

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 121****Coast Guard****46 CFR Part 16****Research and Special Programs Administration****49 CFR Part 199****Federal Railroad Administration****49 CFR Part 219****Federal Highway Administration****49 CFR Part 382****Federal Transit Administration****49 CFR Part 653**

[OST Docket No. 48498]

RIN 2105-AB94

Random Drug Testing Program

AGENCIES: Office of the Secretary Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, Research and Special Programs Administration, and the United States Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: In response to public comments, petitions submitted by industry, and on their own initiative, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), the Research and Special Programs Administration (RSPA), and the United States Coast Guard (USCG) (the operating administrations or "OAs") have revised their random drug testing rules. As revised, the rules provide that the OA may lower the minimum random drug testing rate to 25 percent if the industry-wide (e.g., aviation, rail) random positive rate is less than 1.0 percent for 2 calendar years while testing at 50 percent. The rate will return to 50 percent if the industry random positive rate is 1.0 percent or higher in any subsequent calendar year. The industry-wide random positive rate for each transportation industry will be calculated from data submitted to the OAs and announced yearly by the respective Administrator or the Commandant of the Coast Guard. Based

on this revision, the random drug testing rate for the railroad and aviation industries is reduced by the FRA and FAA Administrators, respectively to 25 percent, effective January 1, 1995.

DATES: This rule is effective January 1, 1995.

FOR FURTHER INFORMATION CONTACT: For general questions, the Office of Drug Enforcement and Program Compliance, (202) 366-3784; For questions regarding a specific operating administration, please call the following people: FTA—Judy Meade (202) 366-2896, FRA—Lamar Allen (202) 366-0127, FHWA—David Miller (202) 366-2981, RSPA—Catrina Pavlik (202) 366-6223, FAA—Bill McAndrew (202) 366-6710, USCG—LCDR Mark Grossetti (202) 267-1421.

SUPPLEMENTARY INFORMATION:**Current Drug Testing Requirements**

In 1988, the Department of Transportation issued six final rules mandating anti drug programs for certain transportation workers in the aviation, interstate motor carrier, pipeline, maritime and transit industries, and expanded the requirements of the existing FRA rule. The rules included requirements for education, training, testing and sanctions. The testing component of each program included pre-employment, post-accident, reasonable suspicion (reasonable cause), periodic (for those subject to periodic medical examinations), random, and return to duty drug testing for approximately four million workers in safety-sensitive positions. After a phase-in of one year, the random testing provisions of the rule required a minimum testing rate of at least 50 percent per year. Implementation of the testing requirements was delayed in FTA and FHWA due to litigation. Employers regulated by FHWA began random testing of interstate drivers in 1991 and 1992, and will begin random testing of intrastate drivers in 1995 and 1996. FTA will begin random testing of large transit operators in 1995 and small transit operators in 1996.

Current Alcohol Testing Requirements

On February 15, 1994 (59 FR 7302), the FAA, FHWA, FRA, FTA and RSPA published final rules limiting alcohol use by transportation workers. Four of the OA rules (FAA, FHWA, FRA and FTA) were required by the Omnibus Transportation Employee Testing Act of 1991. RSPA adopted similar, but more limited requirements, based on its own statutory authority.

The FAA, FHWA, FRA and FTA rules require random testing of safety-sensitive employees in those industries. The rules provide for an initial minimum random alcohol testing rate of 25 percent. The industry's (e.g., aviation, motor carrier, rail or transit) random alcohol rate may be adjusted based on a performance standard related to its random alcohol violation rate. Because of safety concerns, two years of data are necessary to justify lowering the random alcohol testing rate; one year of data is sufficient to raise it. The OA (in conjunction with the OST Office of Drug Enforcement and Program Compliance) will review the data and announce in the *Federal Register* the minimum annual random alcohol testing rate applicable in the calendar year following publication. If the industry violation rate is 1 percent or greater during a given year, the random alcohol testing rate will be 50 percent for the calendar year following the OA Administrator's announcement that the rate must change. If the industry violation rate is less than 1 percent but greater than 0.5 percent during a given year (for two years if currently at 50 percent), the random alcohol testing rate will be 25 percent for the calendar year following the OA Administrator's announcement that the rate must change. If the industry violation rate is less than 0.5 percent during a given year (for two years if testing at a higher rate), the random alcohol testing rate will be 10 percent the next calendar year.

The ANPRM

On December 15, 1992 (57 FR 59778), DOT published an advance notice of proposed rulemaking (ANPRM) requesting public comment and submission of data concerning whether there are less costly alternatives to the current random testing program that can maintain an adequate level of deterrence and detection of illegal drug use. The ANPRM asked for comment on a number of alternatives to the current 50 percent random testing rate that DOT could consider. These alternatives included:

- (1) Making an across-the-board modification of the rate for all DOT anti-drug programs;
- (2) Modifying how the random testing rate is implemented (e.g., frequency of testing, etc.);
- (3) Making a selective modification of the rate by:
 - (a) operating administration (e.g., FAA or FRA could modify its rate);
 - (b) job category (e.g., pilots, train engineers);
 - (c) any other category that warranted a different rate based on drug use

prevalence or other factors (e.g., age or geographic region);

(4) Establishing a performance standard program;

(5) Permitting employers who take specified additional steps to deter drug use to reduce their random testing rate;

(6) Modifying the random testing rate for all operating administration rules for a specific time period, subject to reconsideration after the results are analyzed;

(7) Conducting demonstration programs in each operating administration before further action is taken; or

(8) Combining some of the alternatives.

Comments to the ANPRM

Over 115 comments were filed in response to the ANPRM. Commenters included governmental agencies, trade associations, regulated entities, unions, contractors and consultants, and individuals. Suggestions ranged from abolition of all random testing requirements to greatly increasing the current 50 percent testing rate.

About two-thirds of the commenters favored a random testing rate of 25 percent or less. These commenters argued that the drug problem is not as widespread as originally believed, and that a 25 percent rate would provide substantial savings while maintaining a serious deterrent effect. Many focused on the cost of the current program and argued that the savings from reducing the incremental number of tests and associated non-productive time would be significant. Others took a broader view and noted that other types of tests, training and education were also deterrents.

Over a dozen commenters supported the current minimum 50 percent random testing rate. They argued that a decrease in the testing rate would increase recreational drug use and undermine the deterrent purpose of the program. Several stated that the data were inadequate to justify a reduction and that costs would not drop because the lower volume would result in higher per test costs. Others took an "if it ain't broke, don't fix it" attitude.

A few commenters argued that the rate should be increased. These commenters stated that a greater perception of getting caught would result in less drug use. One noted that at a 50 percent testing rate, some employees are never tested while others are tested two or more times per year.

In terms of a triggering group, most favored an industry-wide approach. There was some support for setting the rate by job categories tempered by the

concern that such differentiation not be arbitrary. A few commenters suggested that employers should have flexibility to set the rate at whatever level they thought best, based on their own past experience.

Technical Meeting

The Department held a public meeting on technical issues related to workplace random testing in Washington, DC, on February 1 and 2, 1993. The meeting, which included presentations by experts from federal agencies, the military, academia, and private industry, was attended by over 200 people. Transcripts of the meeting are included in the docket.

The NPRM

The Department published a notice of proposed rulemaking (NPRM) on February 15, 1994, (59 FR 7614). The NPRM proposed that the random testing rate could be lowered to 25 percent by an operating administration if the industry-wide random positive rate were less than 1.0 percent for 2 consecutive calendar years while testing at 50 percent. The rate would increase back to 50 percent if the industry random positive rate were 1.0 percent or higher for any entire subsequent calendar year. Under the proposal, it was possible that different industries would be subject to different rates in a given calendar year. The NPRM asked for comment on a variety of ways to fine tune this basic approach.

The NPRM also proposed that each year each Administrator (or Commandant of the Coast Guard) would publish in the Federal Register the minimum required percentage for random testing of covered employees during the calendar year following publication. Any random testing rate change indicated by industry performance would then occur at the beginning of that calendar year.

In the NPRM, the Administrator's decision to authorize a decrease (or to require a return to the 50 percent rate) would be based on the overall positive rate in the industry. The primary source of data would be the Management Information System (MIS) reports from covered employers submitted to the individual operating administrations. For the aviation and rail industries, for years prior to the MIS reports, we proposed initially to rely on the data submitted under reporting requirements that have been in place since FAA's and FRA's random drug testing rules were originally issued.

The NPRM proposed that, if a given covered employee were subject to random drug testing under the drug

testing rules of more than one DOT agency, the employee would be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's safety-sensitive functions. Similarly, the NPRM provided that if an employer were required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer could either establish separate pools for random selection, with each pool containing covered employees subject to testing at the same required rate, or establish one pool for testing all covered employees at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

The proposal included several provisions to provide employers greater flexibility or to provide greater clarity. In addition, RSPA and USCG proposed minor amendments to conform their rule to the Departmental system and eliminate unnecessary provisions.

Comments to the NPRM

There were approximately 70 comments filed. (Some commenters filed identical, or very similar, comments in different dockets or several times during the rulemaking.)

Approximately forty comments were filed by aviation commenters, nine by the motor carrier industry, eight by maritime interests, seven by transit, three by pipelines, and two by rail. Forty-four of the commenters were regulated entities, eighteen represented trade associations, four represented unions, two were from consultants, and one was from a governmental entity.

Almost all the commenters supported reduction of the testing rate and the increased flexibility in tying the testing rate to the positive rate in a specified population. The commenters differed, however, on how low the rate should be and what positive rate was low enough to justify reduction. Forty-two of the commenters, including all of the aviation interests, supported a 10 percent testing rate, in some form. The Air Transport Association/Airline Industrial Relations Conference, for example, wanted a permanent rate of 10 percent for the larger commercial air carriers (Part 121 and 135 certificate holders.) Alternatively they suggested that the Department set a testing rate ranging between 25 and 10 percent for the entire industry or airline segment, or adopt the three-tiered system in the alcohol testing rules. The Regional Airline Association, on the other hand, suggested that 10 percent of covered employees be tested annually for either

drugs or alcohol. The Metropolitan Transit Authority of New York, the American Movers Conference, the Transportation Trade Department of the AFL-CIO, and the American Trucking Associations also argued for a 10 percent testing rate.

Twenty-three commenters supported the NPRM proposal of a reduction to 25 percent. These included all of the marine commenters (American Maritime Officers, American Waterways Operators, Inland Steel, the International Association of Drilling Contractors, the Lake Carriers' Association, Sailboats, Inc., Sealand, and the Transportation Institute), all of the pipeline commenters (Columbia Gas, Enron and Questar), the Association of American Railroads, six motor carrier commenters (including the American Bus Association, the Owner-Operator Independent Drivers Association and the Regular Common Carrier Conference), several transit commenters (the American Public Transit Association, the South Bend Public Transportation, and the Washington Metropolitan Area Transit Authority), the State of Michigan Department of Transportation, and the Institute for a Drug-Free Workplace. In general, these comments reiterated and supported the arguments made in the NPRM.

Several commenters, including the Substance Abuse Program Administrators Association, Substance Abuse Management, the Bay Area Rapid Transit, and Connecticut Transit supported maintaining the current 50 percent testing rate. They stated that the current rules are effective, that a reduction in the rate alone would not produce significant savings, and that DOT should explore other cost-saving alternatives. One transit system believed that a reduction in the testing rate by DOT would undermine local discretion to continue testing at a higher rate.

Commenters suggested a number of variations to the reduction mechanism proposal in the NPRM. The Regulated Common Carriers wanted the Department to use a 2.0 percent positive rate benchmark for 25 percent random testing. The American Trucking Associations (ATA) had a lengthy and

complex submission. It wanted DOT to lower the testing rate to 25 percent by January 1, 1995; drop to 10 percent if a motor carrier's positive rate were less than 1.5 percent; change the 2 year rule to 1 year; and randomly collect past data from carriers. ATA claimed that reduction to 25 percent would save the motor carrier industry \$300 million per year with no adverse effect on safety. ATA surveyed 300 ATA motor carrier members concerning their drug testing experience in calendar year 1992. Of the 120 members who responded, approximately 75 percent of the responders began testing at a 50 percent rate. They conducted 22,577 tests with 271 positives, which equals a 1.20 percent positive rate. Twenty-five percent of the responders tested at a 25 percent rate. Of the 2,745 tests conducted, there were 36 positives, which equals a 1.31 percent positive rate. According to ATA, this shows that there is no significant difference in the positive rate based on 50 percent or 25 percent testing. It was not clear, however, why the respondents were testing at different rates.

Eighteen commenters addressed the issue of what is the appropriate grouping for triggering a potential reduction in the testing rate. Thirteen commenters (including the American Trucking Associations, the American Movers Conference, the American Public Transit Association, the National Air Transportation Association, the Regulated Common Carrier Conference, all the pipeline submissions, and a number of smaller aviation and motor carrier interests) suggested the rates be determined for each company or operator. The Air Line Pilots Association and the Allied Pilots Association suggested that the rates be determined by job category. Several comments favored a breakdown by industry segment (e.g., intercity buses, aviation contractors, offshore mobile drilling units) or by state.

Most of the commenters were anxious to institute a reduction in the testing rate as soon as possible and to ensure that the testing rate would not be raised without good cause. A number of commenters were concerned by the

relatively long time before there was any possibility of reducing the random testing rates in most of the industries. These commenters, therefore, wanted the Department to expedite or "fast track" the potential reduction in testing rates. Many marine and motor carrier commenters, for example, asked that DOT either randomly collect or specifically require reports of past years' data that employers are required to maintain. These commenters suggested that DOT should consider this retroactively-collected data to determine whether a reduction is warranted.

There were a number of comments on the appropriate number of years for lowering or raising the random testing rate. For example, several commenters strongly argued that DOT should allow the testing rate to be reduced based on one year of data. The Air Transport Association stated that an increase in the testing rate should be based on either 3 years of data that demonstrate a clear upward trend or a significant increase in any 1 year.

Several commenters were concerned that recent changes in the U.S. Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug-Testing Programs, as incorporated in 40 CFR Part 40, will result in more frequent identification of the presence of THC (the active ingredient in marijuana) on screening tests, thus leading to an increase in the number of positive tests. These commenters argued that the Department should make a special accommodation in the rules to account for this expected increase.

Available Data

In addition to the public comments to the rulemaking, the Department considered the following drug testing data in the regulated industries, the Department's civilian workforce, and the U.S. Coast Guard military personnel. The data do not include refusals to be tested. The operating administration data reflect phase-in of random testing from 25 percent to 50 percent unless otherwise noted.

Aviation

RANDOM TESTING

	1990*	1991	1992*	1993
Total Number of Random Tests	84,585	170,186	183,176	182,482
Number of Positives	445	1,258	1,307	960
Percent Positive	0.53	0.74	0.71	0.53

(*These numbers are slightly different from the NPRM due to further examination and correction of some reported data.)

POST-ACCIDENT DRUG POSITIVE RATES

	1990	1991	1992	1993
Total Post Accident Tests	248	481	459	343
Number of Positives	2	2	0	0
Percent Positive	0.8	0.4	0	0

REASONABLE CAUSE DRUG POSITIVE RATES

	1990	1991	1992	1993
Total Reasonable Cause Tests	1,127	1,178	861	377
Number of Positives	48	46	37	29
Percent Positive	4.2	3.9	4.2	7.6

Railroads

RANDOM TESTING

	1990	1991	1992	1993
Total Number of Random Tests	35,228	50,436	42,599	42,199
Number of Positives	365	447	336	303
Percent Positive	1.04	0.88	0.79	0.7

POST-ACCIDENT DRUG POSITIVE RATES

1987	1988	1989	1990	1991	1992	1993
5.1%	5.6%	3.0%	3.0%	1.1%	1.8%	2.0%

REASONABLE CAUSE DRUG POSITIVE RATES

[Includes tests after violations of operating rules and personal injuries]

1987	1988	1989	1990	1991	1992	1993
5.4%	4.7%	3.6%	1.8%	1.9%	1.9%	1.9%

In July 1991, the FRA initiated a comparative study of different random testing rates and the impact on deterrence, as measured by the positive rate. The study compared four railroads testing at 50 percent (control group) with four railroads testing at 25 percent (experimental group). The positive rate for the control group when the study was initiated was 1.1 percent; for the experimental group it was 0.89 percent. In the first year (July 1991 through June 1992), the control group positive rate was 0.90 percent, the experimental group's was 0.87 percent. For the period July 1992 through June 1993, these groups had positive rates of 0.80 percent and 0.94 percent, respectively. During the third year, the experimental rate was 0.86 percent and the control rate was 0.77 percent. The three-year totals were 0.89 percent for the experimentals and 0.82 percent for the controls.

Motor Carriers

The Omnibus Transportation Employee Testing Act of 1991 (P.L. 102-143, Title V Section 5) required FHWA to conduct a demonstration project to study the feasibility of random roadside alcohol and controlled substances testing. It was partly designed to "serve as a test of, and establish a record on, the effectiveness of state-administered testing in detecting individuals, such as independent owner-operators and independent drivers, who might otherwise avoid detection through the carrier-administered testing directed by the [Omnibus Act]. S. Rep. 102-54, p. 34. The pilot program was administered under the Motor Carrier Safety Assistance Program (MCSAP), which is a federal grant program that assists states in enforcing motor vehicle safety laws and regulations. The pilot program

sampled drivers holding commercial drivers licenses operating only on interstate highways and major state roads.

The states of New Jersey, Minnesota, Nebraska, and Utah were selected to participate in the program because they are representative of various geographic and population characteristics. During the course of the year-long study in each state, over 30,000 random drug tests were conducted. Minnesota and New Jersey combined probable cause testing with requests for voluntary urine samples. In some states, drivers could refuse to submit to the drug tests without sanction. The percent positive may also be understated because drivers could have avoided the testing site if they were aware of the testing through communications on CB radios or other informal information networks. The results were as follows:

RANDOM DRUG TESTING RESULTS IN FOUR PILOT PROGRAM STATES

Drug Testing	NE	UT	MN	NJ	Total
Specimens Evaluated	7 496	10,131	5,729	7,556	30,912
Refusals	32	55	359	859	1,305
Percent Refused	0.43%	0.54%	5.9%	10.2%	4.1%
Positive Specimens	271	410	269	460	1,410
Percent Positive	3.6%	4.0%	4.7%	6.1%	4.6%

The study notes that positive rates for employer-based random drug testing programs that were inspected as a part of normal safety reviews were 2.5 percent for fiscal year 1992, and 3.11 percent for the first six months of fiscal year 1993.

FHWA conducted a one-time special field study of compliance reports. In general compliance investigations of 4,967 interstate motor carrier drug testing programs in the first six months of FY 1993, 28,250 random tests were conducted. There were 878 verified

positive results (3.11 percent). The audits represent less than 2 percent of the motor carriers subject to the FHWA rule. The FHWA selects interstate motor carriers for general safety rule compliance investigations by factors such as a safety rating or prior compliance problem. These compliance investigations do not offer scientific, statistically unbiased sampling methods.

U.S. DOT Employees

In the Department's federal employee testing program, the random testing rate

of at least 50 percent was phased-in from 25 percent to 50 percent over the first year of the program and achieved at the end of FY 1988. A testing rate of at least 50 percent was maintained in FY 1989-1991. In FY 1992, the figures include testing over the first five months with a rate of at least 50 percent, followed by seven months of testing with a rate of at least 25 percent. FY 1993 figures reflect a full year of testing at 25 percent. The following table summarizes DOT federal employee random testing data.

	FY88	FY89	FY90	FY91	FY92	FY93
Total Number of Random Tests	5,047	17,926	19,103	18,671	12,454	9,433
Number of Positives	42	92	43	40	39	24
Percent Positive	0.83	0.51	0.23	0.21	0.31	0.25

As noted earlier, the USCG has been conducting random drug tests on its active duty and reserve uniformed personnel. Rather than setting a specific

testing rate as a requirement at the beginning of the fiscal year, the USCG conducts the maximum number of tests possible from the funds that are

appropriated. The percentage of positive results for random tests in each fiscal year and the approximate testing rate is as follows:

	1987	1988	1989	1990	1991	1992	1993
Percent Positive	1.57%	1.31%	0.68%	0.41%	0.41%	0.78%	0.75%
Testing Rate	120%	95%	95%	95%	85%	85%	80%

The Final Rule

The final rule adopts the NPRM with one change. It provides that the Administrator or the Commandant may lower the minimum random drug testing rate to 25 percent if the industry-wide (e.g., aviation, rail) random positive rate is less than 1.0 percent (including refusals to be tested) for 2 consecutive calendar years while testing at 50 percent. The rate will return to 50 percent if the industry random positive rate is 1.0 percent or higher in any subsequent calendar year. The only change is a one-time adjustment for the two industries that have not yet fully implemented random drug testing. Under this provision, the FTA and/or FHWA Administrators may allow the testing rate for their regulated industry to be lowered based on 1995 and 1996 data from those entities required to report. The FTA Administrator will not have to wait until he has the first 2 years

of data from small transit operators and the FHWA Administrator will not have to wait until he has the first two years of data from small intrastate motor carriers and motor coach operations before they can possibly lower the rate as proposed in the NPRM. Many of these decisions mirror the reasoning we used in the final rules concerning alcohol testing that were published on February 15, 1994 (59 FR 7302).

Readers may wish to review the preamble to the alcohol testing rules to supplement their understanding of our actions in this final rule.

The Triggering Group

The final rule provides that the positive and random testing rates will be determined for each industry, and not by employers or industry segment. After careful consideration, we believe that this is the fairest and most effective approach. It addresses broad safety issues in each industry rather than by

company or segment of the workforce. It provides a strong incentive for employers with successful programs to pressure problem subgroups to improve their performance. As an administrative matter, it is much easier for the industry to implement and DOT to oversee and enforce an industry-wide program.

Some commenters, such as airline pilots, said that such an approach is unfair. Similarly, there are certain employers that are so large that their sheer numbers may skew an entire industry's positive rate.

We acknowledge that breaking up industries into subgroups may be desirable from the point of view of subgroups with lower positive rates. Nevertheless, after careful consideration, we have chosen not to take this approach for several reasons: It allows us to focus on broad safety issues and keep the focus away from potentially endless splitting and balkanization within the industries. If

the Department, for example, divided an industry into large and small operators, a particular large operator with very low positives may ask to be separated or certain categories of employees within one of the groups may ask then to be distinguished.

Breaking industries into different subgroups would have many undesirable consequences. As a practical matter, it would be extremely difficult and costly for DOT to administer and enforce. There would be less pressure on very poorly performing subgroups to improve, especially when the existing industry-wide rate was close to 1.0 percent. There might be greater incentive to cheat, especially if the rates were determined by company or small subgroups. Significantly more employees would fall into more than one category, which would cause unnecessary confusion in ensuring random selection and recordkeeping. It would be much harder for consortia to keep track of and ensure the integrity of the data. Finally, it might lead to grouping by demographics.

The Testing Rates

The final rule maintains the initial 50 percent random drug testing rate. We believe that this is the appropriate testing rate for industries that are beginning their testing programs. In order to provide incentive for lowering drug usage in a given industry, the Department will allow the random testing rate to be lowered to 25 percent based on demonstrably low annual positive testing rates. The decision will primarily be based on data submitted to the Department.

Under existing MIS rules, certain employers must submit data for a given calendar year by the following March 15th. The Office of Drug Enforcement and Program Compliance in the Office of the Secretary (OST) and each operating administration will review each industry's data for accuracy and completeness and issue a determination regarding the random test rate within a few months. Because covered entities need some lead time to adjust their procedures, make changes in any contracts, and take other necessary action to adjust to an increase or decrease, the notice will be published in advance of the next calendar year.

We recognize that because the reported positive rate is obtained from data the precision of which is eroded by sampling variance and measurement error, and whose accuracy is diminished by non-response bias, there is a risk that it diverges from the actual positive rate in the population. Each operating administration will be using MIS data

collection and sampling methods that address these issues to the extent possible and make sense in the context of its particular industry. Where not all employers are included in the reported data, the operating administration will decide how many covered employers must be required to report or be sampled; this decision will be based on the number of employers (not otherwise required to report) that must be sampled to ensure that the reported data from the sampled employers reliably reflect the data that would have been received if all were required to report. However, the decision on whether the reported data reliably support the conclusion (e.g., an audit of company records shows significant falsification of reports) remains subject to DOT's discretion. If the reported data are not sufficiently reliable, the operating administration will not permit the random rate adjustment to occur.

Each operating administration will publish a notice in the *Federal Register* stating what the random testing rate will be in the following year. Any random rate adjustment will occur at the beginning of the calendar year in order to maintain the integrity of the MIS data. The Department may also use a variety of other tools such as press releases, special mailings, or briefings for key industry and press representatives to disseminate information regarding any rate adjustments.

As proposed in the NPRM, the random testing rate may be reduced to 25 percent if the industry-wide random positive rate is less than 1.0 percent for 2 consecutive calendar years while testing at 50 percent. Such a performance-based approach rewards "good" results while maintaining an acceptable level of deterrence, as well as detection. Based on the comments filed and the experiences of the DOT internal program, we believe that reducing the random testing rate to 25 percent could save up to 40 percent of the annual random testing costs incurred at the full 50 percent rate. A two-tier system makes the drug testing rule more consistent with the alcohol testing rule while acknowledging the difficulty of identifying drug use.

We believe that 1.0 percent is the appropriate level at which to permit a reduction or require an increase for the reasons stated in the NPRM. This level is based on the experience that the military and other workplace programs have had with deterrence-based drug testing. Their results reveal that no matter what rate is used for random testing, the testing programs never achieve zero positives. There always is

a constant group of "hard-core" individuals of less than 1.0 percent of the population who are detected positive over a period of time; these individuals are unaffected by deterrence-based testing because of addiction or belief that they can escape detection. Several commenters asked us to raise the level, primarily to make it easier for their industry to qualify for a reduction in the testing rate. We were unpersuaded, however, by these commenters because we believe it is not appropriate to raise the level to ease compliance, would unduly undermine the important safety objectives of the program, and is an appropriate cut-off in light of what we believe are achievable goals.

As mentioned above, many commenters, particularly in the aviation industry strongly supported a 10 percent testing rate. They noted that the alcohol testing rules provide a three-tier system (50 percent /25 percent /10 percent), and believe that if performance were adequate, an industry, or industry subgroup, should be permitted to test at a 10 percent rate. To the extent that costs are reduced with the number of tests conducted, a 10 percent testing rate would provide important cost savings to the best employers with the smallest drug use problem. On a more intangible level, it would provide a goal for employers. It also would be the most flexible approach.

In the NPRM, we noted our tentative conclusion that a 25 percent random testing rate is the minimum effective rate to ensure deterrence for drug use and to allow at least a modicum of detection. There were a number of comments that stated that merely being subject to random testing provided adequate deterrence and detection. Some employer commenters stated that covered employees were unaware of the specific testing rates and that the employees believed that they could be caught at any time. Others denied that their company or industry had any significant problem and considered any but the most minimal testing a waste of time, money and energy. Others focused on the best way to spend the finite resources that could be devoted to drug use prevention.

As discussed in the NPRM, illegal drug use is different from alcohol misuse and these differences argue for a higher random drug testing rate. Drug usage is often harder to detect based on behavior and physical clues such as breath and body odor, or drug packaging. Alcohol passes through the body relatively quickly, while many drugs stay in the system for days, weeks or even months. Unlike alcohol use,

most drug use is illegal and drug testing helps ensure deterrence and detection of even off-duty use.

Considering the vital public interest in protecting the safety of our transportation system and the data that show the deterrent and detection benefits of high random rates for drugs, the Department cannot justify permitting a reduction to 10 percent. Statistically lowering the rate to 10 percent would result in less representative data since so few employees would be tested. Fewer tests result in less detection. So few tests would be conducted at a 10 percent rate that it might take a long time to notice any adverse effects or trends.

Data Required To Raise or Lower Testing Rate

The Department is requiring two years of data before a potential reduction in the testing rate because we want to make sure that the use of drugs is, in fact, demonstrably low and the data reflect more than a statistical aberration or an unusual year.

On the other hand, if an industry's data indicate a positive rate at or above 1.0 percent in any calendar year, we will raise the testing rate based on only one year's data. Our primary interest is ensuring safety and it is important to take a conservative approach. Under our approach, however, there is up to one year's time lag between a rise in positive test results and an increase in the random testing rate. In extraordinary circumstances that endanger public safety, we may need to take emergency action before the beginning of the calendar year.

One-Time Exception

There is one relatively minor change from the NPRM. Large transit companies and intrastate motor carriers will begin random testing on January 1, 1995, and small transit companies and intrastate motor carriers on January 1, 1996. If we required a positive rate of less than 1.0 percent for two years of testing at a 50 percent rate for the transit and motor carrier industries, the rate could not be lowered until January 1, 1999, at the earliest. Because interstate motor carriers have been testing for several years and transit and intrastate motor carriers can learn much from other transportation employers that have been testing for a number of years, and because FTA and FHWA will have received a significant amount of data over the first two years, we will provide a one-time exception from this general rule and allow the random testing rate to be reduced based on only one year of data from the entire industry and two

years from its large entities. The Secretary in consultation with the FTA and/or FHWA Administrators does, however, explicitly reserve the discretion to require another year of data from the small entities if he or she deems it necessary for safety. If the Department's review of the data indicates that it is insufficient to make a determination to lower the random testing rate to 25 percent, we will issue a notice stating that the rate will not be changed until one more year of data has been obtained.

Other Provisions

We are not making any change in the rule to account for the change in the marijuana initial test cutoff levels. The change merely allows for more urine specimens that contain marijuana metabolites to be identified. To the extent that there is minimal drug use in a given industry, this technical change should make little difference. That we will now be more successful in correctly identifying positive samples is no reason to make the DOT drug testing rules more lenient. Improvements in technology that permit us to identify users who previously escaped detection are not a reason for lowering our standards.

The remainder of the proposals in the NPRM drew no public comment and are adopted without change. The final rule provides that if a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency, the employee is subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function. Similarly, the final rule provides that if an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may either establish separate pools for random selection, with each pool containing covered employees subject to testing at the same required rate, or establish one pool for testing all covered employees at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

If the employer conducts random testing through a consortium, the number of tests to be conducted may be calculated for each individual employer or may be based on the total number of covered employees subject to random testing by the consortium. In order to ensure deterrence, the dates for administering random tests must be spread reasonably throughout the calendar year

The final rule contains a number of definitions that mirror the alcohol testing rules. The term "positive rate" is defined in the definition section of each operating administration drug rule as, "the number of positive results for random tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random tests conducted under this part plus the number of refusals of random tests required by this part." "Refuse to submit" means "a covered employee [who] fails to provide a urine sample as required by 49 CFR Part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process." As a practical matter, this means that refusals to take a random drug test count as a positive result and would be added to the total number of random tests conducted for the purpose of calculating the industry positive rate. Since they are treated as if they are positive in terms of most of the rules' consequences, we believe they should be counted in the totals. Moreover, without this approach, the system could be easily abused. For example, employers with high positive rates might have an incentive to subtly communicate that employees who test positive will be fired but employees who refuse to be tested will receive little or no punishment other than facing removal from duty and evaluation. The FAA, FRA and USCG also have other sanctions for refusals.

Adulteration of a urine sample is considered a refusal to test because it constitutes an obstruction of the testing process. As such, adulterated specimens are included in the calculation of the industry positive rate. Administrative or procedural errors during the testing process, such as breaking the container holding the sample, that result in canceled tests are not counted in the totals when calculating the industry random test rate.

Modal-Specific Actions

The Coast Guard is also removing existing (and no longer applicable) regulatory language that allowed existing marine employers to begin their random drug testing at a 25 percent annual rate (46 CFR 16.205(d)). This provision was included to reduce the initial burden that the then-new random drug testing program would impose on employers. Because the provision no longer serves any purpose, and may lead to confusion, the Coast Guard has removed this regulatory language.

RSPA is revising the random testing cycle to a calendar year beginning on January 1 and ending December 31. The December 23, 1994, Management Information System final rule requires operators to collect specified drug testing data in 1994, and to report that information to RSPA on an annual basis beginning in 1995. Previously, operators had conducted random testing and maintained records on an April-April or August-August cycle. The revision will allow operators to conduct random testing and collect their drug testing data on a calendar year cycle.

The FAA is adding three definitions and amending a third definition to make the drug testing rule clearer and to parallel the alcohol testing rule. "Contractor company" is defined to mean "a company that has employees who perform safety-sensitive functions by contract for an employer." "DOT agency" is defined to mean "an agency (or 'operating administration') of the United States Department of Transportation administering regulations requiring drug testing (14 CFR part 61 *et al.*, 46 CFR part 16; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40." The FAA is also adding a provision to clarify current requirements concerning access to records. The provision provides that an employer required to conduct random drug testing under the anti drug rules of more than one DOT agency shall provide each such agency access to the employer's records of random drug testing, as determined to be necessary by the agency to ensure the employer's compliance with the rule. This provision is designed to resolve some confusion regarding compliance monitoring of multi-modal pools.

Implementation Dates

Based on the 1992-1993 data submitted to FRA and FAA, the railroad and aviation industries may begin testing at a minimum 25 percent random rate beginning January 1, 1995, because their positive rates were less than 1.0 percent in 1992 and 1993. Pipeline and marine employers will continue testing at 50 percent until they have 2 years of data showing that random positive rates for their industries are less than 1.0 percent. If the positive rates are below 1.0 percent for 1994 and 1995, then testing rates may be lowered to 25 percent beginning January 1, 1997.

Interstate motor carriers are currently testing at a minimum 50 percent testing rate and will continue to do so until the positive rate for the entire motor carrier industry (both interstate and intrastate and motor coach operations) is less than

1.0 percent. Large intrastate motor carriers will begin random drug testing at a minimum 50 percent testing rate on January 1, 1995, and small intrastate motor carriers will begin random testing at a 50 percent rate on January 1, 1996. We will allow the motor carrier industry to reduce its testing rate to 25 percent beginning on January 1, 1998, if the 1995 and 1996 data for those required to conduct random testing under the FHWA rule demonstrate a positive rate of less than 1.0 percent.

Large transit operators will begin random drug testing at a minimum 50 percent testing rate on January 1, 1995, and small transit operators will begin random testing at a 50 percent rate on January 1, 1996. If the 1995 and 1996 data for large transit operators combined with the 1996 data for small transit operators demonstrate a positive rate of less than 1.0 percent, we will allow the transit industry to reduce its testing rates to 25 percent beginning on January 1, 1998. Industries that do not meet the criterion will continue to test at a minimum 50 percent random testing rate.

Regulatory Analyses and Notices

DOT Regulatory Policies and Procedures

The final rule is considered to be a significant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034, because of the substantial public and Congressional interest in this subject. A regulatory evaluation has been prepared and is available for review in the OST docket. This final rule was reviewed by the Office of Information and Regulatory Affairs pursuant to Executive Order 12866.

FAA estimates an average potential cost savings of approximately \$9 million per year for the aviation industry if the testing rate is dropped to 25 percent. USCG estimates an annual cost savings of between \$0.8 million to \$1.6 million annually for maritime; RSPA estimates \$1.4 million or more per year for pipelines; FRA estimates \$1 million per year for the railroad industry; FHWA estimates \$107 million per year or more for motor carriers; and FTA estimates an average of \$7 million per year or more for transit. Further detail is available in the OST final regulatory evaluation and the OA preliminary regulatory evaluations, which are available in the respective dockets.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism

implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

Based on the current positive testing rate data, the aviation and rail industries will qualify for a reduction to a 25% testing rate in 1995. Although this change will result in substantial cost savings, there will be little economic impact on a substantial number of small entities in those industries. It is difficult to project which other transportation industries are likely to qualify for a reduction in the testing rate. The remaining transportation industries (motor carriers, pipelines, maritime, and transit) include many small companies. If the random testing rate were reduced in any of those industries, there might be a significant cost savings, as discussed in the accompanying regulatory evaluation. In addition, to the extent that the rate is lowered it might have a negative economic impact on those who provide services to employers covered under the rules, some of whom are small entities. Under the best circumstances, however, motor carriers, transit and pipeline industries could not reduce their testing rates until 1998. We therefore certify that this rule will not have a significant economic impact on a substantial number of small entities for at least the next several years.

Paperwork Reduction Act

There are a number of reporting or recordkeeping requirements associated with DOT-mandated drug testing. Some of the requirements are currently part of the OAs' drug testing rules and some have been incorporated as a result of the final rules setting up the management information systems that were published in the Federal Register on December 23, 1993. To the extent that fewer random tests are required in a given transportation industry, there will be a proportionate reduction in recordkeeping, but no change in the reporting requirement.

Issued in Washington, D.C. on November 22, 1994.

Mortimer L. Downey,
Deputy Secretary.

FAA

14 CFR Chapter I

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Aircraft pilots, Airmen, Airplanes, Air transportation, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety Transportation.,

For the reasons set out in the preamble, the Federal Aviation

Administration amends 14 CFR part 121, as follows:

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

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

Authority: 49 U.S.C. 106(g), 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1485, and 1502.

2. In Appendix I, Section II, the definitions of "contractor company," "DOT agency," and "positive rate," are added in alphabetized order and the definition of "refusal to submit," is amended, to read as follows:

Appendix I to Part 121—Drug Testing Program

II. Definitions.

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

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring drug testing (14 CFR part 61 et al., 46 CFR part 16; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.

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

Refusal to submit means that an individual failed to provide a urine sample as required by 49 CFR part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with this appendix, or engaged in conduct that clearly obstructed the testing process.

3. Appendix I, Section V Paragraph C is revised to read as follows:

Appendix I to Part 121—Drug Testing Program

V Types of Drug Testing.

C. Random testing.

1. Except as provided in paragraphs 2-4 of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

2. The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination

is drawn from the statistical reports required by section X of 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 positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

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

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

5. The selection of employees for random drug 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 drug testing determined by the Administrator. If the employer conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

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

8. If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

9. If an employer is required to conduct random drug testing under the drug 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 covered employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

10. An employer required to conduct random drug testing under the anti drug rules of more than one DOT agency shall provide each such agency access to the employer's records of random drug testing, as determined to be necessary by the agency to ensure the employer's compliance with the rule.

Issued in Washington, DC on November 22, 1994.

David R. Hinson,
Administrator, Federal Aviation Administration.

USCG

46 CFR Chapter I

List of Subjects in 46 CFR Part 16

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

For the reasons set out in the preamble, the Coast Guard amends 46 CFR part 16, as follows:

PART 16—CHEMICAL TESTING

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

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

2. In § 16.105, the definitions of *Positive rate* and *Refuse to submit* are added in alphabetized order to read as follows:

§ 16.105 Definitions of terms used in this part.

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

*

Refuse to submit means that a crewmember fails to provide a urine sample as required by 49 CFR part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

3. In § 16.205, paragraph (d) is removed and reserved.

4. In § 16.230, paragraphs (c) and (e) are revised, paragraph (f) is redesignated as paragraph (k), and new paragraphs (f) through (j) are added to read as follows:

§ 16.230 Random testing requirements.

*

(c) The selection of crewmembers for random drug 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 crewmembers' Social Security numbers payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection.

(e) Except as provided in paragraph (f) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered crewmembers.

(f) The annual rate for random drug testing may be adjusted in accordance with this paragraph.

(1) The Commandant's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported random positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Commandant considers the quality and completeness of the reported data, may obtain additional information or reports from marine employers, and may make appropriate modifications in calculating the industry random positive rate. Each year, the Commandant will publish in the *Federal Register* the minimum annual percentage rate for random drug testing of covered crewmembers. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(2) When the minimum annual percentage rate for random drug testing is 50 percent, the Commandant may lower this rate to 25 percent of all covered crewmembers if the Commandant determines that the data received under the reporting

requirements of 46 CFR 16.500 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(3) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of 46 CFR 16.500 for any calendar year indicate that the positive rate is equal to or greater than 1.0 percent, the Commandant will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered crewmembers.

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

(h) Each marine employer shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(i) If a given covered crewmember is subject to random drug testing under the drug testing rules of more than one DOT agency for the same marine employer, the crewmember shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the crewmember's function.

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

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

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

Issued in Washington, DC, November 22, 1994.

VADM A. E. Henn,

Acting Commandant, United States Coast Guard.

RSPA

49 CFR Chapter I

List of Subjects in 49 CFR Part 199

Pipeline safety, Drug testing, Recordkeeping and reporting.

For the reasons set out in the preamble, RSPA amends 49 CFR Part 199, as follows:

PART 199—DRUG AND ALCOHOL TESTING

1. The authority citation for Part 199 is revised to read as follows:

Authority: 49 U.S.C. 60101 et seq., 49 CFR 1.53.

2. Section 199.3 is amended by adding the following definitions in alphabetical order:

§ 199.3 Definitions.

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

* * *

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR Part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with the provisions of this subpart, or engages in conduct that clearly obstructs the testing process.

*

3. Section 199.11 is amended by revising paragraph (c) to read as follows:

§ 199.11 Drug tests required.

*

(c) *Random testing.* (1) Except as provided in paragraphs (c)(2) through (4) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(2) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this subpart. 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 operators, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(3) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 199.25 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(4) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 199.25 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

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

(7) Each operator shall ensure that random drug tests conducted under this subpart are unannounced and that the

dates for administering random tests are spread reasonably throughout the calendar year.

(8) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same operator, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(9) If an operator is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the operator may—

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

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

Issued in Washington, D.C. on November 22, 1994.

D.K. Sharma,

Administrator, Research and Special Programs Administration.

FRA

49 CFR Chapter II

List of Subjects in 49 CFR Part 219

Alcohol and drug abuse, Railroad safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, FRA amends 49 CFR Part 219, as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. The authority for part 219 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20111, 20112, 20113, 20140, 21301, 21304; and 49 CFR 1.49(m).

2. Section 219.5 is amended by adding, in alphabetical order, definitions for "positive rate" and "refuse to submit" as follows:

§ 219.5 Definitions.

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

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR Part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

3. Section 219.602 is added as follows:

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

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

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

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

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

(e) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensures that every covered

employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, *i.e.*, no employee may be selected as a result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process.

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

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

(h) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same railroad, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

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

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

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

Issued in Washington, DC, November 22, 1994.

Donald M. Itzkoff,
Deputy Administrator, Federal Railroad
Administration:

FHWA

49 CFR Chapter III

List of Subjects in 49 CFR Part 382

Alcohol and drug abuse, Highway safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FHWA amends 49 CFR part 382, as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

1. The authority for part 382 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.*, 31502; and 49 CFR 1.48.

2. Section 382.107 is amended by adding, in alphabetical order, a definition for "positive rate" and revising the definition of "refuse to submit" as follows:

§ 382.107 Definitions.

*

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

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fails to provide adequate breath for alcohol testing as required by Part 40 of this title, without a valid medical explanation, after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part,

(2) Fails to provide an adequate urine sample for controlled substances testing as required by Part 40 of this title, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement for urine testing in accordance with the provisions of this part, or

(3) Engages in conduct that clearly obstructs the testing process.

3. Section 382.305 is revised to read as follows:

§ 382.305 Random testing.

(a) (1) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the number of drivers each selection period.

(2) Except as provided in paragraphs (e) through (g) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the number of drivers each selection period.

(b) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA 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 FHWA Administrator will publish in the **Federal Register** the minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) (1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FHWA Administrator may lower this rate to 10 percent of all drivers if the FHWA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all drivers if the FHWA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d) (1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all drivers.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all drivers.

(e) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the FHWA Administrator will publish in the *Federal Register* the minimum annual percentage rate for random controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication.

(f) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all drivers if the FHWA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent. However, after the calendar year 1994 of random testing for interstate motor carriers under part 391, subpart H and the initial calendar year of testing by large employers under this section, the FHWA Administrator may lower the rate for calendar year 1997 if the combined positive testing rate is less than 1.0 percent, and if it would be in the interest of safety.

(g) When the minimum annual percentage rate for random controlled substances testing is 25 percent, and the data received under the reporting requirements of § 382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all drivers.

(h) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall

have an equal chance of being tested each time selections are made.

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

(j) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(k) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(l) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(m) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(n) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees

who are subject to testing at the same required minimum annual percentage rate; or

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

Issued in Washington, DC on November 22, 1994.

Rodney Slater,
Administrator, Federal Highway
Administration

FTA

49 CFR Chapter VI

List of Subjects in 49 CFR Part 653

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set out in the preamble, the Federal Transit Administration amends 49 CFR Part 653, as follows:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for Part 653 is revised to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

2. In § 653.7 the definition of "positive rate" is added and the definition of "refuse to submit" is revised as follows:

§ 653.7 Definitions.

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

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR Part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

3. Section 653.47 is revised to read as follows:

§ 653.47 Random Testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for

random drug testing shall be 50 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 653.73 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent. However, after the initial two years of random testing by large transit operators and the initial first year of testing by small transit operators, the Administrator may lower the rate the following calendar year, if the combined positive testing rate is less

than 1.0 percent, and if it would be in the interest of safety.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 653.73 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

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

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

annual percentage rate under this part or any DOT drug testing rule.

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

(h) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

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

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

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

Issued in Washington, DC on November 22, 1994.

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[FR Doc. 94-29389 Filed 11-29-94; 12:02 pm]

BILLING CODE 4910-62-P

