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

#### **§ 655.35 Other alcohol-related conduct.**

(a) No employer shall permit a covered employee tested under the provisions of subpart E of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than 0.02;

or (2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

### **Subpart E—Types of Testing**

#### **§ 655.41 Pre-employment drug testing**

(a)(1) Before allowing a covered employee or applicant to perform a safety-sensitive function for the first time, the employer must ensure that the employee takes a pre-employment drug test administered under this part with a verified negative result. An employer may not allow a covered employee, including an applicant, to perform a safety-sensitive function unless the employee takes a drug test administered under this part with a verified negative result.

(2) When a covered employee or applicant has previously failed a pre-employment drug test administered under this part, the employee must present to the employer proof of successfully having completed a referral, evaluation and treatment plan as described in § 655.62.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a pre-employment drug test administered under this part with a verified negative result.

(c) If a pre-employment drug test is canceled, the employer shall require the covered employee or applicant to take another pre-employment drug test administered under this part with a verified negative result.

(d) When a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employee has not been in the employer's random selection pool during that time frame, the employer shall ensure that the employee takes a pre-employment drug test with a verified negative result.

#### **§ 655.42 Pre-employment alcohol testing.**

As an employer, you may, but are not required to, conduct pre-employment alcohol testing under this part. If you choose to conduct pre-employment alcohol testing, you must comply with the following requirements:

(a) You must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(b) You must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

(c) You must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(d) You must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR part 40.

(e) You must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

#### § 655.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug and/or alcohol test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug and/or engaged in alcohol misuse.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. A supervisor who is trained in detecting the signs and symptoms of drug use and alcohol misuse must make the required observations.

(c) The decision to refer an employee for a reasonable suspicion test shall be made by one trained supervisor. Employers are prohibited from requiring two or more trained supervisors to participate and/or agree on such a referral.

#### § 655.44 Post-accident testing.

(a) Accidents. (1) *Fatal accidents.* As soon as practicable following an accident involving the loss of human life, an employer shall conduct drug and alcohol tests on each surviving covered employee operating the mass transit vehicle at the time of the accident. The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) *Nonfatal accidents.* (i) As soon as practicable following an accident not involving the loss of human life, in which a mass transit vehicle is involved, the employer shall drug and alcohol test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The decision not to administer a drug and/or alcohol test under this paragraph (a)(2)(i) shall be based on the employer's determination, using the best available information at the time of the determination, that the employee's performance could not have contributed to the accident. Such a decision must be documented in detail, including the decision-making process used to reach the decision not to test. The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) If an alcohol test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this paragraph (a)(2)(ii) is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall maintain the same record. Records shall be submitted to FTA upon request of the Administrator.

(b) An employer shall ensure that a covered employee required to be drug tested under this section is tested as soon as practicable but within 32 hours of the accident.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(d) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(e) The results of a blood, urine, or breath test for the use of prohibited drugs or alcohol misuse, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such test conforms to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer.

#### § 655.45 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees; the random alcohol testing rate shall be 25 percent. As provided in paragraph (b) of this section, this rate is subject to annual review by the Administrator.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug and alcohol testing is based, respectively, on the reported positive drug and alcohol violation rates for the entire industry. All information used for this determination is drawn from the drug and alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of the data, the Administrator shall consider the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry's verified positive results and violation rates. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rates for random drug and alcohol testing of covered employees. The new minimum annual percentage rate for random drug and alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) Rates for drug testing. (1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for the two preceding consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 655.72 for the calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for

random drug or random alcohol testing to 50 percent of all covered employees.

(d) Rates for alcohol testing. (1)(i) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(ii) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(2)(i) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 655.72 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(ii) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 655.72 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random drug and alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rates for random drug and alcohol testing determined by the Administrator. If the employer conducts random drug and alcohol testing

through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug and alcohol testing at the same minimum annual percentage rate under this part.

(g) Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted during all time periods when safety-sensitive functions are performed.

(h) Each employer shall require that each covered employee who is notified of selection for random drug or random alcohol testing proceeds to the test site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

(i) A covered employee shall only be randomly tested for prohibited drug use or alcohol misuse while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(j) If a given covered employee is subject to random drug and alcohol testing under the testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug and alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(k) If an employer is required to conduct random drug and alcohol testing under the drug and alcohol testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

**§ 655.46 Return to duty testing following refusal to submit to a test, verified positive drug test result and/or breath alcohol test result greater than 0.04.**

Where a covered employee refuses to submit to a test, has a verified positive drug test result, and/or has a confirmed alcohol test result greater than 0.04, the employer, before returning the employee to duty to perform a safety-sensitive function, shall follow the procedures outlined in 49 CFR part 40.

**§ 655.47 Follow-up testing after returning to duty.**

An employer shall conduct follow-up testing of each employee who returns to duty, as specified in 49 CFR part 40, subpart O. The substance abuse professional may terminate the requirement for follow-up testing, as provided in 49 CFR 40.307.

**§ 655.48 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.**

Each employer shall retest a covered employee to ensure compliance with the provisions of § 655.35, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04. The employee may not perform safety-sensitive functions unless the confirmation alcohol test result is less than 0.02.

**§ 655.49 Refusal to submit to a drug or alcohol test.**

(a) Each employer shall require a covered employee to submit to a post-accident drug and alcohol test required under § 655.44, a random drug and alcohol test required under § 655.45, a reasonable suspicion drug and alcohol test required under § 655.43, or a follow-up drug and alcohol test required under § 655.47. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

(b) Where an employee refuses to submit to a test, the employer shall follow the procedures outlined in 49 CFR part 40.

**Subpart F—Drug and Alcohol Testing Procedures**

**§ 655.51 Compliance with testing procedures requirements.**

The drug and alcohol testing procedures in 49 CFR part 40 apply to employers covered by this part, and must be read together with this part, unless expressly provided otherwise in this part.

**§ 655.52 Substance abuse professional (SAP).**

The SAP must perform the functions in 49 CFR part 40, subpart O.

**§ 655.53 Supervisor acting as collection site personnel.**

An employer shall not permit an employee with direct or immediate supervisory responsibility or authority over another employee to serve as the urine collection person, breath alcohol technician, or saliva-testing technician for a drug or alcohol test of the employee.

**Subpart G—Consequences****§ 655.61 Action when an employee has a verified positive drug test result or has a confirmed alcohol test result of 0.04 or greater, or refuses to submit to a test.**

(a)(1) Immediately after receiving notice from a medical review officer (MRO) or a consortium/third party administrator (C/TPA) that a covered employee has a verified positive drug test result, the employer shall require that the covered employee cease performing a safety-sensitive function.

(2) Immediately after receiving notice from a Breath Alcohol Technician (BAT) that a covered employee has a confirmed alcohol test result of 0.04 or greater, the employer shall require that the covered employee cease performing a safety-sensitive function.

(3) If an employee refuses to submit to a drug or alcohol test, the employer shall require that the covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure that the covered employee meets the requirements of 49 CFR part 40 for returning to duty, including taking a return to duty drug and/or alcohol test.

**§ 655.62 Referral, evaluation, and treatment.**

(a) If a covered employee has a verified positive drug test result, or has a confirmed alcohol test of 0.04 or greater, or refuses to submit to a drug or alcohol test, the employer shall advise the employee of the resources available for evaluating and resolving problems associated with prohibited drug use and alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals (SAPs) and counseling and treatment programs.

(b) A covered employee under a second chance agreement, who has had a verified positive drug test result, or had a confirmed alcohol test of 0.04 or greater, or refused to submit to a drug or alcohol test, shall not resume

performing safety-sensitive functions until the covered employee has met all the requirements of 49 CFR part 40, including a substance abuse professional (SAP) evaluation, referral, and education treatment process.

**Subpart H—Administrative Requirements****§ 655.71 Retention of records.**

(a) *General requirement.* An employer shall maintain records of its anti-drug and alcohol misuse program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* In determining compliance with the retention period requirement, each record shall be maintained for the specified period of time, measured from the date of the document's or data's creation. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of covered employee verified positive drug or alcohol test results, documentation of refusals to take required drug or alcohol tests, and covered employee referrals to the substance abuse professional, and copies of annual MIS reports submitted to FTA.

(2) *Two years.* Records related to the collection process and employee training.

(3) *One year.* Records of negative drug or alcohol test results.

(c) *Types of records.* The following specific records must be maintained:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug or alcohol tests.

(iv) Documents generated in connection with decisions on post-accident drug and alcohol testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine or breathe sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a test administered under this part.

(3) Records related to referral and return to duty and follow-up testing: Records concerning a covered

employee's entry into and completion of the treatment program recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness and alcohol misuse, including a copy of the employer's policy on prohibited drug use and alcohol misuse.

(ii) Names of covered employees attending training on prohibited drug use and alcohol misuse and the dates and times of such training.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug and alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Copies of annual MIS reports submitted to FTA.

**§ 655.72 Reporting of results in a management information system.**

(a) Each recipient shall annually prepare and maintain a summary of the results of its anti-drug and alcohol misuse testing programs performed under this part during the previous calendar year.

(b) When requested by FTA, each recipient shall submit to FTA's Office of Safety and Security, or its designated agent, by March 15, a report covering the previous calendar year (January 1 through December 31) summarizing the results of its anti-drug and alcohol misuse programs.

(c) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, contractor, consortium or joint enterprise or by a third party service provider acting on the recipient's or employer's behalf.

(d) *Drug use information: Long Form.* Each report that contains information on verified positive drug test results shall be submitted on the FTA Drug Testing Management Information System (MIS) Data Collection Form (Appendix A of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug regulations of the United States Coast Guard.

(3) Number of specimens collected by type of test (i.e., pre-employment, follow-up, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type

of test, type of drug, and employee category.

(5) Number of negatives verified by an MRO by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a verified positive drug test.

(7) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in § 655.61).

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

(9) Number of covered employees who were administered drug and alcohol tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random drug test required under this part.

(11) Number of covered employees who refused to submit to a non-random drug test required under this part.

(12) Number of covered employees and supervisors who received training during the reporting period.

(13) Number of fatal and nonfatal accidents which resulted in a verified positive post-accident drug test.

(14) Number of fatalities resulting from accidents which resulted in a verified positive post-accident drug test.

(15) Identification of FTA funding source(s).

(e) *Drug Use Information: Short Form.* If all drug test results were negative during the reporting period, the employer must use the "EZ form" (Appendix B of this part). It shall contain:

(1) Number of FTA covered employees.

(2) Number of covered employees subject to testing under the anti-drug regulation of the United States Coast Guard.

(3) Number of specimens collected and verified negative by type of test and employee category.

(4) Number of covered employees verified positive by an MRO or who refused to submit to a drug test prior to the reporting period and who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in § 655.62).

(5) Number of covered employees who refused to submit to a non-random drug test required under this part.

(6) Number of covered employees and supervisors who received training during the reporting period.

(7) Identification of FTA funding source(s).

(f) *Alcohol misuse information: Long Form.* Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of this part shall be submitted on the FTA Alcohol Testing Management (MIS) Data Collection Form (Appendix C of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2)(i) Number of screening tests by type of test and employee category.

(ii) Number of confirmed tests, by type of test and employee category.

(3) Number of confirmed alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test and employee category.

(4) Number of confirmed alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(5) Number of covered employees with a confirmed alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions during the reporting period (having complied with the recommendation of a substance abuse professional as described in § 655.61).

(6) Number of fatal and nonfatal accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(7) Number of fatalities resulting from accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(8) Number of covered employees who were found to have violated other provisions of subpart B of this part and the action taken in response to the violation.

(9) Number of covered employees who were administered alcohol and drug tests at the same time, with a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random alcohol test required under this part.

(11) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(12) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(13) Identification of FTA funding source(s).

(g) *Alcohol Misuse Information: Short Form.* If an employer has no screening

test results of 0.02 or greater and no violations of the alcohol misuse provisions of this part, the employer must use the "EZ" form (Appendix D of this part). It shall contain: (This report may only be submitted if the program results meet these criteria.)

(1) Number of FTA covered employees.

(2) Number of alcohol tests conducted with results less than 0.02 by type of test and employee category.

(3) Number of employees with confirmed alcohol test results indicating an alcohol concentration of 0.04 or greater prior to the reporting period and who were returned to duty in a covered position during the reporting period.

(4) Number of covered employees who refused to submit to a random alcohol test required under this part.

(5) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(6) Identification of FTA funding source(s).

#### § 655.73 Access to facilities and records

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by § 655.71.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs or misuse of alcohol, including any records pertaining to his or her drug or alcohol tests. The employer shall provide promptly the records requested by the employee. Access to a covered employee's records shall not be contingent upon the employer's receipt of payment for the production of those records.

(c) An employer shall permit access to all facilities utilized and records compiled in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) An employer shall disclose data for its drug and alcohol testing programs, and any other information pertaining to the employer's anti-drug and alcohol misuse programs required to be maintained by this part, to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee rail fixed guideway systems,

upon the Secretary's request or the respective agency's request.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's drug or alcohol testing related to the accident under investigation.

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

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug or alcohol test under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the

specific, written consent of the employee authorizing release of the information to an identified person.

#### **Subpart I—Certifying Compliance**

##### **§ 655.81 Grantee oversight responsibility**

A grantee shall ensure that the recipients of funds under 49 U.S.C. 5307, 5309, or 5311 comply with this part.

##### **§ 655.82 Compliance as a condition of financial assistance.**

(a) *General.* A recipient may not be eligible for federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 or under 23 U.S.C. 103(e)(4), if a recipient fails to establish and implement an anti-drug and alcohol misuse program as required by this part. Failure to certify compliance with these requirements, as specified in § 655.83, may result in the suspension of a grantee's eligibility for federal funding.

(b) *Criminal violation.* A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under 18 U.S.C. 1001.

(c) *State's role.* Each State shall certify compliance on behalf of its section

5307, 5309, or 5311 subrecipients, as applicable, whose grant the State administers. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 5307, 5309, or 5311 subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

##### **§ 655.83 Requirement to certify compliance**

(a) A recipient of FTA financial assistance shall annually certify compliance, as set forth in § 655.82, to the applicable FTA Regional Office.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so.

(c) A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part.

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**APPENDIX A TO PART 655 - DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS)  
DATA COLLECTION FORM**

**INSTRUCTIONS**

The following instructions are to be used as a guide for completing the drug testing information in the Federal Transit Administration (FTA) Drug Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-v as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i	2
C. DRUG TESTING INFORMATION	ii-v	3-4
D. OTHER DRUG TESTING/PROGRAM INFORMATION	v	5
E. DRUG TRAINING/EDUCATION	vi	5
F. FTA FUNDING SOURCES	vi	5

Page 1      **EMPLOYER INFORMATION** (Section A) requires the name of the employer for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

Page 2      **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the

recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). **NUMBER OF EMPLOYEES COVERED BY THE USCG**, requires that you identify the number of employees in each employee category.

Section C is used to summarize the drug testing results for applicants and covered employees. There are six categories of testing to be completed. The first part of the table is where you enter the data on pre-employment testing. The following five parts are for entering drug testing data on random, post-accident, reasonable suspicion, return to duty and follow-up testing, respectively. Items necessary to complete these tables include:

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

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

A sample table with detailed instructions is provided for the first part, **PRE-EMPLOYMENT** testing information. The format and explanations used for the sample apply to all six parts of the table in Section C.

Information on actions taken with those persons testing positive is required at the end of both pages. Specific instructions for providing this latter information are given after the instructions for completing the table in Section C.

Page 3

**DRUG TESTING INFORMATION** (Section C) requires information for drug testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers **do not** include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

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

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

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

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

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

Page 3 Below the part of the table containing pre-employment testing information is a box with the heading "Number of persons denied a position as a covered employee following a verified positive drug test". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

#### SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, DRUG TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing the form.

- A Urine specimens were collected for 157 applicants for revenue service vehicle operation positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".
- B The Medical Review Officer (MRO) for the employer reported that 153 of those 157 specimens from applicants for revenue service vehicle operation positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation".
- C The MRO for the employer reported that 4 of those 157 specimens from applicants for revenue service vehicle operation positions were positive (i.e., a drug or drugs

were detected). Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

**D**

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

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

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Two different drugs were detected in specimen #3 (multi-drug) so an entry is made in both the marijuana and the cocaine column for this specimen. Information on multi-drug specimens must also be entered in Section D, **OTHER DRUG TESTING/PROGRAM INFORMATION**, on page 5 of the reporting form.

Please note that the sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue service vehicle operation should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives – 1 for marijuana and 1 for opiates. This information is entered in the row marked "Armed Security Personnel".

**E**

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for revenue service vehicle operation positions were collected and 107 for applicants for armed security personnel positions. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

PRE - EMPLOYMENT								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				MARIJUANA (THC)	COCAINE	PHENCYCLIDINE (PCP)	OPIATES	AMPHETAMINES
REVENUE VEHICLE OPERATION	157	153	4	3	1	0	0	1
ARMED SECURITY PERSONNEL	107	105	2	1	0	0	1	0
TOTAL	264	258	6	4	1	0	1	1

A
B
C
D
E

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

**Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.**

- Page 4      Following the table that summarizes **DRUG TESTING INFORMATION**, you must provide counts of fatal and non-fatal accidents and fatalities which resulted in positive post-accident drug tests for any employee involved in the accident. This information should be available from the safety program manager or the drug program manager.
- Page 4      Also following the table that summarizes **DRUG TESTING INFORMATION**, you must provide a count of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule. This information should be available from the personnel office and/or drug program manager.
- Page 5      **OTHER DRUG TESTING/PROGRAM INFORMATION** (Section D) requires that you complete a table dealing with specimens positive for more than one drug, employees testing positive for both drugs and alcohol, and a table dealing with employees who refused to submit to a drug test.
- Page 5      **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**. Then specify the combination of drugs reported as positive by placing the number in the appropriate columns. For example, if marijuana and cocaine were detected in 3 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".
- Page 5      Next you must provide a count of **employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**.
- Page 5      **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random or non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.
- Page 5      **DRUG TRAINING/EDUCATION** (Section E) requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.
- Page 5      **FTA FUNDING SOURCES** (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).

For FTA Use Only

**FTA DRUG TESTING MIS DATA COLLECTION FORM**

OMB No. 2132-0556

YEAR COVERED BY THIS REPORT: 20 \_\_\_\_

**A. EMPLOYER INFORMATION**

Name \_\_\_\_\_

Address \_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

Consortium Used (if applicable)

Name \_\_\_\_\_

Address \_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

I, the undersigned, certify that the information provided on this Federal Transit Administration Drug Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

\_\_\_\_\_  
Title

<p>Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.</p>
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<p>The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TPM-30), Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.</p>
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## B. COVERED EMPLOYEES

COVERED EMPLOYEES		
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY THE USCG
Revenue Vehicle Operation		
Revenue Vehicle and Equipment Maintenance		
Revenue Vehicle Control/Dispatch		
CDL/Non-Revenue Vehicle		
Armed Security Personnel		
TOTAL		

## READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current reporting period only** (for example, January 1, 1994 - December 31, 1994).
2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:
  - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA drug testing regulation.
  - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in Section D ["OTHER DRUG TESTING INFORMATION"]. Do not include refusals for testing in other sections of this report.
4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.
5. Complete all items; **DO NOT LEAVE ANY ITEM BLANK**. If the value for an item is zero (0), place a zero (0) on the form.

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

**C. DRUG TESTING INFORMATION**

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
<b>PRE-EMPLOYMENT</b>								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
<b>Total</b>								
<b>RANDOM</b>								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
<b>Total</b>								
<b>POST-ACCIDENT</b>								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
<b>Total</b>								
Number of persons denied a position as a covered employee following a verified positive drug test:								

C. DRUG TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
<b>REASONABLE SUSPICION</b>								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
<b>Total</b>								
<b>RETURN TO DUTY</b>								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
<b>Total</b>								
<b>FOLLOW-UP</b>								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
<b>Total</b>								
Number of accidents, as defined by the FTA drug testing regulation, which resulted in a positive post-accident drug test:				FATAL		NON-FATAL		
Number of fatalities resulting from accidents which resulted in a positive post-accident drug test:								
Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:								

**D. OTHER DRUG TESTING/PROGRAM INFORMATION**

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:						
EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST						Number
Covered employees who refused to submit to a random drug test required under the FTA regulation:						
Covered employees who refused to submit to a non-random drug test required under the FTA regulation:						

**E. DRUG TRAINING/EDUCATION**

TRAINING DURING CURRENT REPORTING PERIOD	Number
Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:	
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:	

**F. FTA FUNDING SOURCES**

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

**APPENDIX B TO PART 655 - DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS)**  
**"EZ" DATA COLLECTION FORM**

**INSTRUCTIONS**

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) Drug Testing MIS "EZ" Data Collection Form. This form should only be used if there are **no positive tests** to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations.

**SECTION A - EMPLOYER INFORMATION** requires the company name for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Also indicate the year covered by this report. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

**SECTION B - COVERED EMPLOYEES** requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). **NUMBER OF EMPLOYEES COVERED BY THE USCG**, requires that you identify the number of employees in each employee category.

**SECTION C - DRUG TESTING INFORMATION** requires information for drug testing, refusal for testing, and training. The first table requests information on the **NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE** in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. "COLL" requires the number of specimens collected in each employee category for each category of testing. "NEG" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO). Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the categories. Each column in the table should be added and the answer entered in the row marked "TOTAL".

---

Following the table that summarizes **DRUG TESTING INFORMATION**, you must provide a count of **employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule**. This information should be available from the personnel office and/or drug program manager.

**EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires a count of the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random or non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.

**DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD** requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

**SECTION D - FTA FUNDING SOURCES** asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).

For FTA Use Only

FTA DRUG TESTING MIS "EZ" DATA COLLECTION FORM

OMB No. 2132-0556

YEAR COVERED BY THIS REPORT: 20 \_\_\_\_

A. EMPLOYER INFORMATION

Company Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

Consortium Used (if applicable)

Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Drug Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

\_\_\_\_\_  
Title

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

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security TPM-30, Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.

**B. COVERED EMPLOYEES**

COVERED EMPLOYEES		
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY THE USCG
Revenue Vehicle Operation		
Revenue Vehicle and Equipment Maintenance		
Revenue Vehicle Control/Dispatch		
CDL/Non-Revenue Vehicle		
Armed Security Personnel		
TOTAL		

**C. DRUG TESTING INFORMATION**

NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE												
EMPLOYEE CATEGORY	PRE-EMPLOYMENT		RANDOM		POST-ACCIDENT		REASONABLE SUSPICION		RETURN TO DUTY		FOLLOW-UP	
	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG
Revenue Vehicle Operation												
Revenue Vehicle and Equipment Maintenance												
Revenue Vehicle Control/Dispatch												
CDL/Non-Revenue Vehicle												
Armed Security Personnel												
TOTAL												
Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:												
<b>EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST</b>											Number	
Covered employees who refused to submit to a random drug test required under the FTA regulation:												
Covered employees who refused to submit to a non-random drug test required under the FTA regulation:												
<b>DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD</b>											Number	
Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:												
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:												

**D. FTA FUNDING SOURCES**

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

**APPENDIX C TO PART 655 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM  
(MIS) DATA COLLECTION FORM**

**INSTRUCTIONS**

The following instructions are to be used as a guide for completing the alcohol testing information in the Federal Transit Administration (FTA) **Alcohol Testing MIS Data Collection Form**. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-iv as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i	2
C. ALCOHOL TESTING INFORMATION	ii-iv	3-4
D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION	v	5
E. ALCOHOL TRAINING/EDUCATION	v	5
F. FTA FUNDING SOURCES	v	5

Page 1      **EMPLOYER INFORMATION** (Section A) requires the year covered by this report, the agency name for which the report is done, a current address, a person's name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

Page 2      **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the

recipient's or contractor's records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Page 3

**ALCOHOL TESTING INFORMATION** (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers **do not** include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first blank column with the heading "**NUMBER OF SCREENING TESTS**," requires a count for all screening tests conducted for each employee category. The second blank column with the heading "**NUMBER OF CONFIRMATION TESTS**," requires a count for all confirmation alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO 0.02, BUT LESS THAN 0.04**," requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.02, but less than 0.04.

The fourth blank column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04**," requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.04. **Note: For return to duty testing, a confirmation result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.**

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

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

Page 3

Below the part of the table containing pre-employment testing information are three boxes. This information should be available from the safety program manager or the alcohol program manager.

1) "**Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater**". This is a count of those persons who were not placed in a covered position because they took a breath test that resulted in an alcohol concentration of 0.04 or higher.

2) "Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of fatal and non-fatal accidents which resulted in post-accident breath alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the accident.

3) "Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of fatalities in accidents which resulted in post-accident alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the fatal accidents.

Page 4

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide the number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations). This information should be available from the personnel office and/or alcohol program manager.

**SAMPLE APPLICANT TEST RESULTS TABLE**

The following example is for Section C, ALCOHOL TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing this section.

A

Screening tests were performed on 157 job applicants for revenue vehicle operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

B

Confirmation tests were necessary for 6 of the 157 applicants for revenue vehicle operator positions. Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation". The confirmation test results for these 6 applicants were the following:

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

C

The confirmation test results for 2 of the applicants for revenue vehicle operator positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Revenue Vehicle Operation".

**D**

The confirmation test results for 3 of the applicants for revenue vehicle operator positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

**E**

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

Please note that our sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue vehicle operators should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 screening tests were conducted resulting in 3 confirmation tests. No confirmation results were equal to or greater than 0.02, but less than 0.04; and the confirmation test result for 1 of the armed security personnel applicants was equal to or greater than 0.04. This information is entered in the row marked "Armed Security Personnel".

PRE-EMPLOYMENT				
EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
Revenue Vehicle Operator	157	6	2	3
Armed Security Personnel	107	3	0	1
TOTAL	264	9	2	4

A  
↑

B  
↑

C  
↑

D  
↑

E  
↑

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

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

- Page 5 **OTHER ALCOHOL TESTING/PROGRAM INFORMATION** (Section D) requires information on employees tested for drugs and alcohol at the same time and that you complete a table dealing with violations of other alcohol provisions/prohibitions of the regulation and a table dealing with employees who refused to submit to an alcohol test.
- Page 5 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.
- Page 5 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION** requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. The action taken with covered employees who violate any of these FTA alcohol regulation provisions is also to be supplied. Other violations not delineated in this table may also be provided.
- Page 5 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random** or **non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.
- Page 5 **ALCOHOL TRAINING/EDUCATION** (Section E) requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.
- Page 5 **FTA FUNDING SOURCES** (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.

For FTA Use Only

**FTA ALCOHOL TESTING MIS DATA COLLECTION FORM** OMB No. 2132-0557

YEAR COVERED BY THIS REPORT: 20 \_\_\_\_

**A. EMPLOYER INFORMATION**

Name \_\_\_\_\_

Address \_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

Consortium Used (if applicable)

Name \_\_\_\_\_

Address \_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

I, the undersigned, certify that the information provided on this Federal Transit Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date of Signature

\_\_\_\_\_  
Title

<p>Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.</p>
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<p>The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security TPM-30 Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.</p>
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**B. COVERED EMPLOYEES**

<b>COVERED EMPLOYEES</b>	
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES
Revenue Vehicle Operation	
Revenue Vehicle and Equipment Maintenance	
Revenue Vehicle Control/Dispatch	
CDL/Non-Revenue Vehicle	
Armed Security Personnel	
TOTAL	

**READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:**

1. All items refer to the **current reporting period only** (for example, January 1, 1994 - December 31, 1994).
2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:
  - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA alcohol testing regulation.
  - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in Section D ["OTHER ALCOHOL TESTING INFORMATION"]. Do not include refusals for testing in other sections of this report.
4. Complete all items; **DO NOT LEAVE ANY ITEM BLANK**. If the value for an item is zero (0), place a zero (0) on the form.

**C. ALCOHOL TESTING INFORMATION**

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
<b>PRE-EMPLOYMENT</b>				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
<b>Total</b>				
<b>RANDOM</b>				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
<b>Total</b>				
<b>POST-ACCIDENT</b>				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
<b>Total</b>				
Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater:				
Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:			FATAL	NON-FATAL
Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:				

C. ALCOHOL TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
<b>REASONABLE SUSPICION</b>				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
<b>Total</b>				
<b>RETURN TO DUTY</b>				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
<b>Total</b>				
<b>FOLLOW-UP</b>				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
<b>Total</b>				
Number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations):				

**D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION**

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:	
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VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN
	Covered employee used alcohol while performing safety-sensitive function.	
	Covered employee used alcohol within 4 hours of performing safety-sensitive function.	
	Covered employee used alcohol before taking a required post-accident alcohol test.	

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	Number
Covered employees who refused to submit to a random alcohol test required under the FTA regulation:	
Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:	

**E. ALCOHOL TRAINING/EDUCATION**

TRAINING DURING CURRENT REPORTING PERIOD	Number
Supervisory personnel who have received at least 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:	

**F. FTA FUNDING SOURCES**

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

**APPENDIX D TO PART 655 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM  
(MIS) "EZ" DATA COLLECTION FORM**

**INSTRUCTIONS**

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there is no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations.

**SECTION A - EMPLOYER INFORMATION** requires the year covered by this report, the agency name for which the report is done, a current address, and a person's name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

**SECTION B - COVERED EMPLOYEES** requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

**SECTION C - ALCOHOL TESTING INFORMATION** requires information for alcohol testing, refusals for testing, and training/education. The first table requests information on the **NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED** in each category for testing. All numbers entered into the pre-employment testing category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. Testing categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. Each column in the table should be added and the answer entered in the row marked "TOTAL".

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, you must provide a count of **employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation)**. This information should be available from the personnel office and/or alcohol program manager.

**EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires a count of the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random or non-random** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

**ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD** requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

**SECTION D - FTA FUNDING SOURCES** asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.

For FTA Use Only

**FTA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM      OMB No. 2132-0557**  
**(No Alcohol Misuse)**

YEAR COVERED BY THIS REPORT: 20 \_\_\_\_

**A. EMPLOYER INFORMATION**

Company Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

Consortium Used (if applicable)

Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Contact \_\_\_\_\_

Phone \_\_\_\_\_

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_____ Signature	_____ Date of Signature
_____ Title	

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

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security TPM-30 Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.

**B. COVERED EMPLOYEES**

COVERED EMPLOYEES	
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES
Revenue Vehicle Operation	
Revenue Vehicle and Equipment Maintenance	
Revenue Vehicle Control/Dispatch	
CDL/Non-Revenue Vehicle	
Armed Security Personnel	
TOTAL	

**C. ALCOHOL TESTING INFORMATION**

NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED						
EMPLOYEE CATEGORY	PRE-EMPLOYMENT	RANDOM	POST-ACCIDENT	REASONABLE SUSPICION	RETURN TO DUTY	FOLLOW-UP
Revenue Vehicle Operation						
Revenue Vehicle and Equipment Maintenance						
Revenue Vehicle Control/Dispatch						
CDL/Non-Revenue Vehicle						
Armed Security Personnel						
Total						
Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation):						

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	Number
Covered employees who refused to submit to a random alcohol test required under the FTA regulation:	
Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:	
ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Supervisory personnel who have received at least 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:	

**D. FTA FUNDING SOURCES**

FTA FUNDING SOURCES				
Check all sections that apply:	5307	5309	5310	5311

Issued on: April 2, 2001.

Hiram J. Walker,  
Acting Deputy Administrator, Federal Transit  
Administration.

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