DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2000–8431; Amendment No. 121–285]

RIN 2120–AH15

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The Federal Aviation Administration (FAA) is revising its drug and alcohol regulations. This final rule incorporates changes in the Department of Transportation (DOT) final rule, ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs,'' published December 19, 2000. In addition, this rule changes the drug testing program and alcohol misuse prevention program regulations in light of the amendments that have been made to the medical standards and certification requirements. Certain requirements under reasonable suspicion and post-accident alcohol testing have been eliminated because these requirements are outdated and no longer valid. Finally, this rule eliminates the approval process for consortia to be consistent with the other DOT Modal Administrations and the DOT Procedures for Transportation Workplace Drug and Alcohol Testing Programs. The effect of these changes is to update and clarify the regulations based on DOT's revisions and previous FAA rulemakings.

DATES: This final rule is effective August 1, 2001.

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:

Availability of Rulemaking Documents

You can get an electronic copy 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.''

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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 amendment number or docket number of this rulemaking.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBREFA on the Internet at our site, http://www.faa.gov/avr/arm/sbrefa.htm. For more information on SBREFA, e-mail us at 9–AWA–SBREFA@faa.gov.

Background

General

On April 29, 1996, the Department of Transportation (DOT) published an advance notice of proposed rulemaking (ANPRM) (61 FR 18713) asking for suggestions to change 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 published proposing a comprehensive revision to 49 CFR part 40. The DOT published its final rule on December 19, 2000 (65 FR 79462). As a consequence of the DOT's final rule, on April 30, 2001, the FAA published an NPRM (66 FR 21494) proposing to revise its drug and alcohol testing regulations to integrate, as appropriate, the new DOT procedures. Also to conform with the DOT procedures and the practices of the other DOT Modal Administrations, the FAA proposed elimination of its approval of consortia.

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 the 14 CFR part 67 final rule, the FAA has identified some inconsistencies between 14 CFR part 121 and 14 CFR part 67 that require modification. In revising 14 CFR part 121 in response to the DOT final rule, the FAA was revising the same sections affected by the 14 CFR part 67 final rule changes. Therefore, rather than reissuing inconsistent provisions, the FAA has taken this opportunity to address these inconsistencies. Also, 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, and therefore have been removed.

Consortia

In Notice No. 00–14, the FAA proposed eliminating consortia ''approvals.'' We received three comments on the consortium issue. For more information on the comments received, see ''Discussion of Comments'' below.

The FAA has eliminated consortia ''approvals.'' The FAA has been the only DOT Modal Administration that has issued ''approvals'' to consortia. In light of the changes to 49 CFR part 40 and in recognition of the practices of the other DOT Modal Administrations, the FAA will no longer ''approve'' consortia, and it will not review consortium plans submitted. There will no longer be any ''FAA-approved'' consortia. All FAA approvals are rescinded by this final rule. Therefore, no entity can hold itself out as ''FAA-approved'' after the effective date of this final rule.

In the past, only FAA-approved consortia could combine the employee random testing pools of different employers. Now, that benefit is conferred to all Consortia/Third-party administrators (C/TPA). We have

replaced ''consortium'' with C/TPA as appropriate throughout appendices I and J.

DOT Discussion of Intermodal Issues

In a document published concurrently with this final rule, the DOT discusses intermodal issues concerning all of the modal final rules amending the drug and alcohol testing rules.

Discussion of Comments

General Overview

The comment period for the NPRM closed June 14, 2001. The FAA received four comments in response to the NPRM before the comment period closed. One comment was a joint filing of the Air Line Pilots Association (ALPA) and Transportation Trades Department (TTD), AFL-CIO. Two comments were from FAA-approved consortia. One comment was from the Drug and Alcohol Testing Industry Association (DATIA).

One of the commenters requested clarification regarding operators as defined by 14 CFR 135.1(c). This issue is outside the scope of this rulemaking and will not be addressed on its merits at this time.

In its comment, DATIA proposes that the FAA require managers of random testing pools, including C/TPAs and MROs, to receive written proof of an individual's pre-employment result before putting that individual into a random testing pool. Also, DATIA proposes that the FAA require that the MRO or C/TPA report a positive test result concurrently to the FAA in writing, whenever an employer is notified that test result is positive. These changes proposed in DATIA's comments are outside the scope of what was proposed in Notice No. 00–14. Therefore, the FAA will not consider these recommendations on their merits at this time.

The ALPA and TTD comment and the DATIA comment both focus on some issues from 49 CFR part 40, which were outside the scope of the FAA's rulemaking. We have forwarded these comments to the DOT for consideration in future revisions to 49 CFR part 40.

In addition, two commenters requested guidance on the interface between the requirements of the FAA's regulations and 49 CFR part 40. The FAA intends to conduct industry training in the future to address such issues.

For ease and clarity, we have categorized the comment discussion by rule section.

Appendix I

I. General

In Notice No. 00–14, the FAA proposed revising section I and renaming it ''General.'' Also, the FAA proposed adding paragraph A. ''Purpose'' to section I for clarity and organizational purposes. We proposed moving and revising the language in the existing section I into a new paragraph B. ''DOT Procedures'' and adding paragraph C. ''Employer Responsibility.'' These changes are necessary to clarify the responsibility of employers to follow the requirements and procedures of this appendix and 49 CFR part 40. These 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.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

II. Definitions

Notice No. 00–14 proposed to change the definition of ''prohibited drug'' to limit the definition to the five drugs that are prohibited under 49 CFR 40.85. 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 changes will eliminate any such confusion.

We also proposed changing the definition of ''refusal to submit'' to refer to 49 CFR part 40. This is a clarifying change.

In addition, Notice No. 00–14 proposed changing the definitions of ''verified negative test result'' and ''verified positive test result.'' These definitions are necessary because these terms are used in this appendix. The definitions are consistent with the broader language for verified tests used in 49 CFR 40.3.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

IV. Substances for Which Testing Must Be Conducted

Notice No. 00–14 proposed to eliminate the second sentence of this section that allowed 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 necessary because 49 CFR 40.85 prohibits testing for additional drugs.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

V. Types of Drug Testing

C. Random Testing. In Notice No. 00–14, we proposed changing all sections referring to FAA-approved consortia. We received one comment on the issue of renaming ''consortium'' to ''C/TPA.'' The commenter supports the proposal.

Therefore, in this section, we revised the language to permit Consortia/Third-party administrators (C/TPA) to combine the employee random testing pools of different employers. In the past, only FAA-approved consortia could combine the employee random testing pools of different employers. This change conforms to 49 CFR part 40.

F. Return to Duty Testing. In Notice No. 00–14, we proposed changing the requirements of return to duty testing to conform with 49 CFR part 40. We also proposed clarifying that an employee must undergo a return to duty drug test before resuming the performance of a safety-sensitive function. In accordance with 49 CFR part 40, we proposed requiring that the test not occur until the Substance Abuse Professional (SAP) not the Medical Review Officer (MRO), has determined that the employee has successfully complied with the prescribed education and/or treatment.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

G. Follow-up Testing. In Notice No. 00–14, we proposed changing 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. We also proposed to change 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. Furthermore, we proposed to clarify that the alcohol test permitted under paragraph 3 needs to be performed in accordance with 14 CFR part 121, appendix J.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

VI. Administrative and Other Matters

Notice No. 00–14 proposed to refer to 49 CFR part 40 for documents that an employer must maintain. We preserved the requirement for FAA-specific documents already in 14 CFR part 121, appendix I, that were not referenced into 49 CFR part 40. In particular, we proposed deleting current paragraphs A. and B. titled ''Collection, Testing, and Rehabilitation Records'' and ''Laboratory Inspections'' respectively because these requirements are now addressed in 49 CFR part 40. We also proposed eliminating 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 proposed moving current paragraph C.3. to the new MRO section, 14 CFR part 121, appendix I, section VII.A., because it is an MRO responsibility.

In Notice No. 00–14, we proposed to add a new paragraph A. ''MRO Record Retention Requirements.'' Specifically, we consolidated language concerning MRO contracting services and transfer of records from current section VII.C. because these records were not included in 49 CFR part 40. These are not new record retention requirements. In the proposal, we inadvertently omitted some language that appeared in current section VII.C. when we transferred the language to paragraph A. We have restored the original language in this final rule.

We proposed to add a new paragraph B. ''Access to Records.'' These requirements are currently in section VII.C.4 and are being moved to consolidate the record requirements into one section.

The FAA did not receive any comments on the proposed changes described above, which are adopted as proposed, with minor editorial changes.

In Notice No. 00–14, we proposed to add a new paragraph C. ''Service Agent.'' One commenter raises questions about the timeframes specified in this provision. We reconsidered paragraph C. and determined that the provisions in 49 CFR 40.333(d) and 40.349(e) are sufficient. Therefore, we are eliminating proposed paragraph C from the final rule.

Also, we proposed to revise paragraph D. ''Release of Drug Testing Information.'' This change conforms to 49 CFR part 40. Because we are deleting proposed paragraph C., proposed paragraph D. is now relettered as paragraph C. We received one comment from ALPA and TTD on this paragraph. The comment states that we should not delete this provision. The FAA has reviewed the proposal and determined that this provision was not deleted in appendix I. However, the commenter was correct in pointing out that this provision was omitted from appendix J in the NPRM, and we have made the appropriate corrections in appendix J. For a further discussion of the issue see appendix J, section IV.C.2.

In addition, one comment was received regarding the requirement in paragraph A. for MROs to transfer records to a new MRO within 10 days of the employer's notification that a new MRO has been hired. The commenter states that 30 days would be a more appropriate timeframe.

In the future, the FAA may consider the expanded timeframe that the commenter suggests. However, the FAA is not making the suggested change at this time because it is outside the scope of this rulemaking and notice and opportunity for public comment have not been provided for changing the existing 10-day requirement. Instead, we are moving the language from paragraph VII.C. to paragraph A. as proposed.

Furthermore, Notice No. 00–14 proposed to change ''consortium'' to ''C/TPA,'' as appropriate. We received one comment on this issue, which supports the change. Therefore, the FAA revised paragraph A.3 to use the term ''C/TPA.''

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

In Notice No. 00–14, we proposed renaming this section from ''MRO and Substance Abuse Professional'' to ''Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities.'' We also proposed renaming paragraph A. from ''MRO and Substance Abuse Professional Duties'' to ''Medical Review Officer'' and renaming paragraph B. from ''MRO Determinations'' to ''Substance Abuse Professional.'' These changes will better organize the information and conform to changes to 49 CFR part 40.

We proposed to delete the majority of MRO and SAP responsibilities in this appendix and instead refer the reader to 49 CFR part 40. Specifically, in Notice No. 00–14, we proposed: (1) Retaining the MRO and employer responsibilities for 14 CFR part 67 airman medical certificate holders because these requirements are specific to the FAA; (2) moving some responsibilities from the MRO to the SAP because 49 CFR part 40 has given SAPs return to work duties that formerly belonged to the MROs; (3) moving the provision from section VI.C.3 that prohibits the MRO from delaying the verification of the primary test result pending the outcome of the split-specimen test; (4) combining the MRO, SAP, and Employer Responsibilities regarding 14 CFR part 67 airman certificate holders under paragraph C. ''Additional Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities Regarding 14 CFR part 67 Airman Medical Certificate Holders.''

Notice No. 00–14 proposed to change paragraph B. ''MRO Determinations'' to reflect the 1996 final rule that amended 14 CFR part 67. Prior to the 1996 final rule, 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. Since the 1996 final rule, MROs have not been permitted to ''make a determination of probable drug dependence or nondependence as specified in 14 CFR part 67.'' Therefore, in Notice No. 00–14 we proposed to: (1) Delete any reference to the MRO determining dependency for a person holding an FAA medical certificate; (2) require the employer, and not the MRO, to forward the SAP evaluation to the Federal Air Surgeon.

In Notice No. 00–14, we proposed to revise paragraph C.2 to 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 the safety-sensitive function. Currently, 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 the changes to 49 CFR part 40 gave the SAP the return to duty role, paragraph C.2 was revised accordingly.

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. Although the individual's medical certificate is subject to review by the Federal Air Surgeon, this review will not affect the SAP's ability to return the individual to duty as long as the individual did not need a medical certificate to perform his/her duties. For example, a flight attendant may hold a medical certificate because he or she is also a private pilot. In such a case, the person's positive test result would be reported to the Federal Air Surgeon, but the SAP could recommend that the individual return to duty as a flight attendant. The Federal Air Surgeon would act independently on the medical certificate. The Federal Air Surgeon's actions on the flight attendant's medical certificate would

have no bearing on his or her ability to return to work as a flight attendant.

One minor change was made to the proposed language for this section. The minor change adds the option for the Federal Air Surgeon to issue a medical certificate without a ''special issuance'' stipulation on the certificate. The reason for this is so that, in rare circumstances, the Federal Air Surgeon could determine that a ''special issuance'' is not necessary. Without the change to the rule language, a person granted a medical certificate without a ''special issuance'' could not return to work.

The FAA received one comment from the ALPA and TTD on the proposed changes regarding 14 CFR part 67. The comment supports the proposed revisions and clarifications that make the drug testing and alcohol misuse prevention regulations consistent with the prior changes to 14 CFR part 67. Therefore, the changes are adopted as proposed, with minor editorial changes.

Additionally, in Notice No. 00–14, the FAA requested comment on whether the 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. Specifically, we discussed that the employer must ensure the employee who is required to hold a medical certificate meets the return to duty and follow-up testing requirements in accordance with 49 CFR part 40, after the Federal Air Surgeon has recommended that such an employee be permitted to perform safety-sensitive duties. The FAA did not propose specific language in appendix I, however, we proposed clarifying language on this issue in 14 CFR 121, appendix J, section V.C.5.

One commenter states that the SAP's duties are clear with respect to 14 CFR part 67; another commenter states that the FAA should clarify this issue. The FAA has determined that the provision merits clarification. Therefore, the FAA has adopted the language proposed to 14 CFR 121, appendix J, section V.C.5 and inserted it into 14 CFR part 121, appendix I, section VII.C.4.

IX. Employer's Antidrug Program

Notice No. 00–14 proposed to eliminate the requirement for an entity seeking to operate as a consortium to first seek the approval of the FAA because, as noted in the common preamble to the NPRM, the terms upon which the FAA granted its approval to consortia have now been changed by the requirements of 49 CFR part 40.

The FAA received three comments on the C/TPA issue. DATIA supports the elimination of FAA's approval of consortia, saying that removal of the FAA approval process will emphasize that C/TPA operations are regulated by 49 CFR part 40 and will promote continuity of services by C/TPAs. Two of the commenters do not favor the elimination of FAA approval for consortia because they believe that such elimination may result in additional confusion and exposure to less than competent service providers for aviation employers. One commenter states that FAA-approved consortia are needed because many aviation employers do not have the knowledge, time, and personnel required to understand and implement an effective drug and alcohol testing program. Furthermore, two commenters believe that FAA-approved consortia fill a critical void. Moreover, one commenter favors extending approval beyond consortia to third party administrators throughout DOT modal administrations.

The FAA disagrees with the comments opposing the elimination of the FAA approval process because experience has shown that some consortia and employers have misunderstood the term ''FAA-approved consortium'' as meaning that the consortium operates in accordance with the appropriate regulations. In fact, FAA ''approval'' of a consortium has never been a measure of the consortium's actual ability or compliance. Employers have always been and will remain responsible for ensuring that their testing programs are in compliance with the regulations. Since this misunderstanding of the term ''approval'' has contributed to significant violations of the regulations, removing ''approval'' for consortia makes that point clear.

Therefore, paragraph A.4 has been revised to eliminate the requirement for a consortium to apply for the FAA's approval. Paragraph A.6 has been revised to eliminate the word ''consortium'' to conform to 49 CFR part 40. Also, since consortium approvals have been eliminated within this appendix, all references to an ''FAA-approved consortium'' or ''consortium'' have been replaced with ''C/TPA'' as defined by 49 CFR part 40.

One commenter inquires about the administrative processes that will be applied if the proposed changes to eliminate FAA-approved consortia are adopted. Specifically, the commenter asks what the ramifications of the proposed change to the employer's policy and program will be.

First, employers can continue to contract with consortia and third party administrators as they always have. The employer's FAA-approved plan has always been signed and certified by the employer, regardless of the employer's membership in a consortium. C/TPAs may continue to prepare and forward the employer's plan submissions to the FAA, as long as the employer signs and certifies the document. Second, it will not be necessary for employers who are consortium members to resubmit their plans. The consortium antidrug plan format, ''CONSORTIUM MEMBER ANTIDRUG PLAN/AMPP CERTIFICATION STATEMENT,'' is substantively the same as the individual antidrug plan format, ''ANTIDRUG PLAN/ALCOHOL MISUSE PREVENTATION PROGRAM CERTIFICATION STATEMENT.'' Since both formats are substantively the same, previously submitted consortium member plans will be treated as independent plans. Third, at this time we are not eliminating the requirement for aviation employers to file and receive approval of drug and alcohol program plans.

After consideration of the comments discussed above, we are eliminating the ''FAA approval'' of consortia as discussed in the NPRM.

X. Reporting of Antidrug Program Results

In Notice No. 00–14 we proposed changing the term ''FAA-approved consortia'' to ''C/TPA.'' We received one comment on this issue, which supported the change. Therefore, in the final rule we have revised paragraph F to permit C/TPAs to prepare reports on behalf of individual employers, whereas only FAA-approved consortia were permitted to do this in the past.

An additional minor change is being made to this paragraph to clarify that C/TPAs are not permitted to sign the annual antidrug program results reports for the employer. This minor change is necessary because an FAA-approved consortium was not permitted to sign its client's annual antidrug program results report in the past, therefore, we are clarifying that the same restriction applies to C/TPAs.

XII. Testing Outside the Territory of the United States

In Notice No. 00–14, the FAA proposed changing the title of this section from ''Employees Located Outside the Territory of the United States'' to ''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 proposed clarifying that this authorization does not apply to entities

regulated by this appendix. We proposed changing paragraph A. to explicitly state 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. 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 the past, and we are continuing to work with ICAO 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 change conforms to past FAA guidance on this section, to past practice, and to our commitment to continue to work with ICAO to address all aspects of international substance abuse testing.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

XIII. Waivers from 49 CFR 40.21

As proposed in Notice No. 00–14, this new provision addresses waivers described in 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 proposed adding 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 will create a process to address requests for waivers from the stand down provisions of 49 CFR 40.21. Consistent with the requirements for seeking a waiver under 49 CFR 40.21(b), we proposed placing the responsibility on 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 did not address the FAA's discretion on these matters.

The FAA will not consider the grant of such waivers lightly. There are strong privacy concerns that surround an unverified positive test result. Waiver applications must address all of the concerns detailed in 49 CFR 40.21(b) and must show that the individual's privacy concerns are being properly protected by the aviation entity. If a waiver application fails to address the criteria in 49 CFR 40.21(b), it is likely to be denied without detailed analysis. In addition, if the FAA grants a waiver, as stated in 49 CFR 40.21(d)(2), ''The Administrator, or his or her designee, may immediately suspend or revoke the waiver if he or she determines that you have failed to protect effectively the interests of employees in fairness and confidentiality, that you have failed to comply with the requirements of this section, or that you have failed to comply with any other conditions the DOT agency has attached to the waiver.''

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

Appendix J

I. General

In Notice No. 00–14, we proposed to add paragraph C. ''Employer Responsibility'' to ensure that employers understand that they are responsible for all applicable requirements and procedures of this appendix and 49 CFR part 40. This change also reinforces that employers are responsible for all actions of their officials, representatives, and service agents in carrying out the requirements of the DOT agency regulations.

In addition, we proposed to:

- Reletter paragraph C. ''Definitions'' 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.
- Change the term from ''refuse to submit (to an alcohol test)'' to ''refusal to submit'', and change the definition to refer to 49 CFR part 40.261.
- Delete the definition of ''Screening Test'' since the definition is provided in 49 CFR part 40.
- Reletter the remaining paragraphs accordingly.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

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 proposed the same rule language. This was discussed in the Department of Transportation's common preamble published on April 30, 2001 (66 FR 21492). We proposed the standardized language in Notice No. 00–14, and we added the word ''testing'' to the heading of the section for consistency with the other paragraphs in this section.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

B. Post-accident Testing. In Notice No. 00–14, we proposed to eliminate paragraph 2(b), which required 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. Also, we proposed adding the word ''testing'' to the heading for consistency with the other paragraphs in this section.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

C. Random Testing. In Notice No. 00–14, we proposed changing all sections referring to FAA-approved consortia. We received one comment on the issue of renaming ''consortium'' to ''C/TPA.'' The commenter supports the proposal.

Therefore, we revised paragraph C. 6 to permit C/TPAs to combine the employee random testing pools of different employers. In the past, only FAA-approved consortia could combine the employee random testing pools of different employers. This change conforms to 49 CFR part 40.

D. Reasonable Suspicion Testing. We proposed eliminating paragraph 4(b), which required 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. Also, we proposed eliminating in paragraph 4(c) (formerly 4(d) in the current rule) the words ''Except as provided in paragraph (b)'' since paragraph (b) has been eliminated.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

E. Return to Duty Testing. We proposed changing 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.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

F. Follow-up Testing. We proposed changing the requirements of follow-up testing to conform with 49 CFR part 40, which now requires the SAP to determine the number of follow-up tests for an employee and to ensure that any employee who receives an alcohol violation is subject to at least six follow-up tests after returning to duty. In addition, we proposed revising this paragraph for clarity.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

IV. Handling of Test Results, Record Retention and Confidentiality

A. Retention of Records. In Notice No. 00–14, the FAA proposed to specify which records employers must continue to retain in addition to the records required by 49 CFR part 40. Specifically, we eliminated 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 paragraph 2 and noted the specific retention period for the records. We eliminated paragraph 2(c) because all of the 1-year requirements are included in 49 CFR part 40.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed.

B. Reporting of Results in a Management Information System. In Notice No. 00–14 we proposed changing the term ''FAA-approved consortia'' to ''C/TPA.'' We received one comment on this issue, which supported the change. Therefore, in the final rule we have revised paragraph B.8 to permit C/TPAs to prepare reports on behalf of individual employers, whereas only FAA-approved consortia were permitted to do this in the past.

An additional minor change is being made to this paragraph to clarify that C/TPAs are not permitted to sign the annual antidrug program results reports for the employer. This minor change is necessary because an FAA-approved consortium was not permitted to sign its client's annual antidrug program results report in the past, therefore, we are clarifying that the same restriction applies to C/TPAs.

C. Access to Records and Facilities. In Notice No. 00–14, the FAA proposed to eliminate most of this section because 49 CFR part 40 sets out confidentiality and release of information requirements. Also, we proposed to retain language from current paragraph C.8, because it reinforces to the employer the requirement to comply with this appendix regarding access to all facilities.

We received one comment from ALPA and TTD stating that we should not eliminate current paragraph C.2, which entitles employees to obtain, and requires employers to provide, records relevant to charges that an employee violated the alcohol misuse prevention provisions. The FAA did not intend to eliminate this provision, and we proposed to keep a similar provision in appendix I (now paragraph VI.C. in appendix I). The FAA agrees with the comment, and therefore, we are not eliminating current paragraph C.2 in appendix J. We will retain paragraph C.2 with a minor change to reference 49 CFR part 40. In addition, because we are retaining current paragraph C.2, we have renumbered proposed paragraph C.2 to a new paragraph C.3 in this final rule.

V. Consequences for Employees Engaging in Alcohol-Related Conduct

C. Notice to Federal Air Surgeon. In Notice No. 00–14, we proposed changing paragraph C.4 in light of the changes to 49 CFR part 40 and the changes that arose from the 1996 amendment to 14 CFR part 67. In addition, we proposed adding a new paragraph C.5, clarifying the employer's obligation to ensure that the employee met the return to duty requirements following the recommendation of the Federal Air Surgeon.

The FAA received one comment from the ALPA and TTD on the proposed changes regarding 14 CFR part 67. The comment supports the proposed revisions and clarifications that make the drug testing and alcohol misuse prevention regulations consistent with the prior changes to 14 CFR part 67. Therefore, the changes are adopted as proposed, with minor editorial changes.

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

In Notice No. 00–14, the FAA proposed to change the title of this section from ''Alcohol Misuse Information, Training, and Referral'' to ''Alcohol Misuse Information, Training, and Substance Abuse Professional'' for clarity and organizational purposes. The FAA also proposed to change the title of paragraph C. from ''Referral, Evaluation, and Treatment'' to ''Substance Abuse Professional (SAP) Duties'' for clarity purposes and to conform to 49 CFR part 40. In addition, we proposed eliminating the majority of this paragraph because the SAP requirements are detailed in 49 CFR part 40, Subpart O. This paragraph now refers the reader to 49 CFR part 40 for SAP requirements.

The FAA did not receive any comments on the proposed changes, which are adopted as proposed, with minor editorial changes.

VII. Employer's Alcohol Misuse Prevention Program

In Notice No. 00–14, the FAA proposed eliminating 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 we have eliminated consortium approvals in section IX of appendix I, we have eliminated the requirement for a consortium to submit an AMPP to the FAA. Similarly, we have removed the requirement for a consortium to notify the FAA of membership changes.

Also as proposed, we have removed any references to an ''FAA-approved consortium'' or ''consortium'' in paragraphs A.6 and A.7 because consortia are no longer required to submit AMPPs. We have eliminated paragraphs A.3 and A.8 and renumbered the remaining paragraphs accordingly.

In addition, as proposed in Notice No. 00–14, in paragraph B. we removed the requirement for employers and contractors to name their consortium in their AMPP certification statement. Furthermore, we eliminated the provisions allowing consortia to submit AMPP certification statements. Therefore, the FAA will not accept C/TPA's own AMPP certification statements, however, C/TPAs can continue to prepare and forward AMPP certification statements on behalf of their clients as long as the employer signs the AMPP certification statement.

For a discussion of the comments received on the issue of consortium approvals, see appendix I, section IX.

Paperwork Reduction Act

There are no new requirements for information collection associated with this amendment.

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 regulations.

Good Cause for Immediate Adoption

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. sec. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency and published rule. The FAA is making this rule effective August 1, 2001, rather than 30 days from now. The good cause supporting this action is that the purpose of this rule is to ensure that the FAA's drug and alcohol testing regulations are consistent with the Department-wide 49 CFR part 40, which goes into effect on August 1, 2001. Unless the FAA's final rule becomes effective August 1, 2001, there may be overlap, conflict, duplication, or confusion between different DOT drug and alcohol testing regulations. The new 49 CFR part 40 was published over seven months ago, therefore affected parties have had ample time to prepare to implement the new regulations. The FAA's final rule merely implements the changes made by 49 CFR part 40, and additionally implements the 1996 final rule that changed 14 CFR part 67.

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 do 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. For the regulatory evaluation of the actions that the FAA is making due to 49 CFR part 40, see the Department of Transportation's discussion in the preamble published concurrently with this final rule. In addition to the FAA's changes that are directly due to changes in 49 CFR part 40, the FAA is making 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 Final Rule is that its economic impact is minimal. Since the costs and benefits of this 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. These FAA amendments are being made because of DOT changes to 49 CFR part 40 and have no incremental economic impacts on their own, and the additional clarifying changes that are being made impose no new requirements; they 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.

The changes in this action make the FAA regulations consistent with the new requirements of 49 CFR part 40. In its rulemaking, the DOT performed an economic analysis of the changes made to 49 CFR part 40 and the impact of the changes on the modal industries. In addition to the changes being made because of the new 49 CFR part 40, the FAA is making revisions to conform to the current 14 CFR part 67. None of these changes, on their own, have incremental economic impacts. The FAA certifies that the rule does 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 rule and has determined that it has no effect on any trade-sensitive activity.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 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 section; such a mandate is deemed to be a ''significant regulatory action.''

This 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 rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action does 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 final rule does 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), this rulemaking action qualifies for a categorical exclusion.

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 final rule 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 Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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 is revised 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, 45101–45105, 46105.

2. Amend appendix I to part 121 as follows:

A. Revise section I;

B. In section II, revise the definitions of ''Prohibited drug'', ''Refusal to submit'', ''Verified negative drug test result'', and ''Verified positive drug test result'';

C. Revise section IV;

D. In section V, revise paragraphs C. 6, F., G.2., G3., and G.4;

E. In section VI, revise paragraphs A. and B., remove paragraph C., redesignate paragraphs D., E., and F. as paragraphs C., D., and E., respectively, and revise newly redesignated paragraph C;

F. In section VII, revise the heading of the section, revise paragraphs A, B, and C, and remove paragraph D;

G. In section IX, revise the introductory text in paragraph 4, remove paragraph 4(b), redesignate paragraph 4(c) as paragraph 4(b) and revise it, revise paragraph 6;

H. In section X, revise paragraph F;

I. In section XII, revise the heading of the section and the introductory text in paragraph A; and

J. 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 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, as specified in 49 CFR 40.85.

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

* * * * *

Verified negative drug test result 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 result 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.* * * *

* * * * *

C. *Random Testing.*

* * * * *

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the employer conducts random drug testing through a Consortium/Third-party administrator (C/TPA), 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 C/TPA who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

* * * * *

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 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 conducted in accordance with the provisions of 49 CFR part 40, 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 employer shall ensure that the former MRO forwards 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 C/TPA, 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 or the Administrator's representative may require that all records maintained by the service agent for the employer must be produced at the employer's place of business.

C. *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, in addition to notifying the employer in accordance with 49 CFR part 40, the MRO must forward to the Federal Air Surgeon, at the address listed in paragraph 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 medical certificate or a special issuance medical certificate from the Federal Air Surgeon. The receipt of a medical certificate or 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. The employer cannot permit an employee who is required to hold a medical certificate under part 67 of this chapter to perform a safety-sensitive duty to resume that duty until the employee has received a medical certificate or a special issuance medical certificate from the Federal Air Surgeon unless and until the employer has ensured that the employee meets the return-to-duty requirements in accordance with 49 CFR part 40.

5. 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.

* * * * *

IX. Employer's Antidrug Program Plan. A. *Schedule for Submission of Plans and Implementation.* * * *

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4. Any entity or individual whose employees perform safety-sensitive functions pursuant to a contract with an employer (as defined in section II of this appendix), may submit an antidrug program plan to the FAA for approval on a form and in a manner prescribed by the Administrator.

* * * * *

(b) Each contractor shall implement its antidrug program in accordance with the terms of its approved plan.

* * * * *

6. Each employer, or contractor company that has submitted an antidrug plan directly to the FAA, shall obtain appropriate approval from the FAA prior to changing programs.

* * * * *

X. *Reporting of Antidrug Program Results.*

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F. A C/TPA may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation 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. A C/TPA must not sign the form.

* * * * *

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.

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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, DC 20591.

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

3. Amend appendix J to part 121 as follows:

A. In section I, redesignate paragraphs C through F as paragraphs D through G, add new paragraph C, and amend newly redesignated paragraph D to remove the definitions for ''Confirmation Test'', ''Consortium'', and ''Screening Test'', to remove the definition of ''Refuse to submit (to an alcohol test)'' and to add the definition ''Refusal to submit'' in alphabetical order;

B. In section III, revise paragraph A, revise the heading of paragraph B, and revise paragraphs B.2 and C.6; remove paragraph D.4.(b); redesignate paragraphs D.4.(c) and D.4.(d) as paragraphs D.4.(b) and D.4.(c); revise newly redesignated paragraph D.4.(c); and revise paragraphs E and F;

C. In section IV, revise paragraphs A., B.8, C.2 and C.3, and remove paragraphs C.4 through C.8;

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

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

F. In section VII, remove paragraphs A.3 and A.8; redesignate paragraphs A.4 through A.7 as paragraphs A.3 through

A.6, respectively, revise newly redesignated paragraph A.6, redesignate paragraph A.9 as paragraph A.7 and revise it; remove paragraph B.1(d); redesignate paragraph B.1(e) as paragraph B.1(d); remove paragraph B.2.

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*

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Refusal to submit 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

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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.

* * * * *

C. Random Testing

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6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the employer conducts random testing through a Consortium/Third-party administrator (C/TPA), 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 who are subject to random alcohol testing at the same minimum annual percentage rate under this appendix or any DOT alcohol testing rule.

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D. Reasonable Suspicion Testing

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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 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 SAP.

2. The number and frequency of such testing shall be determined by the employer's SAP, 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.

B. Reporting of Results in a Management Information System

* * * * *

8. A C/TPA may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation 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. A C/TPA must not sign the form.

C. Access to Records and Facilities

* * * * *

2. A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests in accordance with 49 CFR part 40. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

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

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 (SAP) Duties

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

VII. Employer's Alcohol Misuse Prevention Program

A. Schedule for Submission of Certification Statements and Implementation

* * * * *

6. The duplicate certification statement shall be annotated indicating receipt by the FAA and returned to the employer or contractor company.

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

* * * * *

Issued in Washington, DC on July 17, 2001.

Jane F. Garvey,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA 2000–8583 (Formerly FRA Docket No. RSOR–6); Notice No. 49]

RIN 2130–AB43

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

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

ACTION: Final rule.

SUMMARY: FRA is publishing a final rule conforming its drug and alcohol testing regulation to the December 19, 2000 revision of DOT's transportation workplace testing procedures. Consistency between the FRA's rule and DOT's revision is important in order to avoid overlap, conflict, duplication, or confusion among DOT drug and alcohol testing regulations.

DATES: This rule becomes effective August 1, 2001.

ADDRESSES: The Department of Transportation's Docket Management System allows the public access through the internet to all documents filed in a particular proceeding. The April 30, 2001 NPRM (formerly FRA Docket RSOR–6, Notice No. 48) and the comments to it, may be found with this rule under Docket No. FRA 2000–8583. Docket No. FRA 2000–8583 may be accessed through the Department's Docket Management System website at *http://dms.dot.gov.*

For instructions on how to use this system, visit the Docket Management System Web Site and click on the ''Help'' menu. This docket is also available for inspection or copying at room PL–401 on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590–0001, during regular business hours.

FOR FURTHER INFORMATION CONTACT: Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS–11, 1120 Vermont Avenue, N.W., Mail Stop 25, Washington, D.C. 20590 (telephone 202–493–6313); or Patricia V. Sun, Trial Attorney, Office of the Chief Counsel, RCC–11, 1120 Vermont Avenue, N.W., Mail Stop 10, Washington, D.C. 20590 (telephone 202–493–6038).

SUPPLEMENTARY INFORMATION:

Background

In this rule FRA finalizes changes to conform its drug and alcohol testing regulation (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). These changes were proposed in an NPRM that FRA published (April 30, 2001, 66 FR 21511) concurrently with NPRMs from the Federal Aviation Administration, the Federal Motor Carrier Safety Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the United States Coast Guard.

FRA adopts the proposals in the NPRM without change (with the exceptions of the penalty schedule published in Appendix A, which is slightly different from the one contained in the NPRM as discussed below; and, to be more consistent with Part 40 terminology, the substitution of ''specimen'' for ''sample'' wherever that term appeared in this rule). FRA received four comments to the NPRM, each of which is discussed in detail below. The majority of the comments concerned Department-wide issues, which are more properly addressed in Part 40 rather than individual modal rules, or raised issues beyond the scope of the NPRM's proposed conforming changes, technical amendments, and corrections.

In addition to conforming Part 219 with the new Part 40, FRA makes corrections to comply with **Federal Register** format requirements and delete outdated rule text references. FRA also makes technical changes to its statutory citations by replacing citations to the Federal Railroad Safety Act of 1970 and the Hours of Service Act (which were repealed in 1994) with references to the proper sections or chapters in title 49 of the United States Code. *See* Public Law 103–272.

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency. FRA is making this conforming rule effective immediately upon publication, rather than 30 days from now to ensure that FRA's drug and alcohol testing regulation is consistent with the Department's Part 40 testing procedures, which become effective on