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 , Notice 94–2]

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: Notice of proposed rulemaking (NPRM).

SUMMARY: Five operating administrations—the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Research and Special Programs Administration (RSPA) and the United States Coast Guard (USCG)—currently require random drug testing of safety-sensitive employees. In a final rule published elsewhere in today's **Federal Register**, the Federal Transit Administration (FTA) , also a part of DOT, is adopting a parallel rule for covered transit employees.

In response to public comments, petitions submitted by industry, and on its own initiative, the FAA, FRA, FHWA, RSPA, USCG and FTA (the operating administrations or "OAs") are proposing to lower the minimum random drug testing rate to 25 percent where 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 would return to 50 percent if the industry random positive rate were 1.0 percent or higher in any subsequent calendar year. The industry-wide random positive rate for each transportation industry would be calculated from data submitted to the Department and announced yearly by the respective Administrator or the Commandant of the Coast Guard.

DATES: Comments are due April 18, 1994.

ADDRESSES: Comments should be sent to the docket number and address of the relevant OA. General comments may be sent to Docket 48498, Office of Documentary Services (C–55), U.S. Department of Transportation, room 4107, 400 Seventh Street SW., Washington, DC 20590–0001. It is not necessary to send copies to both the OST docket and the operating administration docket.

FAA—Docket 25148 and 26604, Federal Aviation Administration, 800 Independence Ave SW., room 915–G, Washington, DC 20591.

USCG—Docket 93–089, United States Coast Guard, 2100 2nd Street SW., room 3406, Washington, DC 20593.

RSPA—Docket PS–134, Research and Special Programs Administration, 400 Seventh Street SW., room 8419, Washington, DC 20590.

FRA—Docket RSOR–6, Federal Railroad Administration, 400 Seventh Street SW., room 8209, Washington, DC 20590.

FHWA—Docket No. MC–94–5, Federal Highway Administration, 400 Seventh Street SW., room 4232, Washington, DC 20590.

FTA—Docket 93–C, Federal Transit Administration, 400 Seventh Street SW., room 9316B, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Smith, Acting Director, Office of Drug Enforcement and Program Compliance, (202) 366–3784.

SUPPLEMENTARY INFORMATION:

Regulatory Background

DOT agencies have been involved in drug testing since the mid-1980s. The USCG has tested its uniformed personnel for drug use since 1982. DOT began random drug testing of certain of its civilian employees in September 1987.

The Department's civilian employee drug testing program is tightly controlled, centrally administered by headquarters staff, and monitored daily. Employee awareness and the visibility of the program are maintained through training programs conducted by regional drug program coordinators. Specimens are collected by a single contractor service, which operates under a uniform standard of procedures that provides for consistent and reliable collections.

The random testing program was phased in and, by September 1988, DOT was testing a population of nearly 33,000 federal civilian employees (primarily air traffic controllers, safety inspectors and individuals with high security clearances) at a testing rate of at least 50 percent each year for illegal drug use. The annual rate of positive random tests has declined from about 0.83 percent to as low as 0.21 percent over the last six years. Over the past four years, the rate has consistently stayed well below 0.5 percent. The data indicated that, in this homogeneous, skilled, and stable population, there was no distinction in the percentage of positive testing results based on geography, age, etc. As a result of the apparent deterrent effect of the testing program as demonstrated by carefully-maintained recordkeeping, long experience, and the decreasing number of positive results, the Department lowered its federal employee random testing rate. Effective March 1, 1992, the Department has been conducting random testing at a rate of at least 25 percent annually. The positive rate continues to remain at a similarly low level. The Department will continue to evaluate the data and will adjust the random testing rate, as necessary. The testing rate adjustment saved the Department approximately 40 percent in annual collection and laboratory testing costs.

The Federal Railroad Administration (FRA) has the longest experience with drug testing programs applicable to transportation industry workers. In 1986, railroads began pre-employment, post accident, and reasonable cause/suspicion testing, as required by the FRA.

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 cause, periodic (for those subject to periodic medical examinations) and random drug testing for approximately four million workers in safety-sensitive positions. Based on extensive experience and success in testing military and other populations, the Department imposed wide scale random testing requirements because unannounced random drug testing is

generally regarded as the best method of deterring illegal drug use, thereby enhancing the safety of the transportation industries.

The OAs' rules imposed a random testing rate of at least 50 percent per year. This means that if an employer has 400 covered employees, the employer must conduct at least 200 random tests per year. Selection for testing must be random, with every employee in the random pool having an equal chance of being chosen each time a selection is made. Because of the randomness, some employees could be tested more than once in a given year, while others might not be tested for years. However, every covered employee would know that he or she had one chance in two of being tested each year. Employers were allowed to phase in random testing at a rate of 25 percent for the first year, but had to increase to at least a 50 percent testing rate after one year.

After the final rules were issued, lawsuits delayed implementation of the rules for three of the six DOT agencies. Currently, only transit workers are not covered by the testing regulations. The 1988 final rule adopted by the Federal Transit Administration (formerly called the Urban Mass Transportation Administration) was vacated by the United States Court of Appeals for the District of Columbia Circuit because of a lack of statutory authority. Legislation (the FTA provisions of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102–143, Title V, October 28, 1991) was subsequently enacted to remedy this problem as well as address other significant concerns with alcohol misuse and illegal drug use by individuals in various transportation industries who perform safety-sensitive duties. A final rule covering transit employees is published elsewhere in today's **Federal Register**. The rule provides, among other things, that transit employees will be subject to a random testing rate of at least 50 percent.

The Federal Railroad Administration phased in random testing in three groups: large railroads, medium-size railroads, and short line railroads. In January 1990, large railroads began testing at 25 percent, medium-size railroads began testing at 25 percent in July 1990 and short line railroads began testing at 25 percent in November 1990. Random testing at a 50 percent rate began one year after these dates for each of the three categories.

In the aviation industry, the 25 percent rate was instituted for large air carriers in December 1989, for medium-size carriers in April 1990, and for the smallest carriers in August of 1990. Testing at 50 percent began one year after the initial phase-in. Testing of contractor employees (such as repair station personnel or security screeners) began one year after the carriers that they worked for or supported initiated testing.

Testing of pipeline personnel began with phase-in (25 percent) testing in April 1990 for large operators and in August 1990 for small operators, with the 50 percent rate implemented one year later by each group.

Random and non-suspicion-based post-accident drug testing in the motor carrier industry were enjoined by court order, although the other types of testing were implemented on December 21, 1989. After the injunction was lifted, random testing by large motor carriers began in November 1991 at a 25 percent rate and testing by small motor carriers began in January 1992 at a 25 percent rate. One year after these dates, the rate increased to 50 percent. (The current rule covers just interstate motor carriers, but a final rule in today's **Federal Register** will extend coverage to all employers and persons who use individuals who are required to have commercial driver's licenses, including employees of intrastate motor carriers and school bus drivers who drive vehicles covered by the drug rule.)

The USCG rule regarding random testing of some commercial vessel personnel was enjoined by court order in December 1989. Other types of testing were phased in commencing in June 1989. In July 1991, the USCG issued a revised rule addressing the court's concerns and justifying the categories of employees subject to random testing. In October of 1991, the maritime industry began testing at a 25 percent random rate with a requirement to increase to a 50 percent rate one year after implementation. There was no distinction between large and small maritime employers for this implementation of random testing.

Only the Federal Aviation Administration and the Federal Railroad Administration require their regulated employers, with minor exceptions, to report testing statistics to them. The Federal Highway Administration, the U.S. Coast Guard and the Research and Special Programs Administration review records maintained by covered employers, but do not have composite data on testing statistics for their industries. Separate final rules published in the **Federal Register** on December 23, 1993, require that certain employers regulated by all five OAs submit uniform data concerning drug testing on an annual basis to those administrations. (Data from the motor carrier industry would be gathered on a survey basis.) In a final rule published in today's **Federal Register**, FTA is requiring similar reporting requirements for the drug testing requirements it is imposing on the transit industry.

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. Although the anti-drug regulations were promulgated by various DOT agencies, we issued a Departmental ANPRM because of the commonality of the issues.

The purpose of the ANPRM was to seek data and ideas on additional strategies that would ensure the continued effectiveness of the Department's anti-drug program while reducing its cost. 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.

In addition, we asked for comment on a number of other issues, most notably costs and data on positive test results.

Comments

Over 115 comments were filed in response to the ANPRM. Commenters included governmental agencies, trade associations, regulated entities, unions, contractors and consultants, and individuals.

In terms of the appropriate random testing rate, the comments ranged from suggestions to abolish all random testing requirements to greatly increasing the current 50 percent testing rate. Those favoring abolition of random testing argued that the federal requirements are intrusive, punitive, costly, and unnecessary. Several commenters argued that post accident and reasonable suspicion testing were adequate. Others supported pre-employment and periodic testing, in addition to post accident and reasonable suspicion testing.

Over 20 commenters favored a rate of less than 25 percent. These commenters tended to focus on the low prevalence of drug use in the workplace, the high cost of testing and time lost from the job. Over 50 commenters favored a testing rate of 25 percent. A number argued that the drug problem is not as widespread as originally believed. In general, these commenters argued 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 more holistic approach and noted that other types of tests, training and education were also deterrents.

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

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

The ANPRM asked for comment on whether any change should be made across all operating administrations or selectively by industry, company, or job classification. Most who favored a differentiated approach suggested that the rate be set by industry. Many of these commenters believed that their industry was better than others and that they were being penalized unfairly by unrelated "bad actors." There was some support for setting the rate by job categories tempered by the concern that such differentiation not be arbitrary. An equal number of commenters stated that it would be confusing to have too many subgroups and argued for a more even-handed approach. A number of commenters suggested that employers should have flexibility to set the rate at whatever level they thought best, based on their own past experience.

Many commenters focused on the importance of research, employee and supervisor education, employee assistance programs and effective enforcement to deter drug use. Most of these comments focused on making the drug testing requirements and the employers' policies highly visible to employees. In particular, a strong "for cause" testing policy and firm discipline was seen by most of these commenters to be essential.

A number of commenters provided information on costs and positive rates. Virtually all the commenters that discussed positive rates stated that there had been no, or very few, positive random test results in their companies or industries. Comments on the cost per test ranged from the teens to well over a hundred dollars. The general comments on cost savings that could be attributed to a change in the random rate also varied considerably. Some argued that the savings would be proportionate to the change in the testing rate because they pay a set fee per drug test. Most believed there would be a substantial savings, although the amount of savings would not directly correlate to the testing rate because the employer still had fixed administrative costs in running the program. A few commenters argued that costs would not drop at all because labs will simply charge more for tests. The comments on costs and benefits are discussed in greater detail in the accompanying regulatory evaluations prepared by each OA and available for review in the docket.

Commenters differed on how much data they believed necessary to justify a change in the testing rate. Most commenters believed at least two years were necessary, although some believed one year was adequate and others, up to five years. There was some support for demonstration programs, particularly if they would result in the random testing rate being lowered without delay. Those viewing demonstration programs as a "tactic" to delay across the board lowering of the testing rate opposed them vigorously.

Technical Meeting

In addition to soliciting written comments, the Department held a public meeting on workplace random testing and its impact on drug use deterrence in Washington, DC, on February 1 and 2, 1993. The meeting included presentations by experts from federal agencies and the military, academia and private industry. Over 20 participants presented papers and sparked discussions that ranged from mathematical models of drug testing rates and their impact on drug use to program data from corporations using random drug testing as part of a drug-free workplace strategy. The participants presented no definitive data that identified optimal random testing rates for achieving maximum deterrence of drug use. Many corporate representatives expressed views that favored reducing required random testing rates; however, they did not support their views with specific data on the causal or correlative relationship between random testing rates and drug use deterrence. The discussions also covered the corollary issue of detection of drug abusers who are not deterred by workplace drug prevention policies or programs. The meeting was attended by over 200 people and included question and answer periods. Transcripts of the meeting are included in the docket.

Available Data

The Department would appreciate public comment in identifying additional data concerning the effectiveness of random testing rates. The following summarizes the data currently available to the Department concerning the results of random testing in the regulated industries, the Department's civilian workforce, and the U.S. Coast Guard military personnel.

	1990	1991	1992
Aviation:			
Total Number of Random Tests	84,585	170,439	183,176
Number of Positives	445	1,258	1,307

	1990	1991	1992
Percent Positive	0.53	0.74	0.71
Railroads:			
Total Number of Random Tests	35,228	50,436	42,599
Number of Positives	365	447	336
Percent Positive	1.04	0.88	0.79

FRA's random testing regulations were issued in November 1988, with the first testing, as noted earlier, starting in January 1990. FRA has kept records of post-accident drug testing for the last five years. For purposes of analyzing any effect from the issuance of the requirement or the implementation of the testing, the positive rates for post-accident testing are provided; they are as follows:

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

In the rail industry, reasonable cause testing occurs whenever there is a violation of a federal safety rule (Rule G), as opposed to when there is individualized suspicion of drug use. The positive rates are as follows:

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

In July 1991, the FRA initiated a comparative study of random testing rates and the impact on deterrence, as measured by the positive rate. The study compared 4 railroads testing at 50 percent (control group) with 4 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. Statistically, the differences in the positive rates between the control and experimental groups are not significant.

Motor Carriers

In general compliance investigations of 4,967 interstate motor carrier drug testing programs by FHWA in the first six months of FY 1993, records indicated that 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 determining factors such as a safety rating or prior compliance problem. These compliance investigations do not offer scientific, statistically unbiased sampling methods.

The Omnibus Transportation Employee Testing Act of 1991 (Pub.L. 102–143, Title V, Section 5) requires FHWA to conduct a demonstration project to study the feasibility of random roadside alcohol and controlled substances testing. The project's goal is to consider alternative methodologies for implementing random testing systems for commercial motor vehicle operators. Congress' intent was for the FHWA to report and make recommendations concerning random testing administered by means other than carrier-administered testing. Preliminary data from the four state random roadside testing project indicate that of 34,127 drug tests conducted, 1,241 (3.9 percent) were positive for drugs. An additional 1,305 drivers randomly selected for a drug test refused to be tested.

The report is to address the effectiveness of State-administered testing in detecting individuals, such as owner-operators, who might otherwise avoid detection in carrier-administered testing programs. The report, Congress stated, may also include testing or other detection methods performed by Federal or local agencies. In addition, the report is to address the funding of such testing through existing State grant programs or other similar programs. The report is due to Congress by April 1994.

U.S. DOT Employees

In the Department's federal employee testing program, the random testing rate of at least 50 percent was phased-in 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. (FY93 figures reflect a full year with the lower testing rate) 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	68	41	41	78	75
Testing Rate Percent	120	95	95	95	85	85	80

Testing Rates in Various Federal Agencies

Executive Order 12564, "Drug-Free Federal Workplace," signed by President Reagan in September 1986, required random drug testing of safety- and security-related federal employees in 135 federal executive branch agencies. According to a 1991 report of the General Accounting Office ("Employee Drug Testing: Status of Federal Agencies' Programs: Report to the Chairman, Committee on Governmental Affairs," U.S. Senate, (May 1991), GAO/FFD–91–70, 14–19), the random drug testing rates at the 18 agencies that GAO reviewed ranged from 4 to 100 percent. In November 1992, GAO issued a follow-up report entitled "Employee Drug Testing: Opportunities Exist to Lower Drug-Testing Program Costs." GAO/GGD–93–13. Although the 1992 report did not reach any definitive conclusions as to what is the ideal frequency for drug testing, it did recommend that the Director of the Office of National Drug Control Policy work with drug-testing agencies to consider modifications to their selected frequency levels of employee testing.

The Proposal

This NPRM proposes to lower the random testing rate to 25 percent for each industry regulated by an operating administration where the industry-wide random positive rate is 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 is possible that different industries will be subject to different rates in a given calendar year.

We selected the 1.0 percent positive rate as the rate adjustment standard 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 will 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 in their invincibility.

Because the proposal will require review of the data and calculations within the operating administrations, the NPRM proposes that each year the Administrator (or Commandant of the Coast Guard) will publish in the **Federal Register** the minimum required percentage for random testing of covered employees during the calendar year following publication. Any random rate change indicated by industry performance would occur at the beginning of that calendar year. We request comment on whether a different implementation cycle would be better.

The Administrator's decision to authorize a decrease (or require a return to the 50 percent rate) would be based on the overall positive rate in the industry. The primary source of data will be the Management Information System (MIS) reports from covered employers to the individual operating administrations. For the aviation and rail industries, we are proposing to rely on the data submitted under reporting requirements that have been in place since their drug testing rules were originally issued. The FAA drug testing rule currently requires all employers to report, among other things, the total number of tests, the number of positive tests and the number of employees that refused to be tested. Similarly, FRA requires large railroads to report detailed information concerning their drug testing performance. Based on these reports, FAA and FRA could lower their rate to 25 percent as early as January 1995 (if a final rule is issued in this rulemaking before the end of 1994).

Under the NPRM, if a given covered employee is 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 function. Similarly, the NPRM 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 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.

The proposal includes several provisions to provide employers greater flexibility or to provide greater clarity. For example, the NPRM proposes that, 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 subject to random testing by the consortium. In order to ensure deterrence, the dates for administering random tests would be required to be spread reasonably throughout the calendar year.

There are a number of important issues related to calculating the positive rate. Consistent with the final rules addressing alcohol misuse prevention that are being published in today's **Federal Register**, the term "positive rate" would be 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."

This NPRM would add a definition of "refuse to submit" in each operating administration drug rule. The definition would be "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 would count as a positive result for the purpose of calculating the industry random test rate and would count toward the number of tests required to be conducted. Since they are treated as if they are positive, 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 that test positive will be fired but employees that refuse to be tested will receive little or no punishment.

Drug urine samples found to be adulterated are considered a refusal to test because they are an obstruction of the testing process. In addition, they count as positives for the purpose of calculating the industry random test rate and count toward the number of tests required to be conducted. Administrative or procedural errors during the testing process, such as breaking the container holding the sample, are considered canceled tests and are not counted in the totals when calculating the industry random test rate.

Before lowering the testing rate in any industry, the Department wants to be confident that the data are reliable and fairly represent the drug prevalence in the industry. The MIS rules require that employers submit data for each calendar

year by the following March 15th. We envision that the OAs and the OST Drug Office would review the data and that the Administrator (or Commandant) would issue a determination within a few months. If the data indicated that a change in the rate were warranted, the change would go into effect the following year, beginning January 1. This process is the same as the one established in the alcohol final rules published elsewhere in today's **Federal Register**. As in that rule, we believe that covered entities generally need approximately one-half year lead time to adjust their procedures, make changes in any contracts and take other necessary action to adjust to an increase or decrease. We also believe it would be best to keep the reporting determination process on a consistent, calendar year basis. We are aware that this process has a built-in delay, and request comments on whether there is some easier method that, at the same time, provides adequate time to gather and submit data, issue a **Federal Register** notice, and implement the change.

Of equal or greater concern is the built-in lag time between industry reports of rising positive rates and the OA's re-imposition of the 50 percent testing rate. To address this concern, the rule provides that the rate will be raised after 1 year of data indicating a positive rate of 1.0 percent or greater. As a practical matter, however, any industry that is lowered to a 25 percent rate cannot be returned, under the current proposal, to a 50 percent rate until a year after the data indicating the problem. For the reasons noted above, we do not think it is practical to require a change in the testing rate on shorter notice.

We recognize that because the reported positive rate is obtained from data whose precision is eroded by sampling variance and measurement error, and whose accuracy is diminished by non-response bias, there is a greater risk that it diverges from the actual positive rate in the population. Each OA 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 OA 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 reflects the data that would have been received if all were required to report. However, we retain for our discretion the decision on whether the reported data reliably support the conclusion (*e.g.*, based on audits of company records that show significant falsification of reports). If the reported data are not sufficiently reliable, the OA will not permit the random rate adjustment to occur.

We have proposed using industry positive rates (positive tests and refusals to test) as the performance benchmark rather than individual employer or job category positive rates urged by some commenters. Company-by-company rates would be extremely difficult to implement and enforce, would be extremely difficult to apply to small companies, would require reports from all companies, could encourage cheating (especially in areas of heavy competition), and could excessively complicate the use of consortia. Although an individual company may have reduced incentive to lower its positive rate, industry organizations may pressure it to work toward a more favorable industry random testing rate. Industry-wide rates should be much more effective, and easier to implement and enforce. In addition, setting testing rates by job category would raise difficult questions of classification and might appear discriminatory to the employees involved.

The practical implication of this NPRM is that FHWA, RSPA and USCG would remain at 50 percent until they have 2 years of data showing that random positive rates for their industries are less than 1.0 percent. FTA, which is just issuing its drug testing rules in today's **Federal Register**, will begin random drug testing at 50 percent. Like the other operating administrations, it may only lower the rate after 2 years of data showing that the random positive rate for its industry is less than 1 percent. The 2-year period for motor carriers and mass transit would only start after their new drug testing requirements are fully implemented, i.e., two years after testing for small entities starts. If this proposal is adopted, we will announce in the final rule in this rulemaking whether one, or both, industries may lower their random drug testing rate.

The Coast Guard is also proposing to remove 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 proposes to remove this regulatory language.

RSPA is proposing to revise 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 begin collecting drug testing data in 1994, and to report that information to RSPA on an annual basis beginning in 1995. The current regulations required operators to begin their drug testing programs, including random testing, in April and August 1990. RSPA believes this proposed change will eliminate the confusion and administrative burden expressed by many operators who are conducting random testing on an April-April or August-August cycle as required by the current regulations. The proposed revision will allow operators to conduct random testing and collect their drug testing data on a calendar year cycle.

Comparison With Alcohol Misuse Prevention Final Rules

With one major exception, this proposal is intended to mirror, in concept, the final rules for alcohol testing being issued in today's **Federal Register**. Those rules initiate random alcohol testing at a 25 percent rate and make provision for the testing rate to be increased to 50 percent if the positive rate is 1.0 percent or greater for any entire subsequent year, and decreased to a 10 percent testing rate if less than 0.5 percent for two consecutive years. The exception is that this NPRM does not propose to lower the random testing rate to 10 percent if the industry positive rate is less than 0.5 percent.

The Department tentatively finds that a 25 percent random testing rate is the minimal effective rate to ensure deterrence for *drug* use and to allow at least a modicum of detection. The drug rules are dealing, by and large, with illegal substances or, at least, legal substances that are being used contrary to lawful purposes. Unlike alcohol, few people can readily detect most drug use from behavior or appearance. Because of the legality of alcohol and its everyday use throughout society, many people can detect when it has been consumed or when a person is under the influence. Another distinction is that drugs are often packaged in very small form, such as a tablet or powder, while many common forms of alcohol, such as beer or wine, are more visible because of the size of their containers. Thus, alcohol misuse appears to be more easily deterred or detected than drug use and it is not as necessary to establish as strong a deterrence for alcohol through

the tool of random testing. We solicit comment, however, on whether the alcohol approach should be considered for the final drug rule.

Regulatory Analyses and Notices

DOT Regulatory Policies and Procedures

The NPRM 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. Regulatory evaluations for each OA have been prepared and are available for review in the respective dockets. This NPRM was reviewed by the Office of Information and Regulatory Affairs pursuant to Executive Order 12866.

FAA estimates an average potential cost savings of approximately $8.9 million per year 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; RSPA estimates $2.05 million per year; FRA estimates $1 million per year; FHWA estimates $107 million per year; and FTA estimates an average of over $7 million per year. Further detail is available in the OA regulatory evaluations, which are available in the respective dockets.

Executive Order 12612

This NPRM 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.

Executive Order 12630

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that any potential modification in the random drug testing program does not pose the risk of a taking of constitutionally protected private property.

Regulatory Flexibility Act

Depending on how many, if any, transportation industries qualify for a reduction in the random testing rate, the proposal could have a significant economic impact on a substantial number of small entities. Some transportation industries, particularly motor carriers, pipelines, maritime, and transit, are composed of many small companies. If the random testing rate were reduced, there would be a significant cost savings, as discussed in the accompanying regulatory flexibility analyses. In addition, to the extent that the rate is lowered it might have a negative economic impact on those contractors who provide services to employers covered under the rules, some of whom are small entities. The Department specifically seeks public comment on the effect, if any, of potential changes in the program on small entities, as well as any suggested alternative approaches. Further review will be conducted based on comments received on this notice.

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.

National Environmental Policy Act

The Department has determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment and that an environmental impact statement is not required.

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

Federico Peña,

Secretary of Transportation.

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 proposes to amend 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 continues 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).

2. In Appendix I, Sec. II, the definition of "positive rate" would be added in alphabetized order, and the definition of "refusal to submit" would be revised, to read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

II. Definitions

* * * * *

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.

* * * * *

Refusal to submit means that a covered employee failed 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 this appendix or engaged in conduct that clearly obstructs the testing process.

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

Apendix 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 drug 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 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 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 January 25, 1994.

David R. Hinson,

Administrator, Federal Aviation Administration.

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 proposes to amend 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 take (a drug test)* 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 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.

* * * * *

§ 16.205 [Amended]

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 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 reported 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 reported 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 on January 25, 1994.

Adm. J. William Kime,

Commandant, United States Coast Guard.

List of Subjects in 49 CFR Part 199

Drug testing, Pipeline safety, Recordkeeping and reporting.

For the reasons set out in the preamble, RSPA proposes to amend 49 CFR part 199, as follows:

PART 199—DRUG AND ALCOHOL TESTING

1. The authority citation for part 199 continues to read as follows:

Authority: 49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, and 2002; 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 valid medical explanation, 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 (b) through (d) 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 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 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 part or any DOT drug testing rule.

(7) Each operator 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.

(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 January 25, 1994.

Ana Sol Gutiérrez,

Acting Administrator, Research and Special Programs Administration.

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 proposes to amend 49 CFR part 219, as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

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

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100–342; Pub. L. 102–143; 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 numbers 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 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.

* * * * *

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 an 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 on January 25, 1994.

Jolene M. Molitoris,

Administrator, Federal Railroad Administration.

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, FHWA proposes to amend 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. app. 2505; 49 U.S.C. app. 2701 et. seq; 49 U.S.C. 3102; 49 CFR 1.48.

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

§ 382.107 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 driver 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.

* * * * *

3. New paragraphs (l) though (p) are added in § 382.305, as follows:

§ 382.305 Random testing.

* * * * *

(l) Except as provided in paragraph (b) of this section, the annual percentage rate for random drug testing will be not less than 50 percent of the drivers.

(m)(1) The Administrator will authorize employers to lower the annual

percentage rate required in paragraph (a) of this section for random drug testing to not less than 25 percent of all drivers when the FHWA determines that the data received by the FHWA for two consecutive calendar years under the reporting requirements of § 382.403 of this part indicates that the positive rate is less than 1.0 percent. When the data for any calendar year in which the annual percentage rate for random drug testing is not less than 25 percent indicate that the positive rate is equal to or greater than 1.0 percent, the Administrator will require employers to increase the annual percentage rate for random drug testing to not less than 50 percent of all drivers.

(2) The Administrator's decision to authorize a decrease or require return to the 50 percent minimum annual percentage rate for random drug testing will be based on the positive rate in the entire industry. Each year, the Administrator will publish in the **Federal Register** any change to the minimum required percentage for random selection of drivers under this part. The change will be applicable January 1 of the calendar year following publication.

(3) In order to ensure statistical validity, the Administrator will consider the quality and completeness of the reported data and will make appropriate modifications in calculating the industry positive rate.

(n) 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 required percentage determined by the Administrator. If the employer conducts random testing 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 covered employees covered by the consortium who are subject to random testing under this part or by any DOT drug testing rule. The dates for administering random tests shall be spread reasonably throughout the calendar year.

(o) If a given driver is subject to random drug testing under the drug testing rules of more than one DOT agency for the same employer, the driver 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 driver's function.

(p) 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 drivers subject to testing at the same required rate; or

(2) Randomly select such drivers 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 January 25, 1994.

Rodney E. Slater,

Administrator, Federal Highway Administration.

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 proposes to amend 49 CFR part 653, as follows:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for part 653 continues to read:

Authority: Sec. 6, Pub. L. 102–143, 105 Stat. 917; 49 CFR 1.51.

2. The definition of "positive rate" is added and the definition of "refuse to submit" is revised in § 653.7 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 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.

* * * * *

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.

(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 January 25, 1994.

Gordon J. Linton,

Administrator, Federal Transit Administration.

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