

§ 199.111 Retention of samples and additional testing.

* * * *

(b) If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, and if timely additional testing is requested by the employee according to DOT Procedures, the split specimen must be tested. * * *

* * * *

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

§ 199.117 Recordkeeping.

* * * *

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

§ 199.201 [Removed and Reserved]

15. Section 199.201 is removed and reserved.

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

§ 199.202 Alcohol misuse plan.

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

§§ 199.203, 199.205 [Removed and Reserved]

17. Sections 199.203 and 199.205 are removed and reserved.

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

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

§ 199.209 Other requirements imposed by operators.

* * * *

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

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

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

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

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

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

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

§ 199.213 [Removed and Reserved]

20. Section 199.213 is removed and reserved.

§ 199.225 [Amended]

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

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

§ 199.231 Access to facilities and records.

* * * *

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

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

Stacey L. Gerard,

Associate Administrator for Pipeline Safety.

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

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

RIN 2130-AB43

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

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

ACTION: Notice of proposed rulemaking (NPRM).

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

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

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

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

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

Background

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

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

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

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

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

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

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

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

Section-by-Section Analysis

Subpart A—General

Section 219.5 Definitions

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

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

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

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

Section 219.7 Waivers

Paragraph (b)

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

Section 219.11 General Conditions for Chemical Tests

Paragraph (b)

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

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

Section 219.21 Information Collection

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

Section 219.23 Railroad Policies

Paragraph (b)

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

Subpart B—Prohibitions

Section 219.102 Prohibitions on Abuse of Controlled Substances

FRA would delete the 1989 implementation date from this section.

Section 219.104 Responsive Action

Paragraph (d)

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

Subpart C—Post-Accident Toxicological Testing

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

only proposals are minor technical changes to update this subpart.

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

Section 219.201 Events for Which Testing Is Required

Paragraph (a)

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

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

Section 219.211 Analysis and Follow-up

Paragraph (i)

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

Subpart D—Testing for Cause

Section 219.300 Mandatory Reasonable Suspicion Testing

Paragraph (a)

FRA would remove the 1995 implementation date from this paragraph.

Paragraph (d)(2)

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

Section 219.303 Alcohol Test Procedures and Safeguards

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

Section 219.305 Urine Test Procedures and Safeguards

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

Subpart E—Identification of Troubled Employees

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

Section 219.403 Voluntary Referral Policy

Subparagraph (b)(5)

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

Subpart F—Pre-Employment Tests

Section 219.501 Pre-Employment Drug Testing

Section 219.502 Pre-Employment Alcohol Testing

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

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

Section 219.503 Notification; Records

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

Subpart G—Random Alcohol and Drug Testing Programs

Section 219.601 Railroad Random Drug Testing Programs

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

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

Section 219.605 Positive Drug Test Results; Procedures

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

Section 219.607 Railroad Random Alcohol Testing Programs

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

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

Section 219.608 Administrator's Determination of Random Alcohol Testing Rate

Subparagraph (b)(1)(i)

This subparagraph specifies the implementation requirements for new railroads.

Subpart H—Drug and Alcohol Testing Procedures

Section 219.701 Standards for Drug and Alcohol Testing

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

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

Subpart I—Annual Report

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

Subpart J—Recordkeeping Requirements

Section 219.901 Retention of Alcohol Testing Records

Section 219.903 Retention of Drug Testing Records

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

Appendix A to Part 219—Schedule of Civil Penalties

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

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

Appendix D to Part 219—Management Information System Collection Forms

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

Regulatory Analyses and Notices

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

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

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

Paperwork Reduction Act

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

Request for Public Comment

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

List of Subjects in 49 CFR Part 219

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

The Proposal

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

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

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

Subpart B—Prohibitions

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

Subpart C—Post-Accident Toxicological Testing

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

Subpart D—Testing for Cause

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

Subpart E—Identification of Troubled Employees

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

Subpart F—Pre-employment Tests

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

Subpart G—Random Alcohol and Drug Testing Programs

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

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

Subpart H—Drug and Alcohol Testing Procedures

- 219.701 Standards for drug and alcohol testing.

Subpart I—Annual Report

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

Subpart J—Recordkeeping Requirements

- 219.901 Retention of alcohol testing records.
 219.903 Retention of drug testing records.
 219.905 Access to facilities and records.

Appendix A to Part 219 Schedule of Civil Penalties**Appendix B to Part 219** Designation of Laboratory for Post-Accident Toxicological Testing**Appendix C to Part 219** Post-Accident Testing Sample Collection

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

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

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

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

§ 219.3 Application.

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

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

part of the general railroad system of transportation.

(2) Subparts D, E, F and G of this part do not apply to a railroad that employs not more than 15 employees covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, and that does not operate on tracks of another railroad (or otherwise engage in joint operations with another railroad) except as necessary for purposes of interchange.

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

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

§ 219.5 Definitions.

As used in this part—

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

Controlled substance has the meaning assigned by 21 U.S.C. 802, and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

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

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

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

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

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

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

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

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

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

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

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

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

NTSB means the National Transportation Safety Board.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 219.7 Waivers.

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

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

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

§ 219.9 Responsibility for compliance.

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

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

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

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

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

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

§ 219.11 General conditions for chemical tests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 219.13 Preemptive effect.

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

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

§ 219.15 [Reserved]

§ 219.17 Construction.

Nothing in this part—

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

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

§ 219.19 [Reserved]

§ 219.21 Information collection.

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

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

§ 219.23 Railroad policies.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subpart B—Prohibitions

§ 219.101 Alcohol and drug use prohibited.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 219.102 Prohibition on abuse of controlled substances.

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

§ 219.103 Prescribed and over-the-counter drugs.

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

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties;

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

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

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

§ 219.104 Responsive action.

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

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

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

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

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

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

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

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

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

(4) Nothing in this part may be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of a positive test result in a test authorized or required by this part.

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

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

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

§ 219.105 Railroad's duty to prevent violations.

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

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

§ 219.107 Consequences of unlawful refusal.

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

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

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

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

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

Subpart C—Post-Accident Toxicological Testing

§ 219.201 Events for which testing is required.

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

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

(i) A fatality;

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

(A) An evacuation; or

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

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

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

(i) A reportable injury; or

(ii) Damage to railroad property of \$150,000 or more.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 219.203 Responsibilities of railroads and employees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Obtaining cooperation of facility.*

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

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

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

§ 219.205 Sample collection and handling.

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

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

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

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

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

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

§ 219.206 FRA access to breath test results.

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

§ 219.207 Fatality.

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

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

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

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

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

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

§ 219.209 Reports of tests and refusals.

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

(2) Each telephonic report must contain:

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

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

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

of the FRA Associate Administrator for Safety.

§ 219.211 Analysis and follow-up.

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

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

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

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

(d) To the extent permitted by law, FRA treats test results indicating medical use of controlled substances consistent with § 219.103 (and other information concerning medically authorized drug use or administration provided incident to such testing) as administratively confidential and withholds public disclosure, except where it is necessary to consider this information in an accident investigation in relation to determination of probable cause. (However, as further provided in this section, FRA may provide results of testing under this subpart and supporting documentation to the National Transportation Safety Board.)

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

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

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

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

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

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

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

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

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

§ 219.213 Unlawful refusals; consequences.

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) [Reserved].

§ 219.301 Testing for reasonable cause.

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

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

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

(1) [Reserved]

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

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

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

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consistent with § 218.37 of this chapter (including failure to protect a train that is fouling an adjacent track, where required by the railroad's rules);

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under a train, or unauthorized running through a switch;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes, as required;

(vii) Entering a crossover before both switches are lined for movement; or

(viii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

(c) *For cause drug testing.* In addition to reasonable suspicion as described in § 219.300, each of the conditions set forth in paragraphs (b)(2) ("accident/

incident”) and (b)(3) (“rule violation”) of this section as constituting cause for alcohol testing also constitutes cause with respect to drug testing.

(d) [Reserved]

(e) *Limitation for subpart C events.* The compulsory drug testing authority conferred by this section does not apply with respect to any event subject to post-accident toxicological testing as required by § 219.201. However, use of compulsory breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of samples under subpart C of this part.

§ 219.302 Prompt sample collection; time limitation.

(a) Testing under this subpart may only be conducted promptly following the observations or events upon which the testing decision is based, consistent with the need to protect life and property.

(b) No employee may be required to participate in alcohol or drug testing under this section after the expiration of an eight-hour period from—

(1) The time of the observations or other events described in this section; or

(2) In the case of an accident/incident, the time a responsible railroad supervisor receives notice of the event providing reasonable cause for conduct of the test.

(c) An employee may not be tested under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave).

(d) As used in this subpart, a “responsible railroad supervisor” means any responsible line supervisor (e.g., a trainmaster or road foreman of engines) or superior official in authority over the employee to be tested.

(e) In the case of a drug test, the eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the drug testing specimens within that period.

(f) [Reserved]

(g) Section 219.23 prescribes the notice to an employee that is required to provide breath or a body fluid sample under this part.

Subpart E—Identification of Troubled Employees

§ 219.401 Requirement for policies.

(a) The purpose of this subpart is to prevent the use of alcohol and drugs in connection with covered service.

(b) Each railroad must adopt, publish and implement—

(1) A policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before those problems manifest themselves in detected violations of this part (hereafter “voluntary referral policy”); and

(2) A policy designed to foster employee participation in preventing violations of this subpart and encourage co-worker participation in the direct enforcement of this part (hereafter “co-worker report policy”).

(c) A railroad may comply with this subpart by adopting, publishing and implementing policies meeting the specific requirements of §§ 219.403 and 219.405 or by complying with § 219.407.

(d) If a railroad complies with this part by adopting, publishing and implementing policies consistent with §§ 219.403 and 219.405, the railroad must make such policies, and publications announcing such policies, available for inspection and copying by FRA.

(e) Nothing in this subpart may be construed to—

(1) Require payment of compensation for any period an employee is out of service under a voluntary referral or co-worker report policy;

(2) Require a railroad to adhere to a voluntary referral or co-worker report policy in a case where the referral or report is made for the purpose, or with the effect, of anticipating the imminent and probable detection of a rule violation by a supervising employee; or

(3) Limit the discretion of a railroad to dismiss or otherwise discipline an employee for specific rule violations or criminal offenses, except as specifically provided by this subpart.

§ 219.403 Voluntary referral policy.

(a) *Scope.* This section prescribes minimum standards for voluntary referral policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a voluntary referral policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad’s responsibility to prevent violations of §§ 219.101 and 219.102.

(b) *Required provisions.* A voluntary referral policy must include the following provisions:

(1) A covered employee who is affected by an alcohol or drug use problem may maintain an employment relationship with the railroad if, before the employee is charged with conduct deemed by the railroad sufficient to warrant dismissal, the employee seeks assistance through the railroad for the employee’s alcohol or drug use problem or is referred for such assistance by another employee or by a representative of the employee’s collective bargaining unit. The railroad must specify whether, and under what circumstances, its policy provides for the acceptance of referrals from other sources, including (at the option of the railroad) supervisory employees.

(2) Except as may be provided under paragraph (c) of this section, the railroad treats the referral and subsequent handling, including counseling and treatment, as confidential.

(3) The railroad will, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee’s alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(4) Except as may be provided under paragraph (c)(2) of this section, the employee will be returned to service on the recommendation of the substance abuse professional. Approval to return to service may not be unreasonably withheld.

(5) With respect to a certified locomotive engineer or a candidate for certification, the railroad must meet the requirements of § 240.119(e) of this chapter.

(c) *Optional provisions.* A voluntary referral policy may include any of the following provisions, at the option of the railroad:

(1) The policy may provide that the rule of confidentiality is waived if—

(i) The employee at any time refuses to cooperate in a recommended course of counseling or treatment; and/or

(ii) The employee is later determined, after investigation, to have been involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct.

(2) The policy may require successful completion of a return-to-service medical examination as a further condition on reinstatement in covered service.

(3) The policy may provide that it does not apply to an employee who has previously been assisted by the railroad under a policy or program substantially consistent with this section or who has previously elected to waive investigation under § 219.405 (co-worker report policy).

(4) The policy may provide that, in order to invoke its benefits, the employee must report to the contact designated by the railroad either:

- (i) During non-duty hours (i.e., at a time when the employee is off duty); or
- (ii) While unimpaired and otherwise in compliance with the railroad's alcohol and drug rules consistent with this subpart.

§ 219.405 Co-worker report policy.

(a) *Scope.* This section prescribes minimum standards for co-worker report policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad's responsibility to prevent violations of §§ 219.101 and 219.102.

(b) *Employment relationship.* A co-worker report policy must provide that a covered employee may maintain an employment relationship with the railroad following an alleged first offense under these rules or the railroad's alcohol and drug rules, subject to the conditions and procedures contained in this section.

(c) *General conditions and procedures.* (1) The alleged violation must come to the attention of the railroad as a result of a report by a co-worker that the employee was apparently unsafe to work with or was, or appeared to be, in violation of this part or the railroad's alcohol and drug rules.

(2) If the railroad representative determines that the employee is in violation, the railroad may immediately remove the employee from service in accordance with its existing policies and procedures.

(3) The employee must elect to waive investigation on the rule charge and must contact the substance abuse professional within a reasonable period specified by the policy.

(4) The substance abuse professional must schedule necessary interviews with the employee and complete an evaluation within 10 calendar days of the date on which the employee contacts the professional with a request for evaluation under the policy, unless it becomes necessary to refer the employee for further evaluation. In each case, all necessary evaluations must be

completed within 20 days of the date on which the employee contacts the professional.

(d) *When treatment is required.* If the substance abuse professional determines that the employee is affected by psychological or chemical dependence on alcohol or a drug or by another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation, the following conditions and procedures apply:

(1) The railroad must, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee's alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(2) The employee must agree to undertake and successfully complete a course of treatment deemed acceptable by the substance abuse professional.

(3) The railroad must promptly return the employee to service, on recommendation of the substance abuse professional, when the employee has established control over the substance abuse problem. Return to service may also be conditioned on successful completion of a return-to-service medical examination. Approval to return to service may not be unreasonably withheld.

(4) Following return to service, the employee, as a further condition on withholding of discipline, may, as necessary, be required to participate in a reasonable program of follow-up treatment for a period not to exceed 60 months from the date the employee was originally withdrawn from service.

(e) *When treatment is not required.* If the substance abuse professional determines that the employee is not affected by an identifiable and treatable mental or physical disorder—

(1) The railroad must return the employee to service within 5 days after completion of the evaluation.

(2) During or following the out-of-service period, the railroad may require the employee to participate in a program of education and training concerning the effects of alcohol and drugs on occupational or transportation safety.

(f) *Follow-up tests.* A railroad may conduct return-to-service and/or follow-up tests (as described in § 219.104) of an employee who waives investigation and is determined to be ready to return to service under this section.

§ 219.407 Alternate policies.

(a) In lieu of a policy under § 219.403 (voluntary referral) or § 219.405 (co-worker report), or both, a railroad may adopt, publish and implement, with respect to a particular class or craft of covered employees, an alternate policy or policies having as their purpose the prevention of alcohol or drug use in railroad operations, if such policy or policies have the written concurrence of the recognized representatives of such employees.

(b) The concurrence of recognized employee representatives in an alternate policy may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate policy applies. The agreement or other document must make express reference to this part and to the intention of the railroad and employee representatives that the alternate policy applies in lieu of the policy required by § 219.403, § 219.405, or both.

(c) The railroad must file the agreement or other document described in paragraph (b) of this section with the Associate Administrator for Safety, FRA. If the alternate policy is amended or revoked, the railroad must file a notice of such amendment or revocation at least 30 days prior to the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing and implementing the policies required by §§ 219.403 and 219.405 with respect to any group of covered employees not within the coverage of an appropriate alternate policy.

Subpart F—Pre-employment Tests

§ 219.501 Pre-employment drug testing.

(a) Prior to the first time a covered employee performs covered service for a railroad, the employee must undergo testing for drugs. No railroad may allow a covered employee to perform covered service, unless the employee has been administered a test for drugs with a result that did not indicate the misuse of controlled substances. This requirement applies to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service.

(b) As used in subpart H of this part with respect to a test required under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

§ 219.502 Pre-employment alcohol testing.

(A) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

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

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

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

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of part 40 of this title.

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

(b) As used in subpart H of this part, with respect to a test authorized under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record may be maintained of the declination.

§ 219.503 Notification; records.

The railroad must provide for medical review of drug test results as provided in subpart H of this part. The railroad must notify the applicant of the results of the drug and alcohol tests in the same manner as provided for employees in subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

§ 219.505 Refusals.

An applicant who has refused to submit to pre-employment testing under this section may not be employed in covered service based upon the application and examination with

respect to which such refusal was made. This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

Subpart G—Random Alcohol and Drug Testing Programs**§ 219.601 Railroad random drug testing programs.**

(a) *Submission.* Each railroad must submit for FRA approval a random testing program meeting the requirements of this subpart. A railroad commencing operations must submit such a program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval by the FRA Administrator. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A railroad already subject to this subpart that becomes subject to this subpart with respect to one or more additional employees must amend its program not later than 60 days after these employees become subject to this subpart and file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

(b) *Form of programs.* Random testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date

upon which the particular samples were collected.

(2)(i) The program must select for testing a sufficient number of employees so that, during the first 12 months—

(A) The random testing program is spread reasonably through the 12-month period.

(B) [Reserved]

(ii) During the subsequent 12-month period, the program must select for testing a sufficient number of employees so that the number of tests conducted will equal at least 50 percent of the number of covered employees.

Annualized percentage rates must be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety, FRA. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(3) Railroad random testing programs must ensure to the maximum extent practicable that each employee perceives the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection may not be provided until the duty tour in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing.

(5) The program must include testing procedures and safeguards, and procedures for action based on positive test results, consistent with this part.

(6) An employee must be subject to testing only while on duty. Only employees who perform covered service for the railroad are subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program must specify the extent to which, and the circumstances under which they are be subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(7) Each time an employee is notified for random drug testing the employee will be informed that selection was made on a random basis.

(c) *Approval.* The Associate Administrator for Safety, FRA, will

notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Associate Administrator for Safety determines that the program does not conform to those criteria, the Associate Administrator for Safety will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions. The railroad must resubmit its program with the required revisions within 30 days of such notice. Failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this subpart.

(d) *Implementation.* (1) No later than 45 days prior to commencement of random testing, the railroad must publish to each of its covered employees, individually, a written notice that he or she will be subject to random drug testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph (1) creates a defense to a violation of § 219.102.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

§ 219.602 FRA Administrator's determination of random drug testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing must be 50 percent of covered employees.

(b) The FRA Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the

industry positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.803 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 219.803 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as a result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process.

(f) The railroad must randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the railroad conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual railroad or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(g) Each railroad must ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(h) If a given covered employee is subject to random drug testing under the

drug testing rules of more than one DOT agency for the same railroad, the employee must be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(i) If a railroad is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

§ 219.603 Participation in drug testing.

A railroad shall, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in urine testing to determine compliance with § 219.102, and the employee must provide the required sample and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

§ 219.605 Positive drug test results; procedures.

(a) [Reserved]

(b) Procedures for administrative handling by the railroad in the event a sample provided under this subpart is reported as positive by the MRO are set forth in § 219.104. The responsive action required in § 219.104 is not stayed pending the result of a retest or split sample test.

§ 219.607 Railroad random alcohol testing programs.

(a) Each railroad must submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A railroad commencing operations must submit a random alcohol testing program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any

amendment to the program may not be implemented prior to approval.

(b) *Form of programs.* Random alcohol testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular samples were collected.

(2) The program must include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated § 219.101.

(3) The program must ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(4) The program must ensure to the maximum extent practicable that each covered employee perceives the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of covered service).

(5) An employee may be subject to testing only while on duty. Only employees who perform covered service for the railroad may be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program may specify the extent to which, and the circumstances under which they are subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(6) Testing must be conducted promptly, as provided in § 219.701(b)(1).

(7) Each time an employee is notified for random alcohol testing the employee must be informed that selection was made on a random basis.

(8) Each railroad must ensure that each covered employee who is notified of selection for random alcohol testing proceeds to the test site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the railroad must instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(c) *Implementation.* (1) No later than 45 days prior to commencement of random alcohol testing, the railroad must publish to each of its covered employees, individually, a written notice that the employee will be subject to random alcohol testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.101 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph (c)(1) creates a defense to a violation of § 219.101. This notice may be combined with the notice or policy statement required by § 219.23.

(2) A railroad commencing operations must submit a random testing program 60 days after doing so. The railroad must implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator.

§ 219.608 FRA Administrator's determination of random alcohol testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing must be 25 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for the determination is drawn from the alcohol MIS reports required by this part. In order to ensure reliability of the data, the Administrator

considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.801 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.801 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 219.801 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 219.801 for any calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The railroad must randomly select and test a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the railroad conducts random alcohol testing through a consortium, the number of employees to

be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random testing at the same minimum annual percentage rate under this part or any DOT alcohol testing rule.

(f) If a railroad is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

§ 219.609 Participation in alcohol testing.

A railroad must, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with § 219.101, and the employee must provide the required breath and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

§ 219.611 Test result indicating prohibited alcohol concentration; procedures.

Procedures for administrative handling by the railroad in the event an employee's confirmation test indicates an alcohol concentration of .04 or greater are set forth in § 219.104.

Subpart H—Drug and Alcohol Testing Procedures

§ 219.701 Standards for drug and alcohol testing.

(a) Drug testing required or authorized by subparts B, D, F, and G of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(b) Alcohol testing required or authorized by subparts B, D, F, and G of this part must be conducted in compliance with all applicable provisions of the Department of Transportation Procedures for Transportation Workplace Drug and Alcohol Testing Programs (part 40 of this title).

(c) Each covered employee who is notified of selection for testing and who

is not performing covered service at the time of notification must proceed to the testing site immediately. The railroad must ensure that an employee who is performing covered service at the time of notification shall, as soon as possible without affecting safety, cease to perform covered service and proceed to the testing site.

Subpart I—Annual Report

§ 219.801 Reporting alcohol misuse prevention program results in a management information system.

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse prevention program.

(b) A railroad that is subject to more than one DOT agency alcohol regulation must identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the railroad must determine which DOT agency regulation or rule authorizes or requires the test. The test result information must be directed to the appropriate DOT agency or agencies.

(c) Each railroad must ensure the accuracy and timeliness of each report submitted. The report must be submitted on one of the two forms specified by the FRA.

(d) Each report required by this section that contains information on an alcohol screening test result of .02 or greater or a violation of the alcohol misuse provisions of subpart B of this part must include the following elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3)(i) Number of screening tests by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up) and employee category.

(ii) Number of confirmation tests, by type of test and employee category.

(4) Number of confirmation alcohol tests indicating an alcohol concentration equal of .02 or greater but less than .04, by type of test and employee category.

(5) Number of confirmation alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of .04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d)).

(8) For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of .02 or greater but less than .04, and the number of confirmation test results of .04 or greater.

(9) For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of .02 or greater but less than .04, and the number of confirmation test results of .04 or greater.

(10) Number of covered employees who were found to have violated other provisions of subpart B of this part, and the action taken in response to the violation.

(11) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.

(12) Number of covered employees who refused to submit to a random alcohol test required under this part.

(13) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(14) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use during the reporting period.

(e) Each report required by this section that contains information on neither a screening test result of 0.02 or greater nor a violation of the alcohol misuse provisions of subpart B of this part must include the following informational elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3) Number of screening tests by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up) and employee category.

(4) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of .04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d)).

(5) For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted.

(6) For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted.

(7) Number of covered employees who refused to submit to a random alcohol test required under this part.

(8) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(9) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use during the reporting period.

§ 219.803 Reporting drug misuse prevention program results in a management information system.

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA an annual report covering the calendar year, summarizing the results of its drug misuse prevention program.

(b) A railroad that is subject to more than one DOT agency drug regulation must identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any drug test on a covered employee subject to the regulations of more than one DOT agency, the railroad must determine which DOT agency regulation or rules authorizes or requires the test. The test result information must be directed to the appropriate DOT agency or agencies.

(c) Each railroad must ensure the accuracy and timeliness of each report submitted by the railroad or a consortium.

(d) Each railroad must submit the required annual reports no later than March 15 of each year. The report must be submitted on one of the forms specified by the FRA. A railroad with no positive test result must submit the "Drug Testing Management Information System Zero Positives Data Collection Form." All other railroads must submit the "Drug Testing Management Information System Data Collection Form."

(e) A railroad submitting the "Drug Testing Management Information System Data Collection Form" must address each of the following data elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug regulations of more than one DOT agency, identified by each agency.

(3) Number of specimens collected by type of test (i.e., pre-employment and covered service transfer, random, post-positive return to service, and follow-up), and employee category.

(4) Number of specimens verified negative by a Medical Review Officer (MRO) by type of test, and employee category.

(5) Number of specimens verified positive for one or more of the five drugs by a MRO by type of test, employee category, and type of drug. If a test has been verified positive by a MRO for multiple drugs, the employer should report the result as a positive for each type of drug.

(6) Number of applicants or transfers denied employment or transfer to a covered service position following a verified positive pre-employment drug test.

(7) Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during the reporting period.

(8) For cause drug testing, the number of specimens collected by reason for test (i.e., accident/injury, rules violation, or reasonable suspicion), type of authority (railroad or FRA), employee category and type of drug, including drugs tested for under railroad authority only.

(9) For cause drug testing, the number of specimens verified negative by a MRO by reason for test, type of authority, employee category and type

of drug, including drugs tested for under railroad authority only.

(10) For cause drug testing, the number of specimens verified positive by a MRO by reason for test, type of authority, employee category and type of drug, including drugs tested for under railroad authority only.

(11) For cause breath alcohol testing under railroad authority, by reason for test, the number of tests conducted, the number of tests with a positive result (i.e., breath alcohol concentration (BAC) = or > .02), and the number of refusals.

(12) For cause urine alcohol testing under railroad authority, by reason for test, the number of tests conducted, the number of tests with a positive result, and the number of refusals.

(13) For cause breath alcohol testing under FRA authority, by reason for test, the number of tests conducted, the number of tests with a positive result, and the number of refusals.

(14) Total number of covered employees observed in documented operational tests and inspections related to enforcement of the railroad's rules on alcohol and drug use.

(15) Based on the tests and inspections described in paragraph (e)(14) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on drugs.

(16) Based on the tests and inspections described in paragraph (e)(14) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on alcohol.

(17) Number of specimens verified positive for more than one drug, by employee category and type of drug.

(18) Number of covered employees who refused to submit to a random drug test required under FRA authority.

(19) Number of covered employees who refused to submit to a non-random drug test required under FRA authority.

(20) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use during the reporting period.

(f) A railroad authorized to submit the "Drug Testing Management Information System Zero Positives Data Collection Form" must address each of the following data elements:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug regulations of more than

one DOT agency, identified by each agency.

(3) Number of specimens collected and verified negative by type of test (i.e., pre-employment and covered service transfer, random, for cause due to accident/incident, for cause due to rules violation, reasonable suspicion, post-positive return to service, and follow-up), and employee category.

(4) For cause breath alcohol testing under railroad authority, the number of tests conducted by reason for test (i.e., accident/injury, rules violation, or reasonable suspicion).

(5) For cause urine alcohol testing under railroad authority, the number of tests conducted by reason for test.

(6) For cause breath alcohol testing under FRA authority, the number of tests conducted by reason for test.

(7) Total number of covered employees observed in documented operational tests and inspections related to enforcement of the railroad's rules on alcohol and drug use.

(8) Based on the tests and inspections described in paragraph (f)(7) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on drugs.

(9) Based on the tests and inspections described in paragraph (f)(7) of this section, the number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy on alcohol.

(10) Number of covered employees who refused to submit to a random drug test required under FRA authority.

(11) Number of covered employees who refused to submit to a non-random drug test required under FRA authority.

(12) Number of supervisory personnel who have received the required initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use during the reporting period.

Subpart J—Recordkeeping Requirements

§ 219.901 Retention of alcohol testing records.

(a) General requirement. In addition to the records required to be kept by part 40 of this title, each railroad must maintain alcohol misuse prevention program records in a secure location with controlled access as set out in this section.

(b) Each railroad must maintain the following records for a minimum of five years:

(1) A summary record of each covered employee's test results; and

(2) A copy of the annual report summarizing the results of its alcohol

misuse prevention program (if required to submit the report under § 219.801(a)).

(c) Each railroad must maintain the following records for a minimum of two years:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

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

(iv) Documents generated in connection with decisions on post-accident testing.

(v) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide an adequate sample.

(2) Records related to test results:

(i) The railroad's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.

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

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on alcohol abuse awareness, including a copy of the railroad's policy on alcohol abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

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

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

§ 219.903 Retention of drug testing records.

(a) General requirement. In addition to the records required to be kept by part 40 of this title, each railroad must maintain drug abuse prevention program records in a secure location with controlled access as set forth in this section.

(b)(1) Each railroad must maintain the following records for a minimum of five years:

(i) A summary record of each covered employee's test results; and

(ii) A copy of the annual report summarizing the results of its drug misuse prevention program (if required to submit under § 219.803(a)).

(2) Each railroad must maintain the following records for a minimum of two years.

(c) *Types of records.* The following specific records must be maintained:

(1) Records related to the collection process:

(i) Documents relating to the random selection process.

(ii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iii) Documents generated in connection with decisions on post-accident testing.

(iv) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a sample.

(2) Records related to test results:

(i) The railroad's copy of the drug test custody and control form, including the results of the test.

(ii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on drug abuse awareness, including a copy of the railroad's policy on drug abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

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

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

§ 219.905 Access to facilities and records.

(a) Release of covered employee information contained in records required to be maintained under §§ 219.901 and 219.903 must be in accordance with part 40 of this title and with this section. (For purposes of this section only, urine drug testing records are considered equivalent to breath alcohol testing records.)

(b) Each railroad must permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, United States Department of Transportation, or any DOT agency with regulatory authority over the railroad or any of its covered employees.

(c) Each railroad must make available copies of all results for railroad alcohol and drug testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention

program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or covered employee.

Appendix A to Part 219—Schedule of Civil Penalties¹

The following chart lists the schedule of civil penalties:

Section ²	Violation	Willful violation
Subpart A—General		
219.3 Application.		
Railroad does not have required program	\$5,000	\$7,500
219.11 General conditions for chemical tests.		
A. Employee unlawfully refuses to participate in testing	\$2,500	\$5,000
B. Employer fails to give priority to medical treatment	3,000	8,000
C. Employee fails to remain available	2,500	5,000
D. Employee tampers with sample	2,500	5,000
E. Failure to meet supervisory training requirements	2,500	5,000
F. Program of instruction not available	2,500	5,000
G. Program not complete	2,500	5,000
219.23 Railroad policies.		
A. Failure to provide written notice of FRA test	\$1,000	\$4,000
B. Failure to provide written notice of basis for FRA test	1,000	4,000
C. Use of subpart C form for other test	1,000	4,000
D. Failure to provide educational materials	1,000	4,000
E. Educational materials fail to explain requirements of this part and/or include required content	1,000	4,000
F. Non-Federal provisions not clearly described as independent authority	1,000	4,000
Subpart B—Prohibitions		
219.101 Alcohol and drug use prohibited.		
Employee violates prohibition(s)		\$10,000
219.103 Prescribed and over-the-counter drugs.		
A. Failure to train employee properly on requirements	\$2,500	\$5,000
B. Employee failure to comply	2,500	5,000
219.104 Responsive action.		
A. Failure to remove employee from covered service immediately	\$3,000	\$8,000
B. Failure to provide notice for removal	1,000	4,000
C. Failure to provide prompt hearing	2,000	7,000
D. Employee improperly returned to service	2,000	7,000
E. Failure to administer proper number of follow-up tests	2,500	5,000
219.105 Railroad's duty to prevent violations.		
A. Employee improperly permitted to remain in covered service	\$7,000	\$10,000
B. Failure to exercise due diligence to assure compliance with prohibition	2,500	5,000
219.107 Consequences of unlawful refusal.		
A. Employee not disqualified for nine months	\$5,000	\$7,500
B. Employee unlawfully returned to service	5,000	7,500
Subpart C—Post-Accident Toxicological Testing		
219.201 Events for which testing is required.		
A. Failure to test after qualifying event	\$5,000	\$7,500
B. Testing performed after non-qualifying event	5,000	10,000
C. Failure to make good faith determination	2,500	5,000
D. Failure to provide requested decision report to FRA	1,000	3,000
219.203 Responsibilities of railroads and employees.		
A. Failure to properly test/exclude from testing	\$2,500	\$5,000
B. Non-covered service employee tested	2,500	5,000
C. Delay in obtaining samples due to failure to make every reasonable effort	2,500	5,000
D. Testing not conducted in accordance with Appendix C requirements	2,500	5,000
E. Independent medical facility not utilized	2,500	5,000
F. Failure to report event or contact FRA when FRA intervention required	1,000	3,000
219.205 Sample collection and handling.		
A. Failure to observe requirements with respect to sample collection, marking and handling	\$2,500	\$5,000
B. Failure to provide properly prepared forms with samples	1,000	2,000
C. Failure to promptly or properly forward samples	2,500	5,000
219.207 Fatality.		
A. Failure to test	\$5,000	\$7,500
B. Failure to request assistance when necessary	2,500	5,000
C. Failure to ensure timely collection and shipment of required specimens	2,500	5,000
219.209 Reports of tests and refusals.		
A. Failure to provide telephonic report	\$1,000	\$2,000
B. Failure to provide written report of refusal to test	1,000	2,000
C. Failure to maintain report explaining why test not conducted within 4 hours	1,000	2,000
219.211 Analysis and follow-up.		
A. Failure to promptly forward specimens to designated FRA laboratory	\$2,500	\$5,000
B. Failure of MRO to report review of positive results to FRA	2,500	5,000
Subpart D—Testing for Cause		
219.300 Mandatory reasonable suspicion testing.		
A. Failure to test when reasonable suspicion criteria met	\$5,000	\$7,500

Section ²	Violation	Willful violation
B. Tested when reasonable suspicion criteria not met	5,000	7,500
C. Testing did not comply with part 40 procedures	5,000	7,500
219.301 Testing for reasonable cause.		
A. Tested when accident/incident criteria not met	\$5,000	\$7,500
B. Tested when operating rules violation criteria not met	5,000	7,500
C. Testing did not comply with part 40 procedures	5,000	7,500
D. Event did not occur during duty tour	2,500	5,000
E. Employee not provided with notice	2,500	5,000
219.302 Prompt sample collection.		
Sample collection not conducted promptly	\$2,500	\$5,000
Subpart E—Identification of Troubled Employees		
219.401 Requirement for policies.		
A. Failure to publish and/or implement required policy	\$2,500	\$5,000
B. Failure to implement policy with respect to individual employee	2,500	5,000
219.407 Alternate policies.		
Failure to file agreement or other document or provide timely notice of revocation	\$2,500	\$5,000
Subpart F—Pre-Employment Tests		
219.501 Pre-employment tests.		
A. Failure to perform pre-employment drug test before first time employee performs covered service	\$2,500	\$5,000
B. Failure to give proper notice	2,500	5,000
Subpart G—Random Testing Programs		
219.601 Railroad random drug programs.		
A. Failure to file a random program	\$2,500	\$5,000
B. Failure to file amendment to program	2,500	5,000
C. Failure to meet random criteria	2,500	5,000
D. Failure to use a neutral selection process	2,500	5,000
E. Testing not spread throughout the year	2,500	5,000
F. Total number of tests below minimum random drug testing rate	2,500	5,000
G. Testing not distributed throughout the day	2,500	5,000
H. Advance notice provided to employee	2,500	5,000
I. Testing when employee not on duty	2,500	5,000
J. Testing continued after employee's duty tour expired	2,500	5,000
K. Failure to provide proper notice	2,500	5,000
L. Failure to include covered service employee in pool	2,500	5,000
M. Random testing not performed in a timely manner	2,500	5,000
219.603 Participation in drug testing.		
Failure to document reason for not testing selected employee	\$2,500	\$5,000
219.607 Railroad random alcohol programs.		
A. Failure to file a random alcohol program	\$2,500	\$5,000
B. Failure to file amendment to program	2,500	5,000
C. Failure to meet random criteria	2,500	5,000
D. Failure to use a neutral selection process	2,500	5,000
E. Total number of tests below minimum random alcohol testing rate	2,500	5,000
F. Advance notice provided to employee	2,500	5,000
G. Testing when employee not on duty	2,500	5,000
H. Testing continued after employee's duty tour expired	2,500	5,000
I. Failure to provide proper notice	2,500	5,000
J. Failure to include covered service employee in pool	2,500	5,000
K. Random testing not performed in a timely manner	2,500	5,000
219.609 Participation in alcohol testing.		
Failure to document reason for not testing selected employee	\$2,500	\$5,000
Subpart H—Drug and Alcohol Testing Procedures		
219.701 Standards for drug and alcohol testing.		
A. Failure to comply with part 40 procedures in subpart B, D, F, or G testing	\$2,500	\$5,000
B. Failure to perform timely notification and testing	–5,000	–7,500
Subpart I—Annual Report	2,500	5,000
219.801 Reporting alcohol misuse prevention program results in a management information system.		
A. Failure to submit MIS report on time	\$2,500	\$5,000
B. Failure to submit accurate MIS report	2,500	5,000
C. Failure to include required data	2,500	5,000
219.803 Reporting drug misuse prevention program results in a management information system.		
A. Failure to submit MIS report on time	\$2,500	\$5,000
B. Failure to submit accurate MIS report	2,500	5,000
C. Failure to include required data	2,500	5,000
Subpart J—Recordkeeping Requirements		
219.901 Retention of Alcohol Testing Records.		
A. Failure to keep records for required period	\$2,500	\$5,000
B. Failure to keep required documentation, materials or certification	2,500	5,000
219.903 Retention of Drug Testing Records.		
A. Failure to keep records for required period	\$2,500	\$5,000
B. Failure to retain required documentation, materials or certification	2,500	5,000
219.905 Access to facilities and records.		

Section ²	Violation	Willful violation
A. Failure to release records in this subpart in accordance with part 40	\$2,500	\$5,000
B. Failure to permit access to appropriate authorities	2,500	5,000
C. Failure to provide access to results of railroad alcohol and drug testing programs	2,500	5,000

¹ A penalty may be assessed against an individual only for a willful violation. The FRA Administrator reserves the right to assess a penalty of up to \$22,000 for any violation, including ones not listed in this penalty schedule, where circumstances warrant. See 49 CFR part 209, appendix A.

² The penalty schedule uses section numbers from 49 CFR part 219; and if more than one item is listed as a type of violation of a given section, each item is also designated by a "penalty code" (e.g., "A"), which is used to facilitate assessment of civil penalties. For convenience, penalty citations will cite the CFR section and the penalty code, if any (e.g., "§219.11A") FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation.

Appendix B to Part 219—Designation of Laboratory for Post-Accident Toxicological Testing

The following laboratory is currently designated to conduct post-accident toxicological analysis under subpart C of this part: NWT Inc., 1141 E. 3900 South, Suite A-110, Salt Lake City, UT 84124, Telephone: (801) 268-2431 (Day), (801) 483-3383 (Night/Weekend).

Appendix C to Part 219—Post-Accident Testing Sample Collection

1.0 General

This appendix prescribes procedures for collection of samples for mandatory post-accident testing pursuant to subpart C of this part. Collection of blood and urine samples is required to be conducted at an independent medical facility.

(Surviving Employees)

2.0 Surviving Employees

This unit provides detailed procedures for collecting post-accident toxicological samples from surviving employees involved in train accidents and train incidents, as required by subpart C of this part. Subpart C of this part specifies qualifying events and employees required to be tested.

2.1 Collection Procedures; General

a. All forms and supplies necessary for collection and transfer of blood and urine samples for three surviving employees can be found in the FRA post-accident shipping box, which is made available to the collection site by the railroad representative.

b. Each shipping box contains supplies for blood/urine collections from three individuals, including instructions and necessary forms. The railroad is responsible for ensuring that materials are fresh, complete and meet FRA requirements.

2.1.1 Responsibility of the Railroad Representative

a. In the event of an accident/incident for which testing is required under subpart C of this part, the railroad representative shall follow the designated set of instructions, and, upon arrival at the independent medical facility, promptly present to the collection facility representative a post-accident shipping box or boxes with all remaining sets of instructions. (Each box contains supplies to collect samples from three employees.) The railroad representative shall request the collection facility representative to review

the instructions provided and, through qualified personnel, provide for collection of the samples according to the procedures set out.

b. The railroad representative shall undertake the following additional responsibilities—

1. Complete Form FRA 6180.73 (revised), Accident Information Required for Post-Accident Toxicological Testing (49 CFR part 219), describing the testing event and identifying the employees whose samples are to be deposited in the shipping box.

2. As necessary to verify the identity of individual employees, affirm the identity of each employee to the medical facility personnel.

3. Consistent with the policy of the collection facility, monitor the progress of the collection procedure.

Warning: Monitor but do not directly observe urination or otherwise disturb the privacy of urine or blood collection. Do not handle sample containers, bottles or tubes (empty or full). Do not become part of the collection process.

2.1.2 Employee Responsibility

a. An employee who is identified for post-accident toxicological testing shall cooperate in testing as required by the railroad and personnel of the independent medical facility. Such cooperation will normally consist of the following, to be performed as requested:

1. Provide a blood sample, which a qualified medical professional or technician will draw using a single-use sterile syringe. The employee should be seated for this procedure.

2. Provide, in the privacy of an enclosure, a urine sample into a plastic collection cup. Deliver the cup to the collector.

3. Do not let the blood and urine samples that you provided leave your sight until they have been properly sealed and initialed by you.

4. Certify the statement in Step 4 of the Post-Accident Testing Blood/Urine Custody and Control Form (49 CFR 219) (Form FRA F 6180.74 (revised)).

5. If required by the medical facility, complete a separate consent form for taking of the samples and their release to FRA for analysis under the FRA rule.

Note: The employee may not be required to complete any form that contains any waiver of rights the employee may have in the employment relationship or that releases or holds harmless the medical facility with respect to negligence in the collection.

2.2 The Collection

Exhibit C-1 contains instructions for collection of samples for post-accident toxicology from surviving employees. These instructions shall be observed for each collection. Instructions are also contained in each post-accident shipping box and shall be provided to collection facility personnel involved in the collection and/or packaging of samples for shipment.

(Post Mortem Collection)

3.0 Fatality

This unit provides procedures for collecting post-accident body fluid/tissue samples from the remains of employees killed in train accidents and train incidents, as required by subpart C of this part. Subpart C specifies qualifying events and employees required to be tested.

3.1 Collection

In the event of a fatality for which testing is required under subpart C of this part, the railroad shall promptly make available to the custodian of the remains a post-accident shipping box. The railroad representative shall request the custodian to review the instructions contained in the shipping box and, through qualified medical personnel, to provide the samples as indicated.

(Surviving Employees and Fatalities)

4.0 Shipment

a. The railroad is responsible for arranging overnight transportation of the sealed shipping box containing the samples. When possible without incurring delay, the box should be delivered directly from the collection personnel providing the samples to an overnight express service courier. If it becomes necessary for the railroad to transport the box from point of collection to point of shipment, then—

1. Individual kits and the shipping box shall be sealed by collection personnel before the box is turned over to the railroad representative;

2. The railroad shall limit the number of persons handling the shipping box to the minimum necessary to provide for transportation;

3. If the shipping box cannot immediately be delivered to the express carrier for transportation, it shall be maintained in secure temporary storage; and

4. The railroad representatives handling the box shall document chain of custody of the shipping box and shall make available such documentation to FRA on request.

Exhibit C-1—Instructions for Collection of Blood and Urine Samples: Mandatory Post-Accident Toxicological Testing

A. Purpose

These instructions are for the use of personnel of collection facilities conducting collection of blood and urine samples from surviving railroad employees following railroad accidents and casualties that qualify for mandatory alcohol/drug testing. The Federal Railroad Administration appreciates the participation of medical facilities in this important public safety program.

B. Prepare for Collection

a. Railroad employees have consented to provision of samples for analysis by the Federal Railroad Administration as a condition of employment (§ 219.11). A private, controlled area should be designated for collection of samples and completion of paperwork.

b. Only one sample should be collected at a time, with each employee's blood draw or urine collection having the complete attention of the collector until the specific sample has been labeled, sealed and documented.

c. Please remember two critical rules for the collections:

d. All labeling and sealing must be done in the sight of the donor, with the sample never having left the donor's presence until the sample has been labeled, sealed and initialed by the donor.

e. Continuous custody and control of blood and urine samples must be maintained and documented on the forms provided. In order to do this, it is important for the paperwork and the samples to stay together.

f. To the extent practical, blood collection should take priority over urine collection. To limit steps in the chain of custody, it is best if a single collector handles both collections from a given employee.

g. You will use a single Post-Accident Testing Blood/Urine Custody and Control Form (FRA Form 6108.74 (revised)), consisting of six Steps to complete the collection for each employee. We will refer to it as the Control Form.

C. Identify the Donor

a. The employee donor must provide photo identification to each collector, or lacking this, be identified by the railroad representative.

b. The donor should remove all unnecessary outer garments such as coats or jackets, but may retain valuables, including a wallet. Donors should not be asked to disrobe, unless necessary for a separate physical examination required by the attending physician.

D. Draw Blood

a. Assemble the materials for collecting blood from each employee: two 10 ml grey-stoppered blood tubes and the Control Form.

b. Ask the donor to complete STEP 1 on the Control Form.

c. With the donor seated, draw two (2) 10 ml tubes of blood using standard medical procedures (sterile, single-use syringe into evacuated gray-top tubes provided).

CAUTION: Do not use alcohol or an alcohol-based swab to cleanse the venipuncture site.

d. Once both tubes are filled and the site of venipuncture is protected, immediately—

1. Seal and label each tube by placing a numbered blood sample label from the label set on the Control Form over the top of the tube and securing it down the sides.

2. Ask the donor to initial each label.

Please check to see that the initials match the employee's name and note any discrepancies in the "Remarks" block of the Control Form.

3. As collector, sign and date each blood tube label at the place provided.

4. Skip to STEP 5 and initiate chain of custody for the blood tubes by filling out the first line of the block to show receipt of the blood samples from the donor.

5. Complete STEP 2 on the form.

6. Return the blood tubes into the individual kit. Keep the paperwork and samples together. If another collector will be collecting the urine sample from this employee, transfer both the form and the individual kit with blood tubes to that person, showing the transfer of the blood tubes on the second line of STEP 5 (the chain of custody block).

E. Collect Urine

a. The urine collector should assemble at his/her station the materials for collecting urine from each employee: one plastic collection cup with temperature device affixed enclosed in a heat-seal bag (with protective seal intact), two 90 ml urine sample bottles with caps and one biohazard bag (with absorbent) also enclosed in a heat-seal bag (with protective seal intact), and the Control Form. Blood samples already collected must remain in the collector's custody and control during this procedure.

b. After requiring the employee to wash his/her hands, the collector should escort the employee directly to the urine collection area. To the extent practical, all sources of water in the collection area should be secured and a bluing agent (provided in the box) placed in any toilet bowl, tank, or other standing water.

c. The employee will be provided a private place in which to void. Urination will not be directly observed. If the enclosure contains a source of running water that cannot be secured or any material (soap, etc.) that could be used to adulterate the sample, the collector should monitor the provision of the sample from outside the enclosure. Any unusual behavior or appearance should be noted in the remarks section of the Control Form or on the back of that form.

d. The collector should then proceed as follows:

e. Unwrap the collection cup in the employee's presence and hand it to the employee (or allow the employee to unwrap it).

f. Ask the employee to void at least 60 ml into the collection cup (at least to the line marked).

g. Leave the private enclosure.

IF THERE IS A PROBLEM WITH URINATION OR SAMPLE QUANTITY, SEE THE "TROUBLE BOX" AT THE BACK OF THESE INSTRUCTIONS.

h. Once the void is complete, the employee should exit the private enclosure and deliver the sample to the collector. Both the collector and the employee must proceed immediately to the labeling/sealing area, with the sample never leaving the sight of the employee before being sealed and labeled.

i. Upon receipt of the sample, proceed as follows:

1. In the full view of the employee, remove the wrapper from the two urine sample bottles. Transfer the urine from the collection cup into the sample bottles (at least 30 ml in bottle A and at least 15 ml in bottle B).

2. As you pour the sample into the sample bottles, please inspect for any unusual signs indicating possible adulteration or dilution. Carefully secure the tops. Note any unusual signs under "Remarks" at STEP 3 of the Control Form.

3. Within 4 minutes after the void, measure the temperature of the urine by reading the strip on the bottle. Mark the result at STEP 3 of the Control Form.

IF THERE IS A PROBLEM WITH THE URINE SAMPLE, SEE THE "TROUBLE BOX" AT THE BACK OF THESE INSTRUCTIONS.

4. Remove the urine bottle labels from the Control Form. The labels are marked "A" and "B." Place each label as marked over the top of its corresponding bottle, and secure the label to the sides of the bottle.

5. Ask the donor to initial each label. Please check to see that the initials match the employee name and note any discrepancy in the "Remarks" block of STEP 3.

6. As collector, sign and date each urine label.

7. Skip to STEP 5 and initiate chain-of-custody by showing receipt of the urine samples from the donor. (If you collected the blood, a check under "urine" will suffice. If someone else collected the blood, first make sure transfer of the blood to you is documented. Then, using the next available line, show "Provide samples" under purpose, "Donor" under "released by," check under "urine" and place your name, signature and date in the space provided.)

8. Complete the remainder of STEP 3 on the Control Form.

9. Have the employee complete STEP 4 on the Control Form.

10. Place the filled urine bottles in the individual employee kit. Keep the paperwork and samples together. If another collector will be collecting the blood sample from this employee, transfer both the form and the kit to that person, showing the transfer of the urine samples on the next available line of STEP 5 (the chain of custody block).

F. Seal the Individual Employee Kit

a. The blood and urine samples have now been collected for this employee. The blood/urine samples will now be sealed into the individual employee kit, while all paperwork will be retained for further completion. After rechecking to see that each sample is properly labeled and initialed, close the plastic bag to contain any leakage in

transportation, and apply the kit security seal to the small individual kit. As collector, sign and date the kit seal.

b. Before collecting samples from the next employee, complete the next line on the chain-of-custody block showing release of the blood and urine by yourself for the purpose of "Shipment" and receipt by the courier service or railroad representative that will provide transportation of the box, together with the date.

G. Complete Treatment Information

Complete STEP 6 of the Control Form. Mark the box if a breath alcohol test was conducted under FRA authority.

H. Prepare the Box for Shipment

a. Sealed individual employee kits should be retained in secure storage if there will be a delay in preparation of the shipping box. The shipping box shall be prepared and sealed by a collection facility representative as follows:

1. Inspect STEP 5 of each Control Form to ensure chain-of-custody is continuous and complete for each fluid (showing samples released for shipment). Retain the medical facility copy of each Control Form and the Accident Information form for your records.

2. Place sealed individual employee kits in the shipping box. Place all forms in zip-lock bag and seal securely. Place bag with forms and unused supplies in shipping box.

3. Affix the mailing label provided to the outside of the shipping box.

I. Ship the Box

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. Whenever possible without incurring delay, the collector should deliver the box directly into the hands of the express courier or air freight representative.

b. Where courier pickup is not immediately available at the collection facility where the samples are taken, the railroad is required to transport the shipping box for expeditious shipment by air express, air freight or equivalent means.

c. If the railroad is given custody of the box to arrange shipment, please record the name of the railroad official taking custody on the copy of Form 6180.73 retained by the collection site.

"TROUBLE BOX"

1. Problem: *The employee claims an inability to urinate, either because he/she has recently voided or because of anxiety concerning the collection.*

Action: The employee may be offered moderate quantities of liquid to assist urination. If the employee continues to claim inability after 4 hours, the urine collection should be discontinued, but the blood samples should be forwarded and all other procedures followed. Please note in area provided for remarks what explanation was provided by the employee.

2. Problem: *The employee cannot provide approximately 60 ml. of sample.*

Action: The employee should remain at the collection facility until as much as possible of the required amount can be given (up to

4 hours). The employee should be offered moderate quantities of liquids to aid urination. The first bottle, if it contains any quantity of urine, should be sealed and securely stored with the blood tubes and Control Form pending shipment. A second bottle should then be used for the subsequent void (using a second Control Form with the words "SECOND VOID—FIRST SAMPLE INSUFFICIENT" in the remarks block and labels from that form). However, if after 4 hours the donor's second void is also insufficient or contains no more than the first insufficient void, discard the second void and send the first void to the laboratory.

3. Problem: *The urine temperature is outside the normal range of 32 deg.-38 deg.C/ 90 deg.-100 deg.F.* and a suitable medical explanation cannot be provided by an oral temperature or other means; or

4. Problem: *The collector observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample* (e.g., substitute urine in plain view, blue dye in sample presented, etc.) and a collection site supervisor or the railroad representative agrees that the circumstances indicate an attempt to tamper with the sample.

Action (for either Problem No. 3 or Problem No. 4): Document the problem on the Control Form. i. If the collection site supervisor or railroad representative concurs that the temperature of the sample, or other clear and unequivocal evidence, indicates a possible attempt to substitute or alter the sample, another void must be taken under direct observation by a collector of the same gender.

ii. If a collector of the same sex is not available, do NOT proceed with this step.

iii. If a collector of the same gender is available, proceed as follows: A new Control Form must be initiated for the second void. The original suspect sample should be marked "Void 1" and the follow-up void should be marked "Void 2," with both voids being sent to the laboratory and the incident clearly detailed on the Control Form.

Exhibit C-2—Instructions for Collection of Post Mortem Samples: Employee Killed in a Railroad Accident/Incident

To the Medical Examiner, Coroner, or Pathologist:

a. In compliance with Federal safety regulations (49 CFR part 219), a railroad representative has requested that you obtain samples for toxicology from the remains of a railroad employee who was killed in a railroad accident or incident. The deceased consented to the taking of such samples, as a matter of Federal law, by performing service on the railroad (49 CFR 219.11(f)).

b. Your assistance is requested in carrying out this program of testing, which is important to the protection of the public safety and the safety of those who work on the railroads.

A. Materials:

The railroad will provide you a post-accident shipping box that contains necessary supplies. If the box is not immediately available, please proceed using supplies available to you that are suitable for forensic toxicology.

B. Samples requested, in order of preference:

a. Blood—20 milliliters or more. Preferred sites: intact femoral vein or artery or peripheral vessels (up to 10 ml, as available) and intact heart (20 ml). Deposit blood in gray-stopper tubes individually by site and shake to mix sample and preservative.

Note: If uncontaminated blood is not available, bloody fluid or clots from body cavity may be useful for qualitative purposes; but do not label as blood. Please indicate source and identity of sample on label of tube.

b. Urine—as much as 100 milliliters, if available. Deposit into plastic bottles provided.

c. Vitreous fluid—all available, deposited into smallest available tube (e.g., 3 ml) with 1% sodium fluoride, or gray-stopper tube (provided). Shake to mix sample and preservative.

d. If available at autopsy, organs—50 to 100 grams each of two or more of the following in order preference, as available: liver, bile, brain, kidney, spleen, and/or lung. Samples should be individually deposited into zip-lock bags or other clean, single use containers suitable for forensic samples.

e. If vitreous or urine is not available, please provide—

1. Spinal fluid—all available, in 8 ml container (if available) with sodium fluoride or in gray-stopper tube; or, if spinal fluid cannot be obtained,

2. Gastric content—up to 100 milliliters, as available, into plastic bottle.

C. Sample collection:

a. Sampling at time of autopsy is preferred so that percutaneous needle puncturing is not necessary. However, if autopsy will not be conducted or is delayed, please proceed with sampling.

b. Blood samples should be taken by sterile syringe and deposited directly into evacuated tube, if possible, to avoid contamination of sample or dissipation of volatiles (ethyl alcohol).

Note: If only cavity fluid is available, please open cavity to collect sample. Note condition of cavity.

c. Please use smallest tubes available to accommodate available quantity of fluid sample (with 1% sodium fluoride).

D. Sample identification, sealing:

a. As each sample is collected, seal each blood tube and each urine bottle using the respective blood tube or urine bottle using the identifier labels from the set provided with the Post-Accident Testing Blood/Urine Custody and Control Form (49 CFR part 219) (Form FRA F 6180.74 (revised)). Make sure the unique identification number on the labels match the pre-printed number on the Control Form. Please label other samples with name and sample set identification numbers. You may use labels and seals from any of the extra forms, but annotate them accordingly.

b. Annotate each label with sample description and source (as appropriate) (e.g., blood, femoral vein).

c. Please provide copy of any written documentation regarding condition of body and/or sampling procedure that is available at the time samples are shipped.

E. Handling:

a. If samples cannot be shipped immediately as provided below, samples other than blood may be immediately frozen. Blood samples should be refrigerated, but not frozen.

b. All samples and documentation should be secured from unauthorized access pending delivery for transportation.

F. Information:

a. If the railroad has not already done so, please place the name of the subject at the top of the Control Form (STEP 1). You are requested to complete STEP 2 of the form, annotating it by writing the word "FATALITY," listing the samples provided, providing any further information under "Remarks" or at the bottom of the form. If it is necessary to transfer custody of the samples from the person taking the samples prior to preparing the box for shipment, please use the blocks provided in STEP 5 to document transfer of custody.

b. The railroad representative will also provide Accident Information Required for Post-Accident Toxicological Testing (49 CFR part 219), Form FRA 6180.73 (revised). Both forms should be placed in the shipping box when completed; but you may retain the designated medical facility copy of each form for your records.

G. Packing the shipping box:

a. Place urine bottles and blood tubes in the sponge liner in the individual kit, close the biohazard bag zipper, close the kit and apply the kit custody seal to the kit. You may use additional kits for each tissue sample, being careful to identify sample by tissue, name of deceased, and specimen set identification number. Apply kit security seals to individual kits and initial across all seals. Place all forms in the zip-lock bag and seal securely.

b. Place the bag in the shipping box. Do not put forms in with the specimens. Seal the shipping box with the seal provided and initial and date across the seal.

c. Affix the mailing label to the outside of the box.

H. Shipping the box:

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. When possible, but without incurring delay, deliver the sealed shipping box directly to the express courier or the air freight representative.

b. If courier pickup is not immediately available at your facility, the railroad is required to transport the sealed shipping box to the nearest point of shipment via air express, air freight or equivalent means.

c. If the railroad receives the sealed shipping box to arrange shipment, please request under "Supplemental Information" on the Control Form, the name of the railroad official taking custody.

I. Other:

FRA requests that the person taking the samples annotate the Control Form under "Supplemental Information" if additional toxicological analysis will be undertaken with respect to the fatality. FRA reports are available to the coroner or medical examiner on request.

Issued in Washington, D.C., on April 11, 2001.

S. Mark Lindsey,

Acting Deputy Administrator, Federal Railroad Administration.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 382

[Docket No. FMCSA-2000-8456]

RIN 2126-AA58

Controlled Substances and Alcohol Use and Testing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The Department of Transportation published a revision of its drug and alcohol testing procedures regulations on December 19, 2000. Consequently, the FMCSA is proposing to amend its controlled substances and alcohol testing regulations to ensure consistency with DOT's revised testing procedures and to avoid duplication. In addition, the FMCSA is proposing to amend its drug and alcohol testing regulations to update outdated provisions and clarify existing rules.

DATES: You must submit comments on or before June 14, 2001.

ADDRESSES: You can mail or hand deliver written comments to the US Department of Transportation, Docket Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001, or submit on-line at <http://dmses.dot.gov/submit>. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments from 9 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. If you want notification of receipt of comments, please include a self-addressed, stamped envelope or postcard, or after submitting comments electronically, print the acknowledgment page.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Rodgers, Transportation Specialist, MC-ECE, (202) 366-4016, or Mr. Michael Falk, Attorney-Advisor, MC-CC, (202) 366-0834, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Department of Transportation published a comprehensive revision to the drug and alcohol testing procedural rules (49 CFR Part 40) (December 19, 2000, 65 FR 79462). The new Part 40 makes numerous changes regarding the way that drug and alcohol testing will be conducted in the future. The majority of the changes in the rule will become effective August 1, 2001. However, some changes will become effective prior to August 1, 2001.

Part 40 is one element of a One-DOT set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. It is important that the six DOT agency rules that cover specific transportation industries be consistent with the revised Part 40, to avoid duplication, conflict, or confusion among DOT regulatory requirements. Therefore, we are proposing to amend our drug and alcohol testing regulations to conform with Part 40.

Background

In this NPRM, the FMCSA proposes changes that would conform its drug and alcohol testing regulations (49 CFR Part 382) to the revised DOT procedures for transportation workplace drug and alcohol testing programs (49 CFR Part 40) published on December 19, 2000 (65 FR 79462).

The FMCSA proposes to delete from part 382 provisions that are also covered in the new part 40. Motor carrier employers and employees affected by part 382 have always been required to read and adhere *both* part 382 and part 40 to comply with the FMCSA's drug and alcohol testing requirements. Referring the reader directly to part 40 instead of duplicating part 40 rule text in part 382 would promote both drafting economy and consistency of interpretation. This NPRM proposes to delete from part 382 regulatory text regarding referral, evaluation and treatment requirements; follow-up testing; inquiries for alcohol and controlled substances information from previous employers; and substance abuse professionals. Instead, the regulations would reference the appropriate provisions of part 40 which deal with these issues.

Although the primary purpose of this NPRM is to conform part 382 with the new part 40, FMCSA would also delete outdated rule text references (e.g., past implementation dates and reporting requirements) that can currently be found throughout part 382. This includes replacing references to the Federal Highway Administration with