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## **Part IV**

## **Department of Transportation**

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**Federal Aviation Administration**

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**14 CFR Parts 61, et. al.**

**Alcohol Misuse Prevention Program and  
Antidrug Program for Personnel and  
Employees of Foreign Air Carriers  
Engaged in Specified Aviation Activities;  
Rule and Proposed Rules**

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

[Docket No. 27065; Amendment No. 61-94, 63-29, 65-37, 121-237, and 135-48; Docket Nos. 24706; 26233; 26872]

RIN 2120-AE43

**Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule prescribes regulations establishing the aviation industry alcohol misuse prevention program. It includes requirements for an alcohol testing program for air carrier employees who perform safety-sensitive duties, in implementation of the FAA-related provisions of the Omnibus Transportation Employee Testing Act of 1991, which was enacted on October 28, 1991. Employees who perform safety-sensitive duties directly or by contract for aviation employers that hold a certificate issued under certain FAA regulations, operators as defined in the regulations, or air traffic control facilities not operated by the FAA or the U.S. military must be subject to an FAA-mandated alcohol misuse prevention program (AMPP). This final rule requires alcohol testing of these employees, proscribes certain alcohol-related conduct, and establishes specified consequences for engaging in alcohol misuse. Employers must provide written materials to covered employees explaining the program and educating employees about the dangers of alcohol misuse. Employers must also submit reports to the FAA on the results of the program. This rule is intended to ensure that public safety is maintained by preventing alcohol misuse by safety-sensitive aviation employees.

**DATES:** This rule is effective on March 17, 1994.

**FOR FURTHER INFORMATION CONTACT:**

Office of Aviation Medicine, Drug Abatement Division (AAM-800), Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590; telephone (202) 366-6710.

**SUPPLEMENTARY INFORMATION:**

**Availability of Final Rule**

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence

Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the notice number of this final rule.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

**Background**

On December 15, 1992, the FAA published a notice of proposed rulemaking (NPRM) in which it proposed to require air carriers to institute alcohol misuse prevention programs similar to the antidrug programs already in place (57 FR 59458). The NPRM was published as part of a coordinated effort by the Office of the Secretary of Transportation (OST) and four other DOT agencies to address the issue of alcohol misuse in the transportation industries. With the exception of the NPRM published by the Research and Special Programs Administration, the rulemakings were initiated under the provisions of the Omnibus Transportation Employee Testing Act of 1991 (Pub.L. 102-143, Title V).

In conjunction with OST and the other DOT agencies, the FAA held a series of public hearings on the regulations proposed in the NPRM. The FAA-specific sections of each of these hearings were recorded by a court reporter and the transcripts of the hearings with copies of any material submitted to the hearing panel have been placed in the docket. The testimony and written materials were considered in development of this final rule.

**Current Laws and Regulations**

A variety of laws and regulations currently restrict the consumption of alcohol by some aviation employees. Federal criminal law prohibits any person from operating or directing the operation of a common carrier while under the influence of alcohol. 18 U.S.C. 342. A blood alcohol level of .10 percent is considered presumptive evidence that the person is under the influence. 18 U.S.C. 343(1).

The FAA's regulations concerning alcohol misuse are supplemented but not changed by this rule. Currently, under the FAA's rules, no person may act or attempt to act as a crewmember of a civil aircraft within 8 hours after consuming any alcoholic beverage, while under the influence of alcohol, or while having 0.04 percent by weight or more of alcohol in the blood. (14 CFR

91.17(a).) In limited circumstances, the FAA's regulations require crewmembers to submit to alcohol tests requested by State or local law enforcement officers and, upon request, to furnish the results of such tests to the Administrator. (14 CFR 91.17(c).) Refusal to take a properly authorized law enforcement alcohol test or to furnish the results can result in the denial, revocation, or suspension of an airman certificate issued under part 61 or 63. (14 CFR 61.16 and 63.12a.)

Holders of or applicants for medical certificates issued under 14 CFR part 67 are subject to additional regulations regarding alcohol use. First, a diagnosis of alcoholism is a disqualifying factor for a medical certificate. A diagnosed alcoholic must be evaluated by the Federal Air Surgeon and meet certain recovery criteria prior to receiving a medical certificate. However, to facilitate recovery and to prevent the unnecessary loss of skilled employees, a program established by the FAA, the airline industry, and the pilots' unions has enabled hundreds of alcoholic pilots to safely return to duty. The program combines confrontation, therapy, and stringently monitored aftercare.

Part 67 also provides that any individual who applies for a medical certificate must permit access by the Administrator to information in the National Driver Register concerning drug- and alcohol-related driving offenses. (14 CFR 67.3.) If an individual has had two or more such offenses within 3 years after the effective date of the rule, the FAA may suspend or revoke a part 61 airman certificate held by the individual or deny the individual's application for such certificate. (14 CFR 61.15.)

**Discussion of Comments and Final Rule**

*The Common Preamble*

A common preamble to all of the related NPRMs proposing alcohol testing rules was published on December 15, 1992 (57 FR 59382, *et seq.*). This common preamble contained a thorough discussion of the comments submitted to the DOT advance notice of proposed rulemaking (ANPRM) published on November 2, 1989, and an overview of the general issues related to alcohol use in the transportation industries. A similar introductory discussion is found in the common preamble to this final rule and the final alcohol misuse prevention rules published by the other affected DOT agencies elsewhere in today's **Federal Register**. The common preamble also responds to comments submitted to the various DOT agency dockets that raise multimodal aspects of the final rules or

the Act. This common preamble is incorporated into this final rule by reference. Because the majority of the issues raised in comments were addressed in the common preamble, the FAA views comments addressed to other DOT agencies as part of its docket, even though copies of those comments are not physically stored with the other comments. Interested persons can request access to those comments through the FAA docket. Any aspects of the final rule that are not discussed below are addressed in the common preamble.

#### *Alcohol Misuse Prevention Program (AMPP)*

The essential provisions of the AMPP proposed by the FAA in the NPRM have remained largely unchanged in this final rule. The rule uses three primary tools for reducing the threat of alcohol misuse in aviation. First, by amending parts 65, 121, and 135, the rule prohibits certain alcohol-related conduct by employees performing safety-sensitive duties. Second, under the provisions of new appendix J to part 121, such employees must be subject to pre-employment, random, post-accident, reasonable suspicion, return to duty, and follow-up alcohol testing. This testing is federally-mandated but will be administered by the affected employers. Third, in accordance with requirements in appendix J, employees subject to the rule must be provided with materials designed to educate them about the provisions of the rule and the consequences of engaging in alcohol misuse.

#### *Other Requirements Imposed by Employers; Requirement for Notice*

Only a few commenters addressed the issue of possible conflicts or confusion regarding company-required programs and FAA-mandated programs. These commenters (representing both labor and management) focused on the issue of alcohol test results of 0.02 to 0.039. The commenters noted that although the FAA's NPRM proposed specific actions for test results falling within this range, an employer is not precluded from taking severe employment action based on these results should the employer so choose. A number of labor organizations wanted the FAA to preclude such action in its final rule.

The FAA has not adopted these comments. The choice of whether to continue to employ an individual should properly remain within the discretion of the employer. We also note that employment or other consequences outside those required by the rule may

be subject to both State law and labor-management negotiation.

With respect to the establishment of a separate company policy, a number of commenters noted that companies already had alcohol testing or prevention programs in place. These commenters stated that established programs should suffice for compliance with the FAA's rule, or that the FAA's rule would unnecessarily duplicate these programs.

The FAA recognizes that, as was the case when the antidrug rule was first implemented, some employers might have programs that encompass some or all of this rule's requirements. To ensure complete and uniform compliance with a single regulatory standard, however, we are not permitting company programs to substitute for programs required by this rule. Should an aviation employer determine that, as a matter of company policy, a different program should be implemented or continued, the program must be clearly separate from the program required under this rule, with appropriate notice given prior to tests under this rule. The FAA will not permit commingling of employer-directed and FAA-mandated programs.

#### *Employers Required To Establish Programs*

The NPRM reflected the FAA's best assessment, based on the developments in the FAA's industry antidrug program, of the categories of employers that should be subject to the alcohol misuse rule. Like the antidrug rule, the FAA determined that the minimal benefit to public safety that might accrue from inclusion of operators that did not hold part 121 or part 135 certificates did not warrant the cost and intrusiveness of alcohol testing. A few commenters addressed this issue and requested additional relief for the small aviation employers we did propose to cover. The FAA has assessed its requirements and has elected to retain most of its regulatory provisions unchanged from the NPRM. We have, however, reduced the reporting requirement burden, which will be addressed below.

The final rule will include essentially the same classes of employers as are covered by the anti-drug rule: 14 CFR part 121 certificate holders, 14 CFR part 135 certificate holders, sightseeing operators who meet the criteria of 14 CFR 135.1(c), and air traffic control (ATC) facilities not operated by the FAA or by or under contract to the U.S. military will have to establish alcohol misuse prevention programs. Companies with employees who perform safety-sensitive functions by contract for these employers will be

permitted to establish and manage programs under this appendix. However, while a contractor company that manages its own program will perform all of the functions required of an "employer" in appendix J, the certificate holders, operators, and ATC facilities will remain responsible for ensuring that all covered employees who perform services for them are subject to an FAA-mandated program.

#### *Employees Subject to the Rule*

The NPRM proposed to retain essentially the same coverage as the antidrug rule. The covered categories included persons performing any of the following duties: flight crewmember, flight attendant, flight instruction, aircraft dispatch, aircraft maintenance, ground security coordinator, aviation screening, and air traffic control. The category of flight test personnel was not included because it was redundant. The category of ground security coordinator duties was specified separately to reflect the coverage intended by the term "aviation security" in the antidrug rule.

In order to determine if any changes should be made in the categories of covered employees, the FAA asked a number of questions in the NPRM. The questions were intended to solicit comment on whether the increased benefit to safety that could accrue by including other functions would warrant the imposition of an alcohol testing requirement on individuals performing those functions or if, consistent with safety, categories of employees could be eliminated from the rule.

The comments on this issue ranged from those stating that since the rule was unnecessary it should provide only the minimum coverage required by the Act to a few comments stating that every aviation employee who could even possibly affect safety should be subject to alcohol testing. Most labor organizations favored the former approach. A number of commenters supporting limited application of the rule recommended that only maintenance personnel who actually return aircraft to service should be covered by the rule. A few commenters supported adding to the coverage proposed in the NPRM. These commenters primarily identified refuelers and deicers as categories of employees that should be subject to alcohol testing.

The FAA has chosen to retain the categories of covered employees proposed in the NPRM. Although a system of checks and inspections does exist to ensure that maintenance activities are properly performed, the

FAA has determined that it is essential that the individuals who perform aircraft maintenance activities be subject to this rule. (The term preventive maintenance has been added to maintenance not because the FAA intends to increase the reach of the rule, but rather to ensure that, as was intended in the NPRM, the rule clearly parallels the coverage of the antidrug rule.)

The FAA carefully reviewed the comments supporting the inclusion of additional categories of covered employees. For a number of reasons, the FAA has elected not to adopt these recommendations. First, the FAA is aware that the costs associated with this rule will be significant. Each additional requirement that was considered was therefore scrutinized with respect to the cumulative burden that would accrue. Based on that consideration, the FAA has determined that the possible marginal benefit that might be achieved by adding categories of covered employees is outweighed by the burden associated with such a change.

#### *Prohibited Alcohol-Related Conduct*

This rule will prohibit specific alcohol-related conduct by covered employees and will also prohibit an employer from using a covered employee if the employer has actual knowledge that the employee has engaged in such conduct. Each of the prohibitions has been carefully tailored to minimize the restriction on the otherwise lawful use of alcohol by covered employees. With the exception of use of alcohol after an accident, each prohibition is limited to prohibiting alcohol use that may affect the performance of covered functions. Some commenters requested that the FAA list the specific actions within a safety-sensitive function that trigger coverage under this rule. Given the variety of tasks encompassed within each category and the differences in the conduct of aviation operations by different employers, however, a comprehensive regulatory listing of such activities is not possible. Therefore, as was proposed in the NPRM, coverage under the rule will be determined by the employer based on the requirements of the FAA's regulations and the employer's experience and knowledge of the employees' duties.

The identification of the activities that will subject employees to this rule shall be included in the company policy required under appendix J and are subject to FAA review.

The specific prohibitions are:

**Alcohol Concentration:** The OST common preamble contains a detailed

discussion of the prohibited alcohol concentrations and a disposition to the comments regarding this issue. It should be noted however, that although this rule will contain a bifurcated system of test results and consequences (0.02–0.039 and 0.04 or greater) the rule will not affect the current regulatory provision in 14 CFR 91.17 under which crewmembers are subject to sanction by the FAA for having a blood alcohol concentration of 0.04% or greater.

**Performance of covered functions while under the influence of alcohol:** As noted above, the FAA's current regulations prohibit any person from acting or attempting to act as a crewmember while under the influence of alcohol. While the FAA's experience in enforcing this provision indicates that it is a useful tool in preventing alcohol misuse, it has been determined that such a prohibition in the context of an employer-based program, with no intervention by a Federal agency or right to review, could lead to unacceptable treatment of employees. This provision has therefore been removed as a violation of the rule.

The concept of "under the influence" remains present in this final rule, however, as part of the reasonable suspicion testing requirement. Under the final rule, if an employer were to determine that sufficient evidence existed to believe that a covered employee was under the influence of alcohol, the employer would be required to administer a reasonable suspicion test. If no test could be performed, safety would still be protected because the employee must be removed from performing safety-sensitive duties temporarily.

This rule does not limit the employer's authority to remove the employee from the performance of safety-sensitive duties if the employer believed, notwithstanding an alcohol test result of less than 0.04 or no test at all, that the employee was impaired. As noted previously, the employer must remove the employee, at least temporarily, if the employee's alcohol concentration was 0.02 or greater but less than 0.04 or if no test could be performed. However, any action other than a temporary removal in either the absence of a test result or with a test result under 0.04 would have to be under the employer's independent authority.

**On-duty use:** A number of commenters expressed concern that the FAA's proposed definition of "performing safety-sensitive functions" could result in the application of the on-duty use prohibition to employees who might be at home on reserve status for

days at a time. Given the dramatic effect of a violation of this provision (i.e., it invokes the permanent bar addressed below), these commenters requested clarification of this provision.

This provision applies to any covered employee who, while not actually performing a safety-sensitive function, could be called at any time to perform. The FAA intends the provision to reach only employees who are at work. Affected employees include, for example, a maintenance supervisor who is in her office who could be called at any time to take over on a maintenance task. Such employees would have to refrain from using alcohol or would be in violation of the on-duty use provision. On-call or reserve employees who are not at work, such as those mentioned above, will, however, be subject to the prohibitions on pre-duty use of alcohol.

Additionally, the rule should not be read as permitting on-duty use to be presumed from an alcohol concentration above the prohibited levels. This would of necessity require the application of back extrapolation to the results, which, as analyzed in detail in the common preamble, is not permitted. To assert a violation of this provision, the employer would have to have clear evidence of consumption of alcohol by a safety-sensitive employee (e.g., an admission, credible witnesses). One important aspect of the prohibition is that it is triggered by the consumption of items other than alcoholic beverages. Use of a medication containing alcohol while on duty will violate this rule and will trigger the permanent bar provisions discussed below. The FAA encourages employers and labor organizations to take appropriate steps to warn affected employees of this prohibition.

**Pre-duty use:** As was proposed in the NPRM, this rule provides a two-tiered prohibition with respect to pre-duty use of alcohol. No commenter opposed prohibiting alcohol use by a crewmember prior to duty, and many commenters wanted the prohibition extended to up to 24 hours before a flight. As noted above, the FAA already prohibits any person from acting or attempting to act as a crewmember within 8 hours after the consumption of any alcoholic beverage. This prohibition was based on a determination by the FAA that a specified period of abstinence would decrease the likelihood that an individual would be impaired by alcohol while acting as a crewmember. The FAA is aware that individuals who drink to excess may still be impaired even after abstaining for 8 hours; however, the 8-hour rule establishes an adequate behavioral

limitation for the majority of persons who are not heavy drinkers. The FAA has determined that the 8-hour limit remains appropriate for crewmembers. Additionally, in order to ensure consistency between the prohibitions affecting FAA and other air traffic controllers, the pre-duty use period for these employees has been changed to 8 hours.

Although with respect to crewmembers, this provision does, to some extent, duplicate the restrictions in 14 CFR 91.17(a), it is limited in application to the covered employees of the specified employers under the rule. The rule also prohibits the employers from using covered employees who have impermissibly used alcohol—a restriction on employers that does not currently exist in the FAA's regulations.

A number of commenters objected to the FAA proposal to add a 4-hour pre-duty use limitation for other classes of covered employees. Some commenters believed that imposition of a 4-hour rule on all covered employees would have little safety benefit while intruding significantly into the lives of employees. The FAA agrees that the nature of the safety-sensitive functions other than crewmember duties is sufficiently different that an 8-hour limitation on pre-duty use of alcohol for those classes could constitute an unwarranted intrusion by the Federal government into the off-duty lives of aviation industry employees. The FAA continues to believe, however, that the minimal disruption that might be caused by a 4-hour limitation is outweighed by the safety benefit that is achieved by moderating the use of alcohol by safety-sensitive employees before they perform their duties.

The FAA is also not adopting a suggestion made in the public hearings regarding other DOT agencies' rules under which employees subject to short notice calls to work would have to abstain from consuming alcohol for 4 hours prior to duty or after being called to duty, whichever is shortest. The FAA does not believe that in the context of the aviation industry there is any situation in which the need for the employee to perform safety-sensitive functions is so exigent that a 4- or 8-hour limitation should be waived.

*Use following an accident:* As proposed in the NPRM, a covered employee with actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident would be required to refrain from using alcohol for 8 hours unless the employee had been given a post-accident test or the employer had

determined that the employee's performance could not have contributed to the accident. The restriction on use, as proposed, would primarily affect those employees whose performance of duties just around the time of the accident may have contributed to the accident and whose consumption of alcohol prior to the time of the accident would be relevant information.

A number of commenters questioned the FAA's ability to enforce this provision and the employees' ability to comply. Some commenters stated that it was unfair of the FAA to consider denying individuals who had been traumatized by an accident the relief that a drink might provide. The FAA recognizes that the rule might be difficult to enforce, and we encourage employers to attempt to control the actions of the affected employees as circumstances permit. The final rule also includes, as in the NPRM, an actual notice requirement so that employees who are unaware of an accident or who do not realize that their performance of duties may be implicated are not held to have violated the rule if, unknowingly, they use alcohol during the post-accident period. The FAA notes that the prohibition only applies if an employee performed a safety-sensitive function on the aircraft involved in an accident at or near the time of the accident. The rule does not, for example, affect individuals who performed maintenance on the aircraft days or weeks prior to the accident.

Despite the potential difficulties associated with this provision, however, and the commonly accepted practice of using alcohol to handle stressful situations, the prohibition is necessary to ensure that use of alcohol before an accident is not masked by allegedly post-accident consumption of alcohol.

#### *Refusal To Submit to a Required Alcohol Test*

A number of commenters objected to the FAA's proposal to treat refusal to submit to random, post-accident, reasonable suspicion, or follow-up testing as a rule violation (as discussed in the common preamble), or as a potential basis for the denial, suspension, or revocation of a certificate issued under 14 CFR part 61, 63, or 65. A few of these commenters stated that because alcohol testing was unconstitutional there should be no sanction attached to refusing to be tested. The Constitutional aspects of this rule are addressed in the common preamble.

A number of labor groups expressed concern that employees who were subjected to harassing tests or who

became aware that proper procedures were not being followed (e.g., the breath alcohol technician (BAT) reuses a mouthpiece) would be placed in the position of having to submit to questionable tests or face possibly severe sanctions. As with any potentially problematic test, the employee will have to determine whether to proceed with the test or to decline. It would then be for the employer in either situation to evaluate the facts, review the provisions of this rule and in 49 CFR part 40, and make a decision on the validity of the test or the legitimacy of the employee's asserted bases for declining the test. The FAA would have to similarly evaluate all of the available information if the FAA considers taking action in the case of an alleged refusal. As a practical matter, these situations can be avoided if each employer ensures that its supervisors and BATs are thoroughly trained and if a knowledgeable employer representative is available to respond quickly to concerns raised during the course of an alcohol test.

No commenter objected to the FAA's decision not to attach any consequences other than preclusion from performing a safety-sensitive function to an individual's choice not to submit to pre-employment or return to duty testing. These provisions are consistent with the FAA's choice in the antidrug rule not to base certificate action on refusals of pre-employment drug tests, and therefore, these provisions remain unchanged.

#### *Required Alcohol Testing*

The common preamble discusses in detail the types of alcohol tests that are required under this rule and those of the other DOT agencies. There are, however, certain aspects of alcohol testing raised by the commenters that are specific to the aviation industry. Those issues are addressed below.

*Pre-employment testing:* As discussed more fully in the common preamble, the nomenclature used to describe this type of test has been changed from "pre-employment/pre-duty," as used in the NPRM, to simply "pre-employment." It should be noted that this change is not intended to affect the substantive requirements for this type of testing, or to imply that the testing must occur prior to hiring an individual. As was proposed in the NPRM, under this final rule employers may conduct pre-employment testing at any time prior to the first time the individual is used to perform (i.e., is "employed" in) a safety-sensitive function. An individual may be tested prior to completion of the hiring process; after he or she has been hired for a safety-sensitive position but

before actual commencement of duties; or, in the case of a current employee, prior to transferring the employee from performing non-safety-sensitive duties to performing safety-sensitive duties.

In the NPRM, the FAA requested specific comment on whether the proposed procedure for using the results of prior pre-employment alcohol tests would be useful. The majority of commenters did not feel that the provision should be retained. Labor groups were concerned that the confidentiality of information regarding employees' past alcohol use would be breached by this provision. Many employers expressed concern about the possibility of liability if they released the results, even in response to a specific employee consent. One commenter recommended that the FAA develop a standard consent form to be used for release of alcohol misuse information from an employer to any third party. Finally, some commenters stated that even if the use of prior test results was authorized, they would not use the option. They saw little utility in the option or expressed reservations about relying on tests the quality of which the employer could not ensure.

Although the FAA recognizes that few employers may choose to use the option of relying on an applicant's prior test results, the FAA has elected to retain this option. The difficulties, if any, associated with choosing this option would be one accepted voluntarily by the employer who so chooses. Further, the FAA notes that even in the absence of such a provision, a prospective employer could still seek information regarding the past performance of an applicant. The FAA has not adopted the recommendation to prepare a standard consent form for use in this or any other disclosure situation. The rule does contain specific language regarding the content of the consent; the FAA expresses no preference as to the format of the document.

Finally, one commenter stated that the pre-employment testing provision did not meet the requirements of the Act because it does not require testing for use of alcohol in violation of law or Federal regulation. While a strict reading of the Act may indicate that this commenter is correct, upon review of the legislative history of the Act, the FAA believes that the pre-employment testing provision in this rule meets the intent of Congress.

**Post-accident testing:** The NPRM proposed that post-accident alcohol testing would be essentially the same as in the antidrug rule. The triggering event would be an aircraft accident (as specifically defined in the rule) and the

employees subject to testing would be the same—covered employees whose performance of safety-sensitive functions either contributed to an accident or cannot be completely discounted as a contributing factor.

Although commenters generally supported the concept of post-accident testing, some were concerned about the practical difficulties associated with determining which employees to test and ensuring the tests are performed in the very short and usually extremely hectic period just following an accident. Some commenters specifically cited the difficulty faced in determining if persons performing maintenance may have contributed to the accident and problems associated with reaching the remote locations in which aircraft accidents can occur.

These same concerns have arisen in the context of post-accident drug testing. With respect to identifying employees to test, both rules provide that the decisions must be based on the best available information. Although the purpose of a post-accident alcohol test is to identify individuals who should be removed from safety-sensitive duties, the focus of a post-accident alcohol test is evidence of alcohol use that may have affected the performance of safety-sensitive functions that contributed to the accident. Test subjects should be restricted to those for whom an alcohol test conducted after an accident would be relevant to whether the individual possibly contributed to the accident as a result of impermissibly using alcohol.

A number of commenters also questioned the requirement that individuals who may be subject to post-accident testing must, with limited exceptions, remain at the scene of the accident. These commenters noted that an aircraft accident is always an extremely traumatic event for the crewmembers involved and it would be unduly harsh to prevent these crewmembers from leaving the immediate vicinity of the accident.

The FAA accepts these concerns and has amended the provision in the final rule to require the employee to remain readily available for testing. This could include going to a crew lounge or airline office; however, the employee would have to take appropriate steps to ensure that if the employer determined that the employee must undergo post-accident testing, the employer would be able to rapidly locate the employee and have him or her tested. It would not, for example, be acceptable for the employee to leave the scene of the accident at an airport without informing the employer or a designated point of contact of the employee's location—even if the

employee remained at the airport and technically "available" for testing.

The issues associated with remote site testing and conduct of tests within the required timeframes are addressed in the common preamble. As mentioned in that document, the FAA is not adopting the recommendation that employers be allowed to substitute for FAA-mandated tests post-accident tests conducted by law enforcement officers (LEOs) for law enforcement purposes. The FAA already has in place a provision (14 CFR 91.17) under which crewmembers required to submit to alcohol tests by LEOs may be required to provide the results of such tests to the FAA. The possible conflicts between the employer's obligations and the intent of post-accident tests under this rule and those of LEOs outweigh any benefit that might be achieved from such a proposal. (As discussed in the preamble to 49 CFR part 40, however, a LEO could serve as an employer's BAT, but any tests would have to be conducted pursuant to this rule and 49 CFR part 40.)

**Random testing:** As required by the Act, the rule includes random alcohol testing for covered employees. The FAA has tailored the testing to ensure that testing reasonably serves the FAA's interest in aviation safety. Selection procedures like those in current FAA-approved antidrug plans must be used to ensure randomness of testing.

The majority of comments received on random testing (other than those asserting it was unconstitutional and/or unnecessary) cited the particular difficulties associated with testing of crewmembers at or near the time of the flight. These commenters noted that pre-flight time for crewmembers, especially pilots, is very tightly scheduled, with little built in flexibility. The commenters asserted that employers would be faced with two choices: either arrange for all crewmembers to report for duty early every day (because testing is supposed to be both unannounced and random) to ensure that the employees were available for testing if they were selected, or accept that a certain number of flights might be delayed to accommodate the additional time required to conduct testing. These commenters asked that the FAA revise its rule to eliminate random testing or to permit all random testing to occur after flights terminate.

While the FAA is extremely sensitive to the financial and operational implications of this rule, it cannot adopt the recommendation of these commenters. Random alcohol testing is required by the Act. An effective random testing program must be designed to detect and deter all of the

prohibited conduct: pre-duty use of alcohol, on-duty use of alcohol, and reporting for duty or remaining on duty with an impermissible alcohol concentration. Because post-flight testing (especially on long flights) would realistically only address on-duty use of alcohol, it would not serve the overall purpose of random alcohol testing. Similarly, if all testing were performed before flights (as recommended by one commenter), the testing program would have no deterrent effect for on-duty use of alcohol. The FAA intends to work with the aviation industry to assist employers in implementing the most cost-effective random alcohol testing programs possible.

The final rule retains the provision from the NPRM under which employees selected for testing must proceed immediately to the testing site. The rule also provides that an employee notified of his or her selection while in the midst of performing a safety-sensitive function would be directed to cease performing the function and proceed to the testing site as soon as possible. Obviously, the FAA does not expect any safety-sensitive employee to simply abandon his or her duties upon notification of selection for random testing. Such an employee would have to arrange for a replacement or otherwise cease performing the safety-sensitive function as soon as it could be safely terminated.

The term "immediately" was used by the FAA intentionally. To the extent possible, employees notified of selection for a random test should take whatever steps are necessary to report to the testing site without any delay or detour. The time between notification and testing should be the absolute minimum necessary. The FAA recognizes that in some situations employees will have to advise supervisors that the employees must report for testing. Employers should ensure that they have instituted procedures to accommodate this provision (for example, the employer could arrange for the BAT to coordinate with designated supervisors to approve the employees' departure to a testing site before notifying the selected employees). The FAA expects that, with limited exceptions, the time between notification and testing will be no more than the requisite travel time to the testing site. If notification and testing occur at an airport, this time should be a matter of minutes.

**Reasonable suspicion testing:** Most of the commenters to the NPRM supported the provision for reasonable suspicion alcohol testing, although some labor organizations asserted that two supervisors should be required. The

FAA has not adopted this recommendation. The common preamble discusses in detail the substantive revisions to this provision.

**Return to duty and follow-up testing:** The specific requirements for these types of tests are discussed in the common preamble.

**Retesting after result of 0.02 or greater but less than 0.04:** In the NPRM, the FAA sought comment on whether the proposed "retest or return" procedure gives employers enough flexibility (or too much) in handling covered employees with low-level alcohol concentrations. Because most commenters supported a single cut-off level, very few addressed this provision. One commenter stated that if the bifurcated cut-off system was adopted, all employees testing between 0.02 and 0.039 should be subject to another test before returning to work; employers should not have the option of waiting until the next duty period in lieu of a test.

The FAA has not adopted this recommendation. The primary intent of this rule is to protect safety, and that goal is adequately accomplished whether an employee tests below 0.02 or is made to wait at least 8 hours before performing safety-sensitive functions. No additional benefit would be achieved by instituting a return-to-duty testing requirement for all employees who test in the 0.02 to 0.039 range. Further, the rule does not preclude, and would in fact require, the employer to conduct a reasonable suspicion test if, when the employee next reported for duty, the employee showed indicators of alcohol misuse.

#### **Recordkeeping and Reporting; Confidentiality**

The requirements of the final rule with respect to recordkeeping are largely unchanged from the NPRM. The records must be maintained in a secure location and are releasable only as required under the rule or with the express written consent of the employee. This rule requires the release of employee-specific information to a subsequent employer or other identified individual if the original employer receives a written request from the employee. Contrary to the concerns expressed by some commenters, the FAA believes that providing a regulatory mandate for such release and removal of employer discretion will minimize possible liability.

The rule also provides express authority to the FAA to conduct on-site inspections of employer's alcohol programs, including the alcohol testing process. As stated in the preamble to the

NPRM, the FAA's experience with compliance monitoring under the antidrug rule has indicated that the individuals managing employers' programs are often unaware of the FAA's authority to conduct such inspections. While the Administrator or his designee has such authority even absent a regulatory provision, the FAA determined that inclusion of such a provision in this rule is necessary to ensure industry awareness of the FAA's authority to monitor compliance.

Although the NPRM proposed reporting of statistical information by all employers and other aviation entities with separate AMPPs, this final rule has been revised to limit the number of entities required to submit reports. The FAA similarly amended its antidrug rule, primarily to relieve the burdens associated with these rules on small employers. The formats to be used for reporting the statistical information are published as exhibits following this rule. No other form, including another DOT Agency's form is acceptable for submission to the FAA.

#### **Consequences of Engaging in Misuse of Alcohol or Refusing To Submit to Testing**

The Omnibus Transportation Employee Testing Act of 1991 (the Act) amended the Federal Aviation Act of 1958 (the FAA Act) and the statutes that apply to the Federal Railroad Administration, the Federal Highway Administration, and the Federal Transit Administration. While these amendments have much common language, especially in the area of testing, they are not identical. Of greatest significance, the amendments to the FAA Act contain a section entitled "Prohibition on service," which does not appear in the amendments to the other DOT agencies' statutes.

The "Prohibition on Service" section is found at new FAA Act section 614(b). Under subsection 614(b)(1), an individual may not remain on duty in a safety-sensitive function if he or she has violated the prohibitions on the use of alcohol. This legislative provision on continued duty is reflected in each of the subsections of the FAA's rule addressing prohibited conduct (see, e.g., 14 CFR 65.46a). Each section states either directly or by implication that the employee may not report for duty or remain on duty requiring the performance of safety-sensitive functions while engaging in conduct prohibited by the rule. These sections further provide that no employer who has actual knowledge that an employee is in violation of the rule may permit the employee to perform or continue to

perform safety-sensitive functions. Additionally, appendix J, section V, paragraph A expressly prohibits an employee who has engaged in conduct prohibited by the rule from performing safety-sensitive functions. This section, consistent with the rules of the other DOT agencies, also requires removal from duty for refusal to submit to a required alcohol test.

Section 614(b)(2) of the FAA Act, "Effect of Rehabilitation," states that no covered employee may perform a safety-sensitive function after engaging in prohibited conduct unless he or she has completed a rehabilitation program under the provisions of section 614(c) of the FAA Act. Section 614(c)(1) requires the Administrator to prescribe regulations that provide, at a minimum, for the identification of employees in need of assistance in resolving problems with misuse of alcohol. Further, the section gives the Administrator the authority to determine the circumstances under which such employees would be required to participate in any required rehabilitation. The provisions recognize that rehabilitation may not be appropriate or warranted in all cases of prohibited conduct.

The legislative requirement of section 614(b)(2) is implemented in appendix J, section V, paragraph E, "Required evaluation." This section requires that the employee be evaluated in accordance with section VI of the appendix prior to performing covered functions. The evaluation process is discussed further below.

The rule also contains a provision, analogous to the one in the antidrug rule, under which employers are required to notify the Federal Air Surgeon of any instance in which a holder of a part 67 medical certificate violated the provisions of the rule or refused to submit to a required alcohol test (with the exception of pre-employment tests). The employer also has to forward to the FAA copies of the evaluations conducted by the SAP. The Federal Air Surgeon will use this information to determine whether further action should be taken with respect to the medical certificate. No employee requiring an airman medical certificate shall return to the performance of safety-sensitive functions without the Federal Air Surgeon's recommendation.

Section 614(b)(3) of the FAA Act, "Performance of prior duties prohibited," provides sanctions for employees who engage in prohibited use of alcohol after the date of the Omnibus Transportation Employee Testing Act. This subsection is found

only in the amendments to the FAA Act and has no parallel in the amendments to the other DOT agencies' statutes. It provides that, under certain circumstances discussed below, an individual shall not be permitted to perform the duties related to air transportation that he or she performed prior to the date he or she engaged in the impermissible use of alcohol. The legislation does not require that the individual's employment be terminated, nor that he or she be reassigned to perform non-safety-sensitive functions. However, it is an absolute bar to the performance of the same duties the employee performed before the violation.

This bar applies under four circumstances. The first occurs if the individual misuses alcohol "while on duty." The remaining prohibitions all relate to rehabilitation: the absolute bar to returning to duty applies if an employee misuses alcohol after the date of enactment, and

1. Had previously misused alcohol and undergone a program of rehabilitation under the regulations promulgated pursuant to the Act;

2. Refused to undertake any required rehabilitation; or

3. Failed to complete any required rehabilitation.

This rule implements the prohibitions in two ways. First, appendix J, section V, paragraph B, "Permanent disqualification for service" applies if an employee is determined to have violated the on-duty use prohibition or if the employee twice violated other provisions of the rule after its effective date. Under this section the employee is permanently barred from performing the safety-sensitive functions he or she performed before such a determination.

As proposed in the NPRM, this bar would have applied to the performance of any safety-sensitive function. The FAA noted in the NPRM that a narrow bar, limited only to the safety-sensitive functions the individual previously performed, could lead to anomalous results. Commenters differed in responding to the proposed bar, some favoring a broad exclusion while another wanted the bar removed as inconsistent with the Americans with Disabilities Act (ADA). The latter commenter failed to note that the Act requires a permanent bar and that the regulations implementing the ADA provide for the necessity of complying with the regulations of another Federal agency (29 CFR 1630.15(e)). However, the FAA has concluded that a bar limited to the statutory requirement is more likely to be seen as clearly consistent with the ADA and other legal

constraints, and has thus adopted this change in the final rule. It should be noted that employers retain any discretion they may have under independent authority to preclude such employees from performing other safety-sensitive functions. The FAA expects that employers will exercise responsible judgment in deciding whether employees not expressly barred from service will be permitted to perform other safety-sensitive functions.

As addressed in the NPRM, the bar on two-time violators will apply both to persons who had gone through rehabilitation and to those who, after evaluation by a substance abuse professional (SAP), are determined not to need treatment. Otherwise, an employee who was found to need treatment and had an instance of recidivism would be sanctioned, but an employee who did not need assistance but simply chose to engage in misuse of alcohol would not be sanctioned.

A number of commenters objected to the FAA's proposal to apply the permanent bar to individuals who engage in multiple instances of alcohol misuse. They noted that recidivism is often a normal part of the rehabilitative process. Given the Act's requirements, these comments cannot be adopted. The Act requires that individuals complete rehabilitation prior to returning to safety-sensitive functions. Therefore, once an employee has been deemed by the SAP to have completed rehabilitation and is returned to the performance of safety-sensitive functions, the employee must conform his or her conduct to the requirements of the rule.

The bar following a refusal or failure of rehabilitation is implicitly implemented in this rule by the requirement that prior to returning to duty performing safety-sensitive functions each employee must be evaluated by an SAP to determine whether the employee properly met the requirements for rehabilitation established during the initial evaluation. An employee who does not meet the requirements, whether by failure or refusal, will be precluded from returning to the performance of safety-sensitive functions. Commenters supported the FAA's choice in the NPRM not to propose a definite time period during which the employee must comply. They agreed that the rule will thus allow for the denial phase that most people go through when first confronted with evidence of an alcohol problem.

### *Alcohol Misuse Information and Training*

In the NPRM, the FAA specifically sought comment on whether the rule should include alcohol awareness training for all employees. Commenters split almost equally between two positions: Labor organizations and employees favored employee training, and employers stated that such training would be unnecessary and costly. The common preamble addresses these issues in greater detail; however, it should be noted that while the FAA is not requiring formal employee training, the FAA did adopt the recommendation to provide more detailed written materials to employees. Further, nothing in this rule precludes an employer from providing training to its employees under the employer's own authority.

### *Employee Referral, Evaluation, and Treatment*

As was noted in the NPRM, the FAA recognized the sometimes conflicting needs of employer flexibility and employee health. The FAA did not propose to prescribe regulations with respect to specific types of rehabilitation and maintains that position in the final rule. This rule does include the process proposed in the NPRM under which each covered employee who engages in alcohol misuse or who refuses to submit to testing must be advised of all resources available to the employee. It also requires that each such employee be evaluated by a SAP to determine whether and what assistance the employee needed in resolving problems associated with alcohol misuse.

Some commenters, primarily labor organizations and employees, stated that the rule should include a mechanism to protect employees from overzealous, biased, or unprofessional SAPs. These commenters suggested that employees be entitled to obtain a second opinion from another SAP, that the SAP evaluations be reviewed by a medical review officer, or that the employee be permitted to choose the SAP. The FAA has not adopted these suggestions. Each person authorized by this rule to act as an SAP has obligations independent of this rule which require him or her to perform the duties in this rule professional and ethical manner. Aside from the financial restrictions discussed in the common preamble, the FAA does not believe that any additional protection of employees is necessary. The use of a second opinion system would be especially difficult and problematic in a program such as this one where, in the exercise of reasonable, good faith analysis of a case, two SAPs

could very possibly arrive at different conclusions on the appropriate therapeutic intervention. As was the case in the NPRM, however, the final rule provides that selection of the SAP should be made in accordance with employer/employee agreements and employer policies.

### *Employer Alcohol Misuse Prevention Program Plans; Certification Statements*

The FAA proposed in the NPRM to include a requirement that employers submit detailed alcohol misuse prevention program (AMPP) plans to the FAA for approval prior to implementation of a program under the rule. Many commenters stated that the use of specific plans would be unduly cumbersome in the context of an AMPP. These commenters stated that unlike drug testing, in which a single laboratory is generally used, it is likely that alcohol testing will be conducted using a variety of breath testing devices. Additionally, since the SAPs must personally evaluate each employee who violates the rule, large companies will probably arrange to have many SAPs available wherever they are necessary. These commenters requested that the FAA limit its plan submission requirements to address these concerns.

The FAA agrees with these comments. Although the use of detailed, preapproved plans was and remains beneficial in the context of the antidrug rule, the FAA has chosen to minimize the requirements for the final alcohol rule. Instead, the FAA will require submission of a certification statement that will provide specified identifying information and an agreement to comply with this rule. Like the plan submission requirement, the certification statements will provide the FAA with the ability to readily determine which companies are failing or refusing to comply with the rule.

Commenters generally supported the FAA proposal to permit companies whose employees perform covered services by contract to an employer to establish independent alcohol misuse prevention programs. Under the revised procedures in this rule, contractor companies are able to submit certification statements directly to the FAA and may be authorized to implement AMPPs for their own employees. An aspect of the NPRM that has not changed is the requirement that each entity that establishes an AMPP, whether a contractor company or an employer, must maintain its program in accordance with the final rule. A contractor company, for example, is required to maintain the confidentiality of records pertaining to its employees

and must disclose such records only in accordance with the rule. The FAA has retained the ability to revoke its authorization for any contractor company that fails to properly implement its AMPP. Because employers are only able to use contractor employees who are subject to an FAA-mandated program, potential revocation of authorization to establish an AMPP provides a strong incentive to contractor companies to properly implement their programs.

The FAA has also retained the provisions under which employers and contractor companies may join consortia for purposes of complying with the rule. A consortium certification statement must set forth the aspects of the AMPP that the consortium intends to provide to aviation employers.

Generally, the final rule provides that aviation entities must submit the certification statements in duplicate. The FAA will annotate receipt on one of the copies and return it to the submitter, after which the submitter can implement its AMPP.

### *Phased Implementation*

The NPRM included a proposed schedule for phased implementation of the AMPP for the aviation industry. Most commenters that addressed the schedule favored the FAA's proposal and this schedule has been maintained in the final rule. For each class of employers, the rule requires submission of a certification statement by a certain date and implementation of the FAA-mandated AMPP approximately 6 months later. One change was made in response to comments: As proposed, employers would have had 8 months after their specified submission date to ensure that contractor employees were subject to an approved program. Many commenters did not think, given the complexity of the new requirements, that they could both implement their own programs and monitor their contractor companies' compliance. The FAA has therefore revised the timetable to require employers to ensure compliance by contractors 12 months after the date on which the employers' must submit their certification statements.

Under the final rule, part 121 and large part 135 certificate holders (more than 50 covered employees) and air traffic control facilities are required to comply with the rule first, with implementation scheduled to occur on January 1, 1995. Part 135 certificate holders with 11 to 50 covered employees are in the second phase of implementation (June 1, 1995), and small part 135 certificate holders and

§ 135.1(c) operators in the last phase (January 1, 1996).

#### *Employees Located Outside the U.S.*

The NPRM proposed that the rule would apply to direct employees of U.S. air carriers who perform safety-sensitive functions outside the U.S. after January 2, 1995. The NPRM also proposed that the FAA would not permit testing of such employees, however, if the FAA received written documentation from an employer demonstrating that such testing would be inconsistent with the laws and regulations of the country in which the testing would occur. Upon review of the comments submitted to this docket and to FAA Docket Number 27066 (which addressed possible testing requirements for foreign air carriers), the FAA has determined that it will not require testing of any employees located outside the territory of the United States.

To ensure proper selection for random testing, an employer is required to remove from the random testing pool any employee assigned to perform covered functions solely outside the territory of the United States, since such an employee would not be available for testing. The employee must be returned to the random testing pool as soon as the employee once more begins to perform functions wholly or partially within the territory of the United States. Although the FAA is cognizant of concerns about safety and economic parity that would be raised by such an exclusion, the FAA has determined that extraterritorial application of this rule, with its significant logistical issues and possible conflicts with local laws, should not be pursued.

#### *Paperwork Reduction Act Approval*

Appendix J to part 121 requires each employer to submit to the FAA: An alcohol misuse prevention program certification statement; notification to the FAA of alcohol misuse by holders of airman medical certificates issued under 14 CFR part 67; notification to the FAA of refusals to submit to alcohol testing by holders of airman certificates issued under 14 CFR parts 61, 63, and 65; and annual statistical reports summarizing data on the employer's alcohol misuse prevention program. To provide the notifications and reports to the FAA, employers are required to maintain records related to each covered employee, including test results. In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the recordkeeping and reporting requirements in this final rule have been submitted to the Office of Management and Budget (OMB) for approval.

Information collection requirements are not effective until the paperwork reduction act package has been received.

#### *Economic Summary*

A full regulatory evaluation has been prepared by the FAA and placed in the docket that provides detailed estimates of the economic consequences of this regulatory action. The FAA certifies that the annual costs to be imposed on small operators will not exceed the thresholds for significant impact and that this rule will not have a significant economic impact on a substantial number of small entities.

#### *International Trade Impact Analysis*

The FAA finds that this rule affects all part 121 and part 135 air carriers. The FAA finds that this rule will not have an adverse impact on trade opportunities for either U.S. firms doing business overseas or foreign firms doing business in the United States.

#### *Federalism Implications*

This rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### *Significance*

This rule is not likely to result in an annual effect on the economy of \$100 million or more, although it may result in an increase in costs for consumers, industry, or Federal, State, or local agencies. The FAA has determined, however, that this rule involves issues of substantial interest to the public. Therefore, the FAA has determined that the rule is significant under the Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

A Regulatory Impact Analysis of the rule has been placed in the regulatory docket. A copy may be obtained by contacting the office identified under "FOR FURTHER INFORMATION CONTACT."

#### *Other Regulatory Matters*

The FAA has received three petitions for rulemaking that address issues concerning alcohol use in aviation. The docket numbers for those petitions are 24706, 26233, and 26872. Because the issues raised in the petitions have been

resolved in this final rule, the FAA has closed these actions.

A number of commenters also asked that the FAA amend 14 CFR 91.13(a) to provide that crewmembers would only be held liable for the actions of a fellow crewmember if they have actual knowledge that the crewmember was impaired by drugs or alcohol. The comments cited the case of *Johnson v. National Transportation Safety Board*, 979 F.2d 618 (7th Cir. 1992), in which a pilot lost his airman certificate after his copilot was determined to have been intoxicated. Revision of this provision was neither explicitly nor implicitly contemplated in the NPRM, and the FAA finds that the issue is outside the scope of this rulemaking.

#### *List of Subjects*

##### *14 CFR Part 61*

Air safety, Air transportation, Aircraft, Aircraft pilots, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

##### *14 CFR Part 63*

Air safety, Air transportation, Aircraft, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

##### *14 CFR Part 65*

Air safety, Air traffic, Air transportation, Aircraft, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

##### *14 CFR Part 121*

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Pilots, Safety, Transportation.

##### *14 CFR Part 135*

Air carriers, Air taxi, Air transportation, Aircraft, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Pilots, Safety, Transportation.

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR parts 61, 63, 65, 121, and 135 as follows:

#### **PART 61—CERTIFICATION: PILOTS AND FLIGHT INSTRUCTORS**

1. The authority citation for part 61 is revised to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

2. Section 61.14 is revised to read as follows:

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

(a) This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, or an operator as defined in § 135.1(c) of this chapter.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

**PART 63—CERTIFICATION: FLIGHT CREW-MEMBERS OTHER THAN PILOTS**

3. The authority citation for part 63 is revised to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1355, 1421, 1422, 1427, 1429, and 1430 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

4. Section 63.12b is revised to read as follows:

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

(a) This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, or an operator as defined in § 135.1(c) of this chapter.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

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

5. The authority citation for part 65 is revised to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

6. Section 65.23 is revised to read as follows:

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

(a) *General.* This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter, or an air traffic control facility not operated by the FAA or the U.S. military.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

7. Section 65.46a is added to read as follows:

**§ 65.46a Misuse of alcohol.**

(a) This section applies to employees who perform air traffic control duties directly or by contract for an employer that is an air traffic control facility not operated by the FAA or the U.S. military (*covered employees*).

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that an employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(d) *Pre-duty use.* No covered employee shall perform air traffic control duties within 8 hours after using alcohol. No employer having actual knowledge that such an employee has used alcohol within 8 hours shall

permit the employee to perform or continue to perform air traffic control duties.

(e) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J to part 121 of this chapter, or the employer has determined that the employee's performance could not have contributed to the accident.

(f) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to part 121 of this chapter. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

8. Section 65.46b is added to read as follows:

**§ 65.46b Testing for alcohol.**

(a) Each air traffic control facility not operated by the FAA or the U.S. military (hereinafter *employer*) must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter.

(b) No employer shall use any person who meets the definition of *covered employee* in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

**PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT**

9. The authority citation for part 121 is revised to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1485, and 1502 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

10. Section 121.458 is added to subpart O to read as follows:

**§ 121.458 Misuse of alcohol.**

(a) *General.* This section applies to employees who perform a function listed in appendix J to this part for a certificate holder (*covered employees*). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder.

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No certificate holder having actual knowledge that an employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(d) *Pre-duty use.* (1) No covered employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No covered employee shall perform safety-sensitive duties other than those specified in paragraph (d)(1) of this section within 4 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(e) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of this part, or the employer has determined that the employee's performance could not have contributed to the accident.

(f) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to this part. No certificate holder shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

11. Section 121.459 is added to subpart O to read as follows:

**§ 121.459 Testing for alcohol.**

(a) Each certificate holder must establish an alcohol misuse prevention

program in accordance with the provisions of appendix J to this part.

(b) No certificate holder shall use any person who meets the definition of *covered employee* in appendix J to this part to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

12. Appendix J to part 121 is added to read as follows:

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

This appendix contains the standards and components that must be included in an alcohol misuse prevention program required by this chapter.

**I. General.**

• **A. Purpose.** The purpose of this appendix is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in aviation.

**B. Alcohol testing procedures.** Each employer shall ensure that all alcohol testing conducted pursuant to this appendix complies with the procedures set forth in 49 CFR part 40. The provisions of 49 CFR part 40 that address alcohol testing are made applicable to employers by this appendix.

**C. Definitions.**

As used in this appendix—

**Accident** means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury or in which the aircraft receives substantial damage.

**Administrator** means the Administrator of the Federal Aviation Administration or his or her designated representative.

**Alcohol** means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl or isopropyl alcohol.

**Alcohol concentration (or content)** means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this appendix.

**Alcohol use** means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

**Confirmation test** means a second test, following a screening test with a result 0.02 or greater, that provides quantitative data of alcohol concentration.

**Consortium** means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this appendix and that acts on behalf of such employers or contractors, provided that it has submitted an alcohol misuse prevention program certification statement to the FAA in accordance with this appendix.

**Contractor company** means a company that has employees who perform safety-sensitive functions by contract for an employer.

**Covered employee** means a person who performs, either directly or by contract, a safety-sensitive function listed in section II of this appendix for an employer (as defined below). For purposes of pre-employment testing only, the term "covered employee" includes a person applying to perform a safety-sensitive function.

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

**Employer** means a part 121 certificate holder; a part 135 certificate holder; an air traffic control facility not operated by the FAA or by or under contract to the U.S. military; and an operator as defined in 14 CFR 135.1(c).

**Performing** (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

**Refuse to submit** (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this appendix, or engages in conduct that clearly obstructs the testing process.

**Safety-sensitive function** means a function listed in section II of this appendix.

**Screening test** means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

**Substance abuse professional** means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission) with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

**Violation rate** means the number of covered employees (as reported under section IV of this appendix) found during random tests given under this appendix to have an alcohol concentration of 0.04 or greater plus the number of employees who refused a random test required by this appendix, divided by the total reported number of employees in the industry given random alcohol tests under this appendix plus the total reported number of employees in the industry who refuse a random test required by this appendix.

**D. Preemption of State and local laws.**

1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

**E. Other requirements imposed by employers.**

Except as expressly provided in these alcohol misuse requirements, nothing in these requirements shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including any authority and rights with respect to alcohol testing and rehabilitation.

**F. Requirement for notice.**

Before performing an alcohol test under this appendix, each employer shall notify a covered employee that the alcohol test is required by this appendix. No employer shall falsely represent that a test is administered under this appendix.

**II. Covered Employees**

Each employee who performs a function listed in this section directly or by contract for an employer as defined in this appendix must be subject to alcohol testing under an FAA-approved alcohol misuse prevention program implemented in accordance with this appendix. The covered safety-sensitive functions are:

1. Flight crewmember duties.
2. Flight attendant duties.
3. Flight instruction duties.
4. Aircraft dispatcher duties.
5. Aircraft maintenance or preventive maintenance duties.
6. Ground security coordinator duties.
7. Aviation screening duties.
8. Air traffic control duties.

**III. Tests Required**

**A. Pre-employment**

1. Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employee shall undergo testing for alcohol. No employer shall allow a covered employee to perform safety-sensitive functions unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04. If a pre-employment test result under this paragraph indicates an alcohol concentration of 0.02 or greater but less than 0.04, the provisions of paragraph F of section V of this appendix apply.

2. An employer is not required to administer an alcohol test as required by this paragraph if:

(a) The employee has undergone an alcohol test required by this appendix or the alcohol misuse rule of another DOT agency under 49 CFR part 40 within the previous 6 months, with a result indicating an alcohol concentration less than 0.04; and

(b) The employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of § 65.46a, 121.458, or 135.253 of this chapter or the alcohol misuse rule of another DOT agency within the previous 6 months

**B. Post-accident**

1. As soon as practicable following an accident, each employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the employer's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

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

3. A covered employee who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

**C. Random testing**

1. Except as provided in paragraphs 2-4 of this section, the minimum annual percentage rate for random alcohol testing will be 25 percent of the covered employees.

2. 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 this determination is drawn from alcohol MIS reports required by this appendix. 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.

3. (a) 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 this appendix for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(b) 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 this appendix 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.

4. (a) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of this appendix 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.

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

5. The selection of employees for random alcohol testing shall be made by a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

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

7. Each employer shall ensure that random alcohol tests conducted under this appendix are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

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

9. A covered employee shall only be randomly tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

10. If a given covered employee is subject to random alcohol testing under the alcohol

testing rules of more than one DOT agency, the employee shall be subject to random alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's functions.

11. If an employer is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the employer may—

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

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

#### *D. Reasonable Suspicion Testing*

1. An employer shall require a covered employee to submit to an alcohol test when the employer has reasonable suspicion to believe that the employee has violated the alcohol misuse prohibitions in § 65.46a, 121.458, or 135.253 of this chapter.

2. The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

3. Alcohol testing is authorized by this section only if the observations required by paragraph 2 are made during, just preceding, or just after the period of the work day that the covered employee is required to be in compliance with this rule. An employee may be directed by the employer to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

4. (a) If a test required by this section is not administered within 2 hours following the determination made under paragraph 2 of this section, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination made under paragraph 2 of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(b) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech, or performance indicators of alcohol misuse, nor shall an employer permit the covered employee to perform or continue to perform safety-sensitive functions until:

(1) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following the determination made under paragraph 2 of this section that there is reasonable suspicion that the employee has violated the alcohol misuse provisions in § 65.46a, 121.458, or 135.253 of this chapter.

(c) Except as provided in paragraph 4(b), no employer shall take any action under this appendix against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this appendix from taking any action otherwise consistent with law.

#### *E. Return to Duty Testing*

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in § 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

#### *F. Follow-up Testing*

Following a determination under section VI, paragraph C.2 of this appendix that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each employer shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of section VI, paragraph C.3(b)(2) of this appendix. A covered employee shall be tested under this paragraph only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

#### *G. Retesting of Covered Employees With an Alcohol Concentration of 0.02 or Greater but Less Than 0.04*

Each employer shall retest a covered employee to ensure compliance with the provisions of section V, paragraph F of this appendix, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

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

#### *A. Retention of Records*

1. *General Requirement.* Each employer shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

2. *Period of Retention.* Each employer shall maintain the records in accordance with the following schedule:

(a) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater,

documentation of refusals to take required alcohol tests, calibration documentation, employee evaluations and referrals, and copies of any annual reports submitted to the FAA under this appendix shall be maintained for a minimum of 5 years.

(b) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of 2 years.

(c) *One year.* Records of all test results below 0.02 shall be maintained for a minimum of 1 year.

3. *Types of Records.* The following specific records shall be maintained.

(a) Records related to the collection process:

(1) Collection logbooks, if used.

(2) Documents relating to the random selection process.

(3) Calibration documentation for evidential breath testing devices.

(4) Documentation of breath alcohol technician training.

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

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

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

(b) Records related to test results:

(1) The employer's copy of the alcohol test form, including the results of the test;

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

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

(c) Records related to other violations of §§ 65.46a, 121.448, or 135.253 of this chapter.

(d) Records related to evaluations:

(1) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(2) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

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

(e) Records related to education and training:

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

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

(3) 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.

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

### **B. Reporting of Results in a Management Information System**

1. Annual reports summarizing the results of alcohol misuse prevention programs shall be submitted to the FAA in the form and manner prescribed by the Administrator by March 15 of each year covering the previous calendar year (January 1 through December 31) in accordance with the provisions below.

(a) Each part 121 certificate holder shall submit an annual report each year.

(b) Each entity conducting an alcohol misuse prevention program under the provisions of this appendix, other than a part 121 certificate holder, that has 50 or more covered employees on January 1 of any calendar year shall submit an annual report to the FAA for that calendar year.

(c) The Administrator reserves the right to require employers not otherwise required to submit annual reports to prepare and submit such reports to the FAA. Employers that will be required to submit annual reports under this provision will be notified in writing by the FAA.

2. Each employer that is subject to more than one DOT agency alcohol rule shall 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 function. Prior to conducting any alcohol test on a covered employee subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

3. Each employer shall ensure the accuracy and timeliness of each report submitted.

4. Each report shall be submitted in the form and manner prescribed by the Administrator.

5. Each report shall be signed by the employer's alcohol misuse prevention program manager or other designated representative.

6. Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements:

(a) Number of covered employees by employee category.

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

(c)(1) Number of screening tests by type of test and employee category.

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

(d) Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04 by type of test and employee category.

(e) Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(f) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.

(g) Number of covered employees with a confirmation alcohol test indicating an

alcohol concentration of 0.04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).

(h) 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 0.04 or greater.

(i) Number of covered employees who were found to have violated other alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter, and the action taken in response to the violation.

(j) Number of covered employees who refused to submit to an alcohol test required under this appendix, the number of such refusals that were for random tests, and the action taken in response to each refusal.

(k) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

7. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)

(a) Number of covered employees by employee category.

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

(c) Number of screening tests by type of test and employee category.

(d) Number of covered employees who engaged in alcohol misuse who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).

(e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to each refusal.

(f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

8. An FAA-approved consortium may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a consortium.

### **C. Access to Records and Facilities**

1. Except as required by law or expressly authorized or required in this appendix, no employer shall release covered employee information that is contained in records required to be maintained under this appendix.

2. A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to

his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

3. Each employer shall make available copies of all results of alcohol testing conducted under this appendix and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee.

4. When requested by the National Transportation Safety Board as part of an accident investigation, each employer shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

5. Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

6. An employer may disclose information required to be maintained under this appendix pertaining to a covered employee to the employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from the results of an alcohol test administered under this appendix or from the employer's determination that the employee engaged in conduct prohibited under §§ 65.46a, 121.458, or 135.253 of this chapter (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

7. An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

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

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

#### **A. Removal From Safety-sensitive Function**

1. Except as provided in section VI of this appendix, no covered employee shall perform safety-sensitive functions if the employee has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter or an alcohol misuse rule of another DOT agency.

2. No employer shall permit any covered employee to perform safety-sensitive functions if the employer has determined that the employee has violated this paragraph.

**B. Permanent Disqualification From Service**

An employee who violates §§ 65.46a(c), 121.458(c), or 135.253(c) or who violates other alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter and had previously engaged in conduct that violated the provisions of §§ 65.46a, 121.458, or 135.253 of this chapter after March 18, 1994 is permanently precluded from performing for an employer the safety-sensitive duties the employee performed before such violation.

**C. Notice to the Federal Air Surgeon**

1. An employer who determines that a covered employee who holds an airman medical certificate issued under part 67 of this chapter has violated the provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall notify the Federal Air Surgeon within 2 working days.

2. Each such employer shall forward to the Federal Air Surgeon a copy of the report of any evaluation performed under the provisions of section VI of this appendix within 2 working days of the employer's receipt of the report.

3. All documents shall be sent to the Federal Air Surgeon, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 400 7th Street SW., Washington, DC 20590.

4. No covered employee who holds a part 67 airman medical certificate shall perform safety-sensitive duties for an employer following a violation until and unless the Federal Air Surgeon has recommended that the employee be permitted to perform such duties.

**D. Notice of Refusals**

1. Except as provided in subparagraph 2 of this paragraph, each employer shall notify the FAA of any covered employee who holds a certificate issued under part 61, part 63, or part 65 who has refused to submit to an alcohol test required under this appendix. Notifications should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airmen Certification Branch, AVN-460, P.O. Box 25082, Oklahoma City, OK 73125.

2. An employer is not required to notify the FAA of refusals to submit to pre-employment alcohol tests or refusals to submit to return to duty tests.

**E. Required Evaluation and Testing**

No covered employee who has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter shall perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. No employer shall permit a covered employee who has engaged in such conduct to perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix.

**F. Other Alcohol-Related Conduct**

1. No covered employee tested under the provisions of section III of this appendix who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-

sensitive functions for an employer, nor shall an employer permit the employee to perform or continue to perform safety-sensitive functions, until:

(a) The employee's alcohol concentration measures less than 0.02; or

(b) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following administration of the test.

2. Except as provided in subparagraph 1 of this paragraph, no employer shall take any action under this rule against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this rule from taking any action otherwise consistent with law.

**VI. Alcohol Misuse Information, Training, and Referral****A. Employer Obligation to Promulgate a Policy on the Misuse of Alcohol**

1. *General requirements.* Each employer shall provide educational materials that explain these alcohol misuse requirements and the employer's policies and procedures with respect to meeting those requirements.

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

(b) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

2. *Required content.* The materials to be made available to employees shall include detailed discussion of at least the following:

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

(b) The categories of employees who are subject to the provisions of these alcohol misuse requirements.

(c) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with these alcohol misuse requirements.

(d) Specific information concerning employee conduct that is prohibited by this chapter.

(e) The circumstances under which a covered employee will be tested for alcohol under this appendix.

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

(g) The requirement that a covered employee submit to alcohol tests administered in accordance with this appendix.

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

(i) The consequences for covered employees found to have violated the

prohibitions in this chapter, including the requirement that the employee be removed immediately from performing safety-sensitive functions, and the procedures under section VI of this appendix.

(j) The consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(k) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem; and available methods of evaluating and resolving problems associated with the misuse of alcohol; and intervening when an alcohol problem is suspected, including confrontation, referral to any available employee assistance program, and/or referral to management.

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

**B. Training for Supervisors**

Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under section II of this appendix receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

**C. Referral, Evaluation, and Treatment**

1. Each covered employee who has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter shall be advised by the employer of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

2. Each covered employee who engages in conduct prohibited under §§ 65.46a, 121.458, or 135.253 of this chapter shall be evaluated by a substance abuse professional who must determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

3. (a) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine whether the employee has properly followed any rehabilitation program prescribed under subparagraph 2 of this paragraph, and;

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the employer following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. The employer may direct the employee to undergo testing for drugs (both return to duty and follow-up), in addition to alcohol testing, if the substance abuse professional determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

4. Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

5. Each employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(a) A public agency, such as a State, county, or municipality;

(b) The employer or a person under contract to provide treatment for alcohol problems on behalf of the employer;

(c) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(d) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

6. The requirements of this paragraph with respect to referral, evaluation, and rehabilitation do not apply to applicants who refuse to submit to pre-employment testing or have a pre-employment test with a result indicating an alcohol concentration of 0.04 or greater.

## VII. Employer's Alcohol Misuse Prevention Program

### A. Schedule for Submission of Certification Statements and Implementation

1. Each employer shall submit an alcohol misuse prevention program (AMPP) certification statement as prescribed in paragraph B of section VII of this appendix, in duplicate, to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 400 7th Street SW., Washington, DC

20590, in accordance with the schedule below.

(a) Each employer that holds a part 121 certificate, each employer that holds a part 135 certificate and directly employs more than 50 covered employees, and each air traffic control facility affected by this rule shall submit a certification statement to the FAA by July 1, 1994. Each employer must implement an AMPP meeting the requirements of this appendix on January 1, 1995. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by July 1, 1995.

(b) Each employer that holds a part 135 certificate and directly employs from 11 to 50 covered employees shall submit a certification statement to the FAA by January 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix on July 1, 1995. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by January 1, 1996.

(c) Each employer that holds a part 135 certificate and directly employs ten or fewer covered employees, and each operator as defined in 14 CFR 135.1(c) shall submit a certification statement to the FAA by July 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix on January 1, 1996. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by July 1, 1996.

2. A company providing covered employees by contract to employers may be authorized by the FAA to establish an AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each contractor company that establishes an AMPP shall implement its AMPP in accordance with the provisions of this appendix.

(a) The FAA may revoke its authorization in the case of any contractor company that fails to properly implement its AMPP.

(b) No employer shall use a contractor company's employee who is not subject to the employer's AMPP unless the employer has first determined that the employee is subject to another FAA-mandated AMPP.

3. A consortium may be authorized to establish a consortium AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each consortium that so certifies shall implement the AMPP on behalf of the consortium members in accordance with the provisions of this appendix.

(a) The FAA may revoke its authorization in the case of any consortium that fails to properly implement the AMPP.

(b) Each employer that participates in an FAA-approved consortium remains individually responsible for ensuring compliance with the provisions of these alcohol misuse requirements and must maintain all records required under section IV of this appendix.

(c) Each consortium shall notify the FAA of any membership termination within 10 days of such termination.

4. Any person who applies for a certificate under the provisions of parts 121 or 135 of this chapter after the effective date of the final rule shall submit an alcohol misuse prevention program (AMPP) certification statement to the FAA prior to beginning operations pursuant to the certificate. The AMPP shall be implemented concurrently with beginning such operations or on the date specified in paragraph A.1. of this section, whichever is later. Contractor employees to a new certificate holder must be subject to an FAA-mandated AMPP within 180 days of the implementation of the employer's AMPP.

5. Any person who intends to begin air traffic control operations as an employer as defined in 14 CFR 65.46(a)(2) (air traffic control facilities not operated by the FAA or by or under contract to the U.S. military) after March 18, 1994 shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or on the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new air traffic control facility must be subject to an FAA-approved program within 180 days of the implementation of the facility's program.

6. Any person who intends to begin sightseeing operations as an operator under 14 CFR 135.1(c) after March 18, 1994 shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program (AMPP) certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or on the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new operator must be subject to an FAA-mandated AMPP within 180 days of the implementation of the employer's AMPP.

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

8. Each consortium that submits an AMPP certification statement to the FAA must receive actual notice of the FAA's receipt of the statement prior to performing services as an FAA-approved consortium under this appendix on behalf of employers or contractor companies.

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

**B. Required Content of AMPP Certification Statements**

1. Each AMPP certification statement submitted by an employer or a contractor company shall provide the following information:

(a) The name, address, and telephone number of the employer/contractor company and for the employer/contractor company AMPP manager;

(b) FAA operating certificate number (if applicable);

(c) The date on which the employer or contractor company will implement its AMPP;

(d) If the submitter is a consortium member, the identity of the consortium; and

(e) A statement signed by an authorized representative of the employer or contractor company certifying an understanding of and agreement to comply with the provisions of the FAA's alcohol misuse prevention regulations.

2. Each consortium certification statement shall provide the following information.

(a) The name, address, and telephone number of the consortium's AMPP manager;

(b) A list of the specific services the consortium will be providing in implementation of FAA-mandated AMPPs (e.g., random testing, SAP).

(c) A statement signed by an authorized representative of the consortium certifying an understanding of and agreement to comply with the provisions of the FAA's alcohol misuse prevention regulations.

**VIII. Employees Located Outside the U.S.**

A. No covered employee shall be tested for alcohol misuse while located outside the territory of the United States.

1. Each covered employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

2. Each covered employee who is removed from the random testing pool under this paragraph shall be returned to the random testing pool when the employee resumes the performance of safety-sensitive functions wholly or partially within the territory of the United States.

B. The provisions of this appendix shall not apply to any person who performs a safety-sensitive function by contract for an employer outside the territory of the United States.

**PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS**

13. The authority citation for part 135 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421–1431, and 1502 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

14. In § 135.1 paragraphs (c) and (d) are revised to read as follows:

**§ 135.1 Applicability.**

(c) For the purpose of §§ 135.249, 135.251, 135.253, 135.255, and 135.353, operator means any person or entity conducting non-stop sightseeing flights for compensation or hire in an airplane or rotorcraft that begin and end at the same airport and are conducted within a 25 statute mile radius of that airport.

(d) Notwithstanding the provisions of this part and appendices I and J to part 121 of this chapter, an operator who does not hold a part 121 or part 135 certificate is permitted to use a person who is otherwise authorized to perform aircraft maintenance or preventive maintenance duties and who is not subject to FAA-approved anti-drug and alcohol misuse prevention programs to perform—

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would otherwise be required to transport the aircraft more than 50 nautical miles further than the repair point closest to operator's principal place of operation to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to FAA-approved programs can perform the repairs.

15. Section 135.253 is added to subpart E to read as follows:

**§ 135.253 Misuse of alcohol.**

(a) This section applies to employees who perform a function listed in appendix J to part 121 of this chapter for a certificate holder or operator (covered employees). For the purpose of this section, a person who meets the definition of covered employee in

appendix J is considered to be performing the function for the certificate holder or operator.

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No certificate holder or operator having actual knowledge that an employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder or operator having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(d) *Pre-duty use.* (1) No covered employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder or operator having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No covered employee shall perform safety-sensitive duties other than those specified in paragraph (d)(1) of this section within 4 hours after using alcohol. No certificate holder or operator having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(e) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of part 121 of this chapter, or the employer has determined that the employee's performance could not have contributed to the accident.

**(f) Refusal to submit to a required alcohol test.** No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to part 121 of this chapter. No operator or certificate holder shall permit a covered employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

16. Section 135.255 is added to subpart E to read as follows:

**§ 135.255 Testing for alcohol.**

(a) Each certificate holder and operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter.

(b) No certificate holder or operator shall use any person who meets the definition of "covered employee" in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

Issued in Washington, DC, on January 25, 1994.

**Federico Pena,**  
*Secretary of Transportation.*  
**David R. Hinson,**  
*Administrator.*

**Note:** These exhibits will not appear in the Code of Federal Regulations.

### Exhibits—FAA Alcohol Testing Management Information System Data Collection Forms

ATTENTION CODE 4910-13-P

**ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)**  
**DATA COLLECTION FORM**

**INSTRUCTIONS**

The following instructions are to be used as a guide for completing the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) **Alcohol Testing MIS Data Collection Form**. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample applicant testing results table with a narrative explanation is provided on pages iii-iv as an example to facilitate the process of completing the form correctly.

This reporting form includes five sections. These sections address the data elements required in the FAA and the DOT alcohol testing regulations. The five sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. AVIATION EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i-ii	1
C. ALCOHOL TESTING INFORMATION	ii-v	2-4
D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION	v	4-5
E. ALCOHOL TRAINING/EDUCATION	v	5

**Page 1** **AVIATION EMPLOYER INFORMATION** (Section A) requires the company name for which the report is prepared and a current address. Below the company names, list any other names the company uses ("Doing Business As") and the company's FAA Plan Identification Number. Provide the FAA Operating Certificate Number held by the company (if any). Below the company name, list the name, address, and telephone number for any other aviation companies covered under the report, attaching additional sheets, if necessary. Finally, a signature and title with a date, are required certifying the correctness and completeness of the information provided on the form, and a current telephone number (including the area code) of the individual who prepared the report.

**Page 1** **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FAA/DOT regulations. For the FAA, the covered employee categories are: "Flight Crewmember" which includes pilots, flight engineers, and navigators; "Flight Attendant"; "Flight Instructor"; "Aircraft Dispatcher"; "Maintenance", which includes employees who perform preventive maintenance; "Ground Security Coordinator"; "Aviation Screener"; and "Air Traffic Controller." The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the

reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if your company employs FAA covered personnel who also perform non-aviation duties covered by the alcohol rules of one or more DOT operating administration(s). **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

Page 2

**ALCOHOL TESTING INFORMATION** (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the applicant was applying. The other categories are for employee testing and require information for company employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. If the value for an item is zero (0), place a zero (0) on the form. These numbers **do not** include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first column with the heading "**NUMBER OF SCREENING TESTS**," requires a count of all screening alcohol tests performed for each employee category. It should not include refusals to test.

The second column with the heading "**NUMBER OF CONFIRMATION TESTS**," requires a count of all confirmation alcohol tests performed for each employee category.

The third column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**," requires a count for each employee category of test results equal to or greater than 0.02, but less than 0.04.

The fourth column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04**," requires a count for each employee category of test results equal to or greater than 0.04. **Note: An employee may not return to a safety sensitive position if a result is equal to or greater than 0.02. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all return to duty results in the third column of the table.**

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page iv with example numbers.

Page 2 Below the part of the table containing pre-employment testing information is a box with the heading "Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater". Enter the appropriate number in the box provided.

### SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, **ALCOHOL TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Flight Crewmember" and "Flight Attendant" to illustrate the procedures for completing the form.

**A** Screening tests were performed on 157 job applicants for flight crewmember positions during the reporting year. This information is entered in the first column of the table in the row marked "Flight Crewmember".

**B** Confirmation tests were necessary for 6 of the 157 applicants for flight crewmember positions. Enter this information in the second column of the table in the row marked "Flight Crewmember". The confirmation test results for these 6 applicants were the following:

<u>Applicant</u>	<u>Confirmation Result</u>
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

**C** The confirmation test results for 2 of the applicants for flight crewmember positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the third column of the table in the row marked "Flight Crewmember".

**D** The confirmation test results for 3 of the applicants for flight crewmember positions were equal to or greater than 0.04. Enter this information in the fourth column of the table in the row marked "Flight Crewmember".

**E** The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for flight crewmember positions and 107 applicants for flight attendant positions were subjected to screening tests. The total for that column would be 264 (i.e.,  $157 + 107$ ). The same procedure should be used for each column (i.e., add all the numbers in that column and place the answer in the last row).

Please note that the sample data collection form also has information for flight attendants workers on line two. The same procedures outlined for flight crewmember should be followed

for entering the data on flight attendants. With applicants for flight attendant positions, 107 screening tests were conducted resulting in 3 confirmation tests. No results were equal to or greater than 0.02, but less than 0.04; the confirmation test result for 1 of the flight attendant applicants was equal to or greater than 0.04. This information is entered in the row marked "Flight Attendant".

PRE-EMPLOYMENT				
EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
Flight Crewmember	157	6	2	3
Flight Attendant	107	3	0	1
TOTAL	264	9	2	4

A
B
C
D
E

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

Page 3

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, your must provide the "Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations)". This information should be available from the personnel office and/or drug or alcohol program manager.

Page 4

Next you must provide information on **ACTIONS TAKEN ON VIOLATIONS OF THIS REGULATION**. Indicate the number of employees subjected to the following actions:

- **No longer employed with company** - include covered employees who resigned or were terminated as the result of alcohol misuse.

- **Reassigned to non-covered functions** - include covered employees who were reassigned within the company to a non-covered position as the result of alcohol misuse.
- **Entered rehabilitation, if applicable, and/or returned to covered functions** - include covered employees who are undergoing or have completed a rehabilitation program and/or covered employees who have returned to a covered function.
- **Other** - include covered employees who did not fall under one of the previous options and specify the action taken.

Indicate the sum of the actions taken on the line marked TOTAL.

Page 4 **OTHER ALCOHOL TESTING/PROGRAM INFORMATION** (Section D) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 4 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 4 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. Other violations not delineated in this table may also be provided.

Page 5 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a **random or other** (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FAA regulation and the actions taken following the refusal.

Page 5 **ALCOHOL TRAINING/EDUCATION** (Section E) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

## FAA ALCOHOL TESTING MIS DATA COLLECTION FORM

OMB No. 2120-0535

YEAR COVERED BY THIS REPORT: 19\_\_

## A. AVIATION EMPLOYER INFORMATION

Company Name		FAA Plan No.
Street Address/P.O. Box		FAA Certificate No.
City	State	Zip Code

Other Part 121 and/or Part 135 certificate holders included in this report. (Attach additional sheets if necessary.)

Company Name		Telephone No.
Street Address/P.O. Box		
City	State	Zip Code

I, the undersigned, certify that the information provided on this Federal Aviation Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

\_\_\_\_\_  
Signature\_\_\_\_\_  
Date\_\_\_\_\_  
Title\_\_\_\_\_  
Telephone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Aviation Administration estimates that the average burden for this report form is 2.5 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: FAA Drug Abatement Division (AAM-800); U.S. Department of Transportation; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2120-0535); Washington, D.C. 20503.

## B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF FAA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FHWA	FRA	FTA	RSPA	USCG
Flight Crewmember						
Flight Attendant						
Flight Instructor						
Aircraft Dispatcher						
Maintenance						
Ground Security Coordinator						
Aviation Screener						
Air Traffic Controller						
TOTAL						

## READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).
2. This report is only for testing REQUIRED BY THE FEDERAL AVIATION ADMINISTRATION (FAA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT):
  - Results should be reported only for employees in COVERED POSITIONS as defined by the FAA alcohol testing regulations.
  - The information provided should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in Section D ["OTHER ALCOHOL TESTING/PROGRAM INFORMATION"]. Do not include refusals for testing in other sections of this report.
4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

## C. ALCOHOL TESTING INFORMATION

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
PRE-EMPLOYMENT				
Flight Crewmember				
Flight Attendant				
Flight Instructor				
Aircraft Dispatcher				
Maintenance				
Ground Security Coordinator				
Aviation Screener				
Air Traffic Controller				
Total				
RANDOM				
Flight Crewmember				
Flight Attendant				
Flight Instructor				
Aircraft Dispatcher				
Maintenance				
Ground Security Coordinator				
Aviation Screener				
Air Traffic Controller				
Total				

Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater:

## C. ALCOHOL TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
POST-ACCIDENT				
Flight Crewmember				
Flight Attendant				
Flight Instructor				
Aircraft Dispatcher				
Maintenance				
Ground Security Coordinator				
Aviation Screener				
Air Traffic Controller				
Total				
REASONABLE SUSPICION				
Flight Crewmember				
Flight Attendant				
Flight Instructor				
Aircraft Dispatcher				
Maintenance				
Ground Security Coordinator				
Aviation Screener				
Air Traffic Controller				
Total				
RETURN TO DUTY				
Flight Crewmember				
Flight Attendant				
Flight Instructor				
Aircraft Dispatcher				
Maintenance				
Ground Security Coordinator				
Aviation Screener				
Air Traffic Controller				
Total				

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations):

## C. ALCOHOL TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
FOLLOW-UP				
Flight Crewmember				
Flight Attendant				
Flight Instructor				
Aircraft Dispatcher				
Maintenance				
Ground Security Coordinator				
Aviation Screener				
Air Traffic Controller				
Total				

ACTIONS TAKEN ON VIOLATIONS OF THIS REGULATION	Number
No longer employed with company:	
Reassigned to non-covered functions:	
Entered rehabilitation, if applicable, and/or returned to covered functions:	
Other (specify):	
TOTAL	

## D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:	
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VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION	
NUMBER OF COVERED EMPLOYEES	VIOLATION
	Covered employee used alcohol while performing safety-sensitive function.
	Covered employee used alcohol within 4/8 hours of performing safety-sensitive function.
	Covered employee used alcohol before taking a required post-accident alcohol test.

## D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION (cont.)

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	NUMBER OF REFUSALS	
	RANDOM TESTS	OTHER TESTS
Number of covered employees who refused to submit to an alcohol test required under the FAA rule:		
ACTION TAKEN	NUMBER	
No longer employed with company:		
Reassigned to non-covered functions:		
Entered rehabilitation, if applicable, and/or returned to covered functions:		
Other (specify):		

## E. ALCOHOL TRAINING/EDUCATION

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FAA alcohol testing regulations:	

**ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)**  
**"EZ" DATA COLLECTION FORM**

**INSTRUCTIONS**

The following instructions are to be used as a guide for completing the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there are no screening tests with results equal to or greater than 0.02 and no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes three sections. These sections address the data elements required in the FAA/DOT alcohol testing regulations.

**SECTION A - AVIATION EMPLOYER INFORMATION** requires the company name for which the report is prepared, a current address, the company's FAA Plan Identification Number, and the FAA Operating Certificate Number held by the company (if any). Below the company name, list the name, address, and telephone number for any other aviation companies covered under the report, attaching additional sheets, if necessary. Finally, a signature and title with a date are required certifying the correctness and completeness of the information provided on the form, and a current telephone number (including the area code) of the individual who prepared the report.

**SECTION B - COVERED EMPLOYEES** requires a count for each employee category that must be tested under the FAA/DOT regulations. For the FAA, the covered employee categories are: "Flight Crewmember", which includes pilots, flight engineers, and navigators; "Flight Attendant"; "Flight Instructor"; "Aircraft Dispatcher"; "Maintenance", which includes employees who perform preventive maintenance; "Ground Security Coordinator"; "Aviation Screener"; and "Air Traffic Controller." The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if your company employs FAA covered personnel who also perform non-aviation duties covered by the alcohol rules of one or more other DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

**SECTION C - ALCOHOL TESTING INFORMATION** requires information for alcohol testing. The first table requests information on the **NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED** by employee category and type of test. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the applicant was applying. The other categories are for employee testing and require information for company employees in covered positions only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. The testing categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. If no testing occurred zeroes should be entered. These numbers do not include refusals for testing. Each column in the table should be added and the answer entered in the row marked **"TOTAL"**.

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, you must provide a count of the number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations). This information should be available from the personnel office and/or alcohol program manager.

**SECTION D - OTHER ALCOHOL TESTING/PROGRAM INFORMATION** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a random or other (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FAA regulation and the action taken following the refusal. Indicate the number of employees subjected to the following actions:

- **No longer employed with company** - include covered employees who resigned or were terminated as the result of a refusal to submit to an alcohol test.
- **Reassigned to non-covered functions** - include covered employees who were reassigned within the company to a non-covered position as the result of a refusal to submit to an alcohol test.
- **Entered rehabilitation, if applicable, and/or returned to covered functions** - include covered employees who are undergoing or have completed a rehabilitation program and/or covered employees who have returned to a covered function.
- **Other** - include covered employees who did not fall under one of the previous options and specify the actions taken.

**SECTION E - ALCOHOL TRAINING/EDUCATION** requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

**FAA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM**  
 (No Alcohol Misuse)

OMB No. 2120-0535

YEAR COVERED BY THIS REPORT: 19\_\_

**A. AVIATION EMPLOYER INFORMATION**

Company Name		FAA Plan No.
		FAA Certificate No.
Street Address/P.O. Box		
City	State	Zip Code

Other Part 121 and/or Part 135 certificate holders included in this report. (Attach additional sheets if necessary.)

Company Name		Telephone No.
		( )
Street Address/P.O. Box		
City	State	Zip Code

I, the undersigned, certify that the information provided on this Federal Aviation Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature

Date

Title

Telephone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Aviation Administration estimates that the average burden for this report form is 1 hour. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: FAA Drug Abatement Division (AAM-800); U.S. Department of Transportation; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2120-0535); Washington, D.C. 20503.

**B. COVERED EMPLOYEES**

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF FAA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FHWA	FRA	FTA	RSPA	USCG
Flight Crewmember						
Flight Attendant						
Flight Instructor						
Aircraft Dispatcher						
Maintenance						
Ground Security Coordinator						
Aviation Screener						
Air Traffic Controller						
TOTAL						

## C. ALCOHOL TESTING INFORMATION

NUMBER OF SCREENING TESTS CONDUCTED						
EMPLOYEE CATEGORY	PRE-EMPLOYMENT	RANDOM	POST-ACCIDENT	REASONABLE SUSPICION	RETURN TO DUTY	FOLLOW-UP
Flight Crewmember						
Flight Attendant						
Flight Instructor						
Aircraft Dispatcher						
Maintenance						
Ground Security Coordinator						
Aviation Screener						
Air Traffic Controller						
Total						

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations):

## D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	NUMBER OF REFUSALS	
	RANDOM TESTS	OTHER TESTS
Number of covered employees who refused to submit to an alcohol test required under the FAA rule:		
ACTION TAKEN	NUMBER	
No longer employed with company:		
Reassigned to non-covered functions:		
Entered rehabilitation, if applicable, and/or returned to covered functions:		
Other (specify):		

## E. ALCOHOL TRAINING/EDUCATION

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FAA alcohol testing regulations:	

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Parts 65, 121, 135**

[Docket No. 25148; Notice No. 94-3]

RIN 2120-AC33

**Antidrug Program for Personnel Engaged in Specified Aviation Activities****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** On November 14, 1988, the FAA issued a final rule requiring specified aviation employers and operators to initiate antidrug programs, including drug testing, for personnel performing specified safety-related functions. Subsequently, on October 28, 1991, the Omnibus Transportation Employee Testing Act of 1991 (the Act) was enacted. Among other things, the Act provided a statutory mandate for drug testing in the aviation industry and required specific consequences for positive drug tests. This NPRM proposes amendments to certain provisions of the FAA's antidrug rule to comply with the Act. The NPRM also proposes certain other changes to the antidrug rule that would clarify employer and medical review officer (MRO) responsibilities or address other issues that have been identified since the promulgation of the rule. These amending changes would facilitate implementation and enforcement of the final rule.

**DATES:** Comments must be received on or before April 18, 1994.

**ADDRESSES:** Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 25148, 800 Independence Avenue, SW., Washington, DC 20591. Comments that are delivered to this address must be marked "Docket No. 25148." Comments may be examined in room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Ms. Julie B. Murdoch, Office of Aviation Medicine, Drug Abatement Division (AAM-800), Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590; telephone (202) 366-6710.

**SUPPLEMENTARY INFORMATION:****Availability of NPRM**

Any person may obtain a copy of this NPRM by submitting a request to the

Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the notice number of this NPRM.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

**Background**

On November 21, 1988, the FAA issued its final antidrug rule requiring certain aviation employers and operators to develop and to implement an antidrug program for employees performing specified aviation activities (53 FR 47024). Initially, the rule was issued under the general authority of the FAA Administrator to promulgate regulations relating to aviation safety; however, the Omnibus Transportation Employee Testing Act of 1991 (the Act) amended the Federal Aviation Act of 1958 (the FAA Act) to provide a statutory mandate for drug testing of air carrier employees. The Act also prescribed certain consequences for prohibited drug use and mandated the use of split specimen testing. This notice proposes changes to the antidrug rule that would conform the rule to the requirements of the Act.

In addition to the conforming changes required by the Act, this notice also proposes certain other changes to the antidrug rule. Each of these changes would clarify the requirements of the rule, or otherwise address concerns that have been raised since the rule was published. Although the FAA has issued a number of amendments to the rule, most of these amendments simply deferred the various compliance deadlines or effective dates contained in the rule. This notice includes substantive changes to address provisions of the rule that are in some cases unclear, do not comport with the changes in the final DOT drug testing procedures issued on December 1, 1989, or do not adequately address required steps in the implementation process.

Many of the issues underlying the proposed changes were raised by employers implementing the rule, by physicians performing MRO functions, and by other federal agencies. After studying these issues, the FAA determined that the needs of the industry would best be served by the amendments proposed in this rulemaking action. The amendments would also meet the needs of public

safety, and facilitate the compliance and enforcement mandate of the FAA.

**Discussion of the Proposed Amendments**

This rulemaking action encompasses a variety of proposed changes to the FAA's antidrug regulations, most of which would affect the operational provisions of the antidrug rule found in 14 CFR part 121, appendix I. These changes range from minor technical changes to a complete revision of the MRO provisions. Each of the proposed changes is discussed in detail below.

**Amendments Required by the Act****Prohibition on Service; Rehabilitation and Evaluation**

Among the amendments to the FAA Act in the Omnibus Transportation Employee Testing Act is a section entitled "Prohibition on service" (found at new FAA Act section 614(b)), which provides that no person who is determined to have engaged in illegal drug use may perform a safety-sensitive function after such determination. The FAA's regulations that address use of prohibited drugs (see, e.g., 14 CFR 65.46(c), (d)) already include such a prohibition on continued duty; however, these sections would be revised slightly to reflect the fact that entities other than certificate holders (i.e., contractor companies) can require drug tests under the antidrug rule if they have an FAA-approved antidrug program.

Section 614(b)(2) of the FAA Act, "Effect of Rehabilitation," states that no covered employee may perform a safety-sensitive function after engaging in prohibited conduct unless he or she has completed a rehabilitation program under the provisions of section 614(c) of the FAA Act. Section 614(c)(1) requires the Administrator to prescribe regulations that at a minimum provide for the identification and opportunity for treatment of employees in need of assistance in resolving problems with the use of controlled substances. Further, the section states that the Administrator shall determine the circumstances under which such employees shall be required to participate in such a program. This language recognizes that rehabilitation may not be appropriate or warranted in all cases of prohibited conduct.

The legislative requirement of section 614(b)(2) is implemented in the proposed revisions to paragraph A, section VII, of appendix I. The legislative history of the Act reflected the fact that the FAA did not prescribe regulations with respect to specific