

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

[Docket No.: FAA-2004-19835: Amendment No. 61-114, 63-34, 65-47, 67-19, 91-291, 121-325, 135-105]

RIN 2120-AH82

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

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

**ACTION:** Final rule.

**SUMMARY:** This final rule changes the airman medical certification standards to disqualify an airman based on an alcohol test result of 0.04 or greater breath alcohol concentration (BAC) or a refusal to take a drug or alcohol test required by the Department of Transportation (DOT) or a DOT agency. Further, this rulemaking standardizes the time period for reporting refusals and certain test results to the FAA, and requires employers to report pre-employment and return-to-duty test refusals. It also amends the airman medical certification requirements to allow suspension or revocation of airman medical certificates for pre-employment and return-to-duty test refusals. Finally, we have updated the regulations to recognize current breath alcohol testing technology. These amendments are necessary to ensure that persons who engage in substance abuse do not operate aircraft or perform contract air traffic control duties until it is determined that these individuals can safely exercise the privileges of their certificates.

**DATES:** These amendments become effective July 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** For technical information, Sherry M. de Vries, Aeromedical Standards and Substance Abuse Branch, Medical Specialties Division, AAM-210, Office of Aerospace Medicine, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8693. For legal information, Michael Chase, Office of the Chief Counsel, AGC-200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8442.

**SUPPLEMENTARY INFORMATION:**

**Availability of Rulemaking Documents**

You can get an electronic copy using the Internet by:

- (1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (<http://dms.dot.gov/search>);
- (2) Visiting the FAA's Regulations and Policies web page at [http://www.faa.gov/regulations\\_policies/](http://www.faa.gov/regulations_policies/); or
- (3) Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>.

You can also get a copy by sending 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.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

**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. If you are a small entity and you have a question regarding this document, you may contact its local FAA official, or the persons listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at <http://www.faa.gov/avr/arm/sbrefa.cfm>.

**Authority for This Rulemaking**

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Chapter 447, Section 44703, Airman Certificates, and Chapter 451, Section 45102, Alcohol and Controlled Substances Testing Programs. Under Section 44703, the FAA is authorized to issue an airman

certificate to an individual who "is qualified for, and physically able to perform the duties related to, the position to be authorized by the certificate." Under Section 45102, the FAA is charged with prescribing regulations to establish programs for drug and alcohol testing of employees performing safety-sensitive functions for air carriers and to take certificate or other action when an employee violates the testing regulations. This regulation is within the scope of the FAA's authority because it updates the existing regulations regarding airman certification of individuals who have violated the drug and alcohol testing regulations or who have otherwise demonstrated a substance abuse history through violation of State or local laws involving driving while intoxicated/driving under the influence. This rulemaking is a current example of the FAA's continuing efforts to ensure that only drug- and alcohol-free individuals perform safety-sensitive duties.

**Discussion of Comments***General Overview*

The FAA has revised regulations that apply to airmen who fail or refuse a drug or alcohol test. These changes conform the FAA's regulations to changes in DOT's and our own drug and alcohol testing regulations.

The comment period for the notice of proposed rulemaking (NPRM), (69 FR 74898) closed on March 14, 2005. The FAA received approximately 30 comments in response to the NPRM. Commenters included the Experimental Aircraft Association (EAA); the Air Line Pilots Association, International (ALPA); and the Drug and Alcohol Testing Industry Association (DATIA).

The majority of commenters favored the proposed changes. Approximately 20 commenters favored all of the proposals, and some of these commenters encouraged stricter standards including zero tolerance for alcohol consumption by pilots. Many of the commenters stated they approved of the proposals because they enhance safety. Three commenters raised issues disagreeing with one or more of the proposals. The remaining commenters offered suggestions, some of which were outside the scope of this rulemaking.

Should a refusal be a medically disqualifying condition?

ALPA disagreed with the proposal to define a refusal as a medically disqualifying condition. ALPA asserted substance abuse is a recognized medical condition under the American Psychiatric Association's Diagnostic and

Statistical Manual of Mental Disorders (DSM). In ALPA's opinion, the FAA should not mix the medical standards with non-medical policy concerns. ALPA acknowledges the current drug and alcohol testing regulations require such pilots to be removed from duty, evaluated and rehabilitated. However, ALPA takes exception with a separate diagnosis of substance abuse arising from a single confirmed alcohol test result or a refusal.

The Federal Air Surgeon sets the standards for airman medical certification based on sound medical judgement in reference to the aviation environment. Thus, while the Federal Air Surgeon may reference sources such as DSM, DSM is not the only basis for determining airman medical certification standards.

This final rule does not attempt to mix medical standards with non-medical policy concerns in this rulemaking, instead it merely harmonizes the FAA's medical certification requirements with the DOT's and FAA's drug and alcohol testing requirements. As ALPA notes, the DOT's and FAA's drug and alcohol testing regulations already recognize a positive drug test result, an alcohol test result of 0.04 or greater BAC, and a refusal as substance abuse requiring rehabilitation before the individual can be returned to perform a safety-sensitive function. In addition, regardless of whether the airman resumes the performance of safety-sensitive functions, the FAA's medical certification regulations already require an airman to demonstrate that he or she meets the standards in part 67 following a positive drug test result or BAC of 0.04 or greater.

The Omnibus Transportation Employees Testing Act of 1990, Title 49, United States Code, sections 45101–45105, already requires that every individual who violates the drug or alcohol testing regulations must be rehabilitated before that individual can be returned to the performance of a safety-sensitive function. (49 U.S.C. section 45103(b)) Since 2000, the DOT's regulations have required that, following a violation of the drug or alcohol testing regulations and before returning an individual to work, the employer must have a Substance Abuse Professional (SAP) make "a face-to-face clinical assessment and evaluation to determine what assistance is needed by the employee to resolve problems associated with alcohol and/or drug use." (49 CFR section 40.293)

Incidentally, prior to the DOT's final rule published in 2000, 65 FR 79462 (December 19, 2000), establishing the

current 49 CFR part 40, the SAP had discretion to determine whether an employee needed substance abuse assistance. The DOT removed this discretion in the final rule, stating "we believe that there are no circumstances in which it is appropriate for a SAP to find that a violator of our regulations is not in need of education and/or treatment." 65 FR at 79508.

When should reports of refusals and drug and alcohol test results be sent to the FAA?

In the NPRM, we proposed standardizing the time period for reporting drug test results and refusals to 2 days. EAA opposed changing the notification for drug test results from 12 working days to 2 working days. Instead, EAA recommended a 7 working day notification requirement.

We have decided to adopt the amendment as proposed because we are not accelerating the schedule for drug test or refusal verification, we are merely requiring an administrative change to report the results to the FAA within 2 days for alcohol test results, drug test results, and refusal verifications. These changes ensure violations are reported to the FAA in a more timely manner. This standardization of 2 days will make the reporting requirements clear and consistent for employers and their service agents. The FAA notes that while we proposed to change the refusal reporting requirement for drug testing to 2 days, we inadvertently omitted the rule language for making a similar change to the alcohol refusal reporting requirement. We have corrected this omission.

How do driving under the influence (DUI) violations affect pilot certificate holders?

EAA questioned how DOT agencies and state and local law authorities would report such information to the FAA. EAA suggested new forms would be needed, and the FAA failed to account for this cost. This association also believed the proposed rule would significantly affect pilot certificate holders who have received a DUI for drugs or alcohol. In addition, EAA asked if pilots are allowed one DUI before their medical certificate is revoked, saying that aviation medical examiners (AME) currently forgive the first DUI. Also, EAA inquired whether a pilot would be suspended for 0.04 or less BAC. EAA said it is not clear whether a DUI or a positive test result not related to flying can result in the loss of the airman's medical certificate.

This final rule only standardizes the reporting periods as described earlier, and does not change the existing reporting requirements for DUI or other drug or alcohol violations found by DOT agencies, state, or local law authorities. Therefore, new forms are not necessary.

Pilot certificate holders who receive a DUI already encounter consequences under the existing FAA regulations. A pilot with one DUI can be evaluated by the AME to determine if there is an alcohol abuse problem. Similarly, the AME is required to defer issuance of a new medical certificate to the Federal Air Surgeon if the airman has refused a DOT alcohol test or has a DOT alcohol violation. As we explained in the preamble to the NPRM, the FAA has taken medical certificate action against pilots for one alcohol-related event. Although test results below 0.04 are not required to be reported to the FAA, it is possible, in certain circumstances, the pilot's medical certificate will be suspended or revoked for an alcohol test result of less than 0.04 BAC. However, under the FAA's regulations, an employer must remove a pilot from the performance of safety-sensitive work if the pilot has an alcohol test result between 0.02 and less than 0.04 BAC. The pilot cannot be returned to safety-sensitive work until he or she has an alcohol test result below 0.02 BAC or until the pilot's next scheduled duty period, but not less than 8 hours following the administration of the test.

Yes, an individual can lose his or her medical certificate for a DUI, DWI, test result, or refusal unrelated to flying. Losing a medical certificate for conduct unrelated to flying is not a new consequence resulting from this final rule.

How does an employer know when a medical certificate is valid?

EAA noted that it can be confusing for an employer to know if a medical certificate is valid after an employee has had a drug or alcohol violation. The association suggested specific language on this point.

In response to EAA's comments, we modified part 121, appendix I, section VII.C.2 to include clarifying language. We also modified part 121, appendix J, section V.C.4 to add the clarifying language and to make it consistent with the corresponding section in appendix I. An employer can refer to these sections for direction on medical certificate validity.

#### Miscellaneous Comments

The FAA received numerous comments outside the scope of the proposals. They included: applying

medical certification to mechanics and others performing safety-sensitive functions; zero alcohol tolerance; conducting breath alcohol testing immediately before each flight; reducing the breath alcohol concentration standard from 0.04 to 0.02 BAC; increasing the BAC standard above 0.04 BAC; increasing the timeframe of prohibition of substance abuse in the medical certification standards to extend longer than 2 years. We have not addressed them in this rulemaking.

#### **Paperwork Reduction Act**

The FAA described the information collection requirements associated with reporting the results of drug and alcohol testing in OMB control number 2120-0535. This NPRM would add the requirement to report refusals to take return-to-duty and pre-employment tests. This is an extremely small additional burden because these reports are already generated and sent to the employer under 49 CFR part 40 and 14 CFR part 121, appendices I and J, and are accounted for in OMB control number 2125-0529. Under the new requirement, employers would merely send these already existing reports on to the FAA, resulting in a total annual burden of fewer than 2 hours across the industry. Specifically, we estimate the annual burden associated with this NPRM to be 1.75 hours to the private sector, costing \$35.00. The annual burden to the Federal Government would be 7 hours, costing \$138.95. Because this burden is extremely small, we will not change Paperwork Burden Submission OMB control number 220-0535 at this time, but we will include the extra 1.75 hours in the next renewal in 2008.

#### **International Compatibility**

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

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

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

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

#### *Regulatory Evaluation, Regulatory Flexibility Analysis, International Trade Impact Assessment, and Unfunded Mandate Assessment*

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531-2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, to be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

The Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposal does not warrant a full evaluation, this order permits a statement to that effect. The basis for the minimal impact must be included in the preamble, if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this rule. The reasoning for this determination follows.

This final rule amends the airman medical certification standards to

disqualify an airman based on an alcohol test result of 0.04 or greater BAC or a refusal to take a required drug or alcohol test. This rule enhances safety by ensuring that persons who engage in substance abuse do not operate aircraft or perform contract air traffic control tower operations until it is determined that these individuals can operate safely. This rulemaking does not impose additional drug and alcohol testing requirements. It only imposes reporting requirements on the aviation industry and the FAA. This final rule will have a minimal impact with positive net benefits, and a regulatory evaluation was not prepared.

The FAA has, therefore, determined this rulemaking action is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures. In addition, the FAA has determined that this rulemaking action: (1) Will not have a significant economic impact on a substantial number of small entities; (2) will not affect international trade; and (3) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

#### **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 business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies consider flexible regulatory proposals, to explain the rationale for their actions, and to solicit comments. 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 agency determines 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 RFA 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.

This action imposes minimal copying, mailing, and faxing costs on small entities subject to this rule.

Consequently, as the FAA Administrator, I certify that the rulemaking action will not have a significant economic impact on a substantial number of small entities.

#### International Trade Impact Assessment

The Trade Agreements Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that these international standards be the basis for U.S. standards. The FAA has assessed the potential effect of this rulemaking action and has determined that it only impacts domestic activities and will not have any trade-sensitive activity.

#### Unfunded Mandate Assessment

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The FAA currently uses an inflation-adjusted value of \$120.7 million in lieu of \$100 million.

This final rule does not contain such a mandate. The requirements of Title II 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 have determined that this action would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore would not have federalism implications.

#### Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically

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

#### List of Subjects

##### 14 CFR Part 61

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

##### 14 CFR Part 63

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

##### 14 CFR Part 65

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

##### 14 CFR Part 67

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

##### 14 CFR Part 91

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

##### 14 CFR Part 121

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

##### 14 CFR Part 135

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

#### The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14 parts 61, 63, 65, 67, 91, 121, and 135 of the Code of Federal Regulations as follows:

#### PART 61—GENERAL

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

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

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

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

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

\* \* \* \* \*

#### PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

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

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

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

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

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

\* \* \* \* \*

#### PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

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

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

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

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

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

\* \* \* \* \*

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

##### § 65.46a Misuse of alcohol.

\* \* \* \* \*

(f) *Refusal to submit to a required alcohol test.* A covered employee may not refuse to submit to any alcohol test required under appendix J to part 121 of

this chapter. An employer may not permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

**PART 67—MEDICAL STANDARDS AND CERTIFICATION**

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

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

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

**§ 67.107 Mental.**

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

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

**§ 67.207 Mental.**

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

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

**§ 67.307 Mental.**

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

**PART 91—GENERAL OPERATING AND FLIGHT RULES**

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

**Authority:** 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and

29 of the Convention on International Civil Aviation (61 stat. 1180).

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

**§ 91.17 Alcohol or drugs.**

(a) \* \* \*

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

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

(2) Whenever the FAA has a reasonable basis to believe that a person may have violated paragraph (a)(1), (a)(2), or (a)(4) of this section, on request of the FAA, that person must furnish to the FAA the results, or authorize any clinic, hospital, or doctor, or other person to release to the FAA, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates an alcohol concentration in the blood or breath specimen.

\* \* \* \* \*

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

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

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

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

**§ 121.458 Misuse of alcohol.**

\* \* \* \* \*

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

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

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

\* \* \* \* \*

**§ II. Definitions.**

\* \* \* \* \*

*Refusal to submit* means that an employee engages in conduct including but not limited to that described in 49 CFR 40.191.

\* \* \* \* \*

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

**§ VI. Administrative and Other Matters.**

\* \* \* \* \*

*D. Refusal to Submit to Testing.*

1. Each employer must notify the FAA within 2 working days of any employee who holds a certificate issued under part 61, part 63, or part 65 of this chapter who has refused to submit to a drug test required under this appendix. Notification must be sent to: Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue, SW., Washington, DC 20591, or by fax to (202) 267-5200.

\* \* \* \* \*

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

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

\* \* \* \* \*

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

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

2. During the SAP interview required for a verified positive test result or a refusal to submit to a test, the SAP must ask and the individual must answer whether he or she holds or would be required to hold an airman medical certificate issued under 14 CFR part 67 of this chapter to perform a safety-sensitive function for the employer. If the individual answers in the affirmative, the individual must obtain an airman medical certificate issued by

the Federal Air Surgeon dated after the verified positive drug test result date or refusal to test date. After the individual obtains this airman medical certificate, the SAP may recommend to the employer that the individual may be returned to a safety-sensitive position. The receipt of an airman medical certificate does not alter any obligations otherwise required by 49 CFR part 40 or this appendix.

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

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

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

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

**Appendix J to Part 121—Alcohol Misuse Prevention Program**

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

I. GENERAL.

\* \* \* \* \*

D. *Definitions.* \* \* \*

\* \* \* \* \*

*Refusal to submit* means that a covered employee has engaged in conduct including but not limited to that described in 49 CFR 40.261, or has failed to remain readily

available for post-accident testing as required by this appendix.

\* \* \* \* \*

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

IV. HANDLING OF TEST RESULTS, RECORD RETENTION, AND CONFIDENTIALITY

\* \* \* \* \*

2. *Period of Retention.*

(a) \* \* \*

\* \* \* \* \*

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

\* \* \* \* \*

■ 21. Amend section V of Appendix J to Part 121 by revising paragraph (C)(4) to read as follows:

C. \* \* \*

\* \* \* \* \*

4. No covered employee who is required to hold an airman medical certificate in order to perform a safety-sensitive duty may perform that duty following a violation of this appendix until the covered employee obtains an airman medical certificate issued by the Federal Air Surgeon dated after the alcohol test result or refusal to test date. After the covered employee obtains this airman medical certificate, the SAP may recommend to the employer that the covered employee may be returned to a safety-sensitive position. The receipt of an airman medical certificate does not alter any obligations otherwise required by 49 CFR part 40 or this appendix.

\* \* \* \* \*

■ 22. Amend section V of Appendix J to Part 121 by revising paragraph (D)(1) to read as follows:

D. *Notice of Refusals*

1. Except as provided in subparagraph 2 of this paragraph D, each covered employer

must notify the FAA within 2 working days of any employee who holds a certificate issued under part 61, part 63, or part 65 of this chapter who has refused to submit to an alcohol test required under this appendix. Notification must be sent to: Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue, SW., Washington, DC 20591, or by fax to (202) 267-5200.

\* \* \* \* \*

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

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

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

■ 24. Revise § 135.253, paragraph (f) to read as follows:

**§ 135.253 Misuse of alcohol.**

\* \* \* \* \*

(f) *Refusal to submit to a required alcohol test.* A covered employee may not refuse to submit to any alcohol test required under appendix J to part 121 of this chapter.

An operator or certificate holder may not permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Issued in Washington, DC, on June 15, 2006.

**Marion C. Blakey,**  
*Administrator.*

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