

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****Federal Highway Administration****Federal Railroad Administration****Federal Transit Administration****Research and Special Programs Administration**

RIN Nos. 2120-AE43; 2125-AC85; 2130-AA43; 2132-AA38; 2137-AC21.

**Limitation on Alcohol Use by Transportation Workers**

**AGENCIES:** The Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA) and the Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Final rules; common preamble.

**SUMMARY:** This document is a common preamble to five alcohol misuse prevention program final rules being published by several operating administrations (OAs) of the Department of Transportation (FAA, FHWA, FRA, FTA, and RSPA) elsewhere in today's issue of the *Federal Register*. Four of these rules are required by the Omnibus Transportation Employee Testing Act of 1991. All of them will enhance the overall safety of the transportation industry and the public.

**DATES:** Effective March 17, 1994. See separate operating administration rules for specific effective and compliance dates.

**FOR FURTHER INFORMATION CONTACT:** Gwyneth Radloff, Office of the General Counsel, Department of Transportation, (202) 366-9305, 400 7th Street, SW., Washington, DC 20590, with respect to the overall Departmental effort. For information concerning a particular operating administration rule, contact the individual(s) listed under the **FOR FURTHER INFORMATION CONTACT** section for that rule.

**SUPPLEMENTARY INFORMATION:****Summary**

FAA, FHWA, FRA, and FTA are promulgating rules to implement the Omnibus Transportation Employee Testing Act of 1991 ("the Act"), which requires alcohol and drug testing programs in the aviation, motor carrier, rail, and transit industries in the interest of public safety. FAA, FHWA and FRA also are relying on their other general safety authority as a basis for issuing these rules. RSPA is applying similar,

but more limited, requirements to the safety-sensitive employees in the pipeline transportation industry using existing statutory authority.

The five rules generally have the same requirements and common language to the extent possible, in recognition of the common elements of the statute and the problem being addressed. This will ease compliance for those companies, employers and third-party service providers that may be subject to, or performing testing under, the rules of more than one of the OAs. Intended substantive differences (where industry-specific differences are necessary or to comport with existing regulatory format or statutory requirements) are explained in the preambles to the individual OA rules.

In general, the rules prohibit covered employees from performing safety-sensitive functions: (1) When test results indicate an alcohol concentration of 0.04 or greater; (2) Within four hours after using alcohol; (3) While using alcohol on the job; (4) During the 8 hours following an accident if their involvement has not been discounted as a contributing factor in the accident or until they are tested; and (5) If they refuse to submit to required alcohol tests. Employers have to remove from a safety-sensitive function any covered employee who violates any of these prohibitions until he or she has met the conditions for returning to a safety-sensitive function. If an employee is found to have an alcohol concentration of 0.02 or greater but less than 0.04 or if the employee is under the influence of or impaired by alcohol, as indicated by behavior, speech and performance indicators of alcohol misuse, and a reasonable suspicion alcohol test result cannot be obtained, the employee will have to be removed from safety-sensitive duties for 8 hours or until a test result below 0.02 is obtained. Four of the rules require employers to conduct pre-employment, reasonable suspicion (the term used in the Act, which is comparable to the term "reasonable cause" testing used in the DOT OAs' existing drug rules and in the DOT advance notice of proposed rulemaking (ANPRM) on alcohol testing discussed below), post-accident, random, return-to-duty and follow-up alcohol testing. These rules also establish a performance standard for adjusting the initial 25 percent random alcohol testing rate for each transportation industry (except RSPA).

RSPA's rule requires only reasonable suspicion, post-accident, return-to-duty and follow-up testing. Most of RSPA's commenters opposed the proposed alcohol prevention program; others

supported it with various modifications tailored to the specific needs of the pipeline industry. Those in opposition noted that RSPA is not covered by the Act and that we do not have data indicating that there is a problem in the pipeline industry to support the costly imposition of the proposed program. They also perceived pipeline safety risks as different from those in other forms of public transportation, since pipelines do not carry people. Some commenters urged that we conduct a pilot program until we obtain sufficient data to make a decision on whether imposition of the program is justified.

The lack of data cited by some commenters could result as easily from the lack of testing and industry alcohol prevention programs as from the absence of an alcohol problem in the pipeline industry. Our primary job in these rules is to implement the Act, which we have done in the other four OA rules. But to be sure we are providing a margin of safety where the Act does not extend, we are establishing an alcohol prevention program, including reasonable suspicion and post-accident testing, for the pipeline industry. Pipeline safety, obviously, is very important. While pipelines do not carry people, they carry dangerous materials that could do tremendous damage to people and property if someone affected by alcohol makes mistakes. Therefore, for safety reasons, we have decided to impose an alcohol misuse prevention program on the pipeline industry. We will monitor the data from the testing that is conducted to determine whether any further action is warranted. The rule will still ensure that pipeline employees are subject to the same alcohol misuse prohibitions, consequences and educational efforts that apply to other transportation industry employees. Pipeline operators can, of course, conduct other types of alcohol testing under their own authority.

The rules will provide more flexibility to use different testing technologies for screening tests than we proposed in the OA notices of proposed rulemaking (NPRMs). When, in the future, we evaluate and approve a device as meeting NHTSA model specifications and we have established rules setting forth the procedures for its use, employers may use the device. However, at the present time, only evidential breath testing (EBT) devices on the National Highway Traffic Safety Administration's (NHTSA) Conforming Products List (CPL), including those without printers, meet these specifications and will have procedures in place at the time the five OA final



rules take effect. (58 FR 48705, September 17, 1993). The CPL is a list of alcohol breath testing devices that have been found to conform to NHTSA's Model Specifications for EBTs. The CPL serves as a guide to State and local governments when they make purchasing decisions about these devices. (NHTSA develops programs relating to motor vehicle and highway safety, some of which are designed to reduce alcohol and other drug use among drivers.) NHTSA has published elsewhere in today's **Federal Register** proposed model specifications for additional alcohol screening devices, which could lead to their approval for future use in conducting screening tests under these rules.

We also are considering requiring the employer to conduct a blood test in reasonable cause and post-accident situations where an EBT is not readily available. The blood alcohol testing proposal, including testing procedures, is addressed in a separate NPRM published elsewhere in today's **Federal Register**. Before we issue a final rule, we need to resolve specimen collection issues and determine how to identify those laboratories that we can rely on to accurately analyze blood samples for alcohol concentration.

All of the OA alcohol misuse prevention final rules also impose reporting and recordkeeping requirements and provide for dissemination of alcohol misuse information to employees, supervisor training, and referral of employees to substance abuse professionals (SAPs) for evaluation.

This document is a common preamble jointly issued by each of the five OAs and provides the background for and an overview of the general, common elements of their rules. It is incorporated as part of the preamble for each individual OA's rule; additional modal-specific preambles have been issued by each of the OAs to provide an explanation of any differences from, or additions to, the common language. The following related documents appear in today's **Federal Register**:

- (1) This common preamble;
- (2) An Office of the Secretary (OST) final rule on alcohol testing procedures and conforming changes to the existing drug testing procedures that is incorporated by reference into the OA alcohol misuse prevention final rules;
- (3) An Office of the Secretary (OST) NPRM proposing blood alcohol testing requirements and procedures that would be incorporated by reference into the OA alcohol misuse prevention final rules, if they become final;

(4) The modal-specific OA alcohol misuse prevention final rules for: FAA; FHWA (also includes changes to its existing drug rule mandated by the Act, including extension of its rule to persons required to hold a commercial drivers license (CDL), including intrastate truck and motor coach operations); FRA (also includes changes to its existing drug rule); FTA; and RSPA;

(5) FAA and FHWA NPRMs seeking public comment on application of alcohol and drug testing requirements to foreign operators in the United States in the aviation and motor carrier industries. A similar FRA ANPRM issued December 15, 1992, is being withdrawn by a notice published elsewhere in today's **Federal Register**. Foreign railroad operators have very limited operations in the U.S. and already comply with FRA's existing substance abuse requirements;

(6) An FTA final rule that imposes on recipients of Federal funding in the transit industry drug testing requirements similar to those in the other transportation industries (it also contains MIS requirements discussed below);

(7) An FAA NPRM proposing conforming changes to its existing drug testing rule to implement the requirements of the Act and for other purposes; and

(8) A DOT-wide common preamble with rule language from 6 OAs that proposes a performance standard for adjusting the random drug testing rate for the current random drug testing programs in the aviation, motor carrier, rail, pipeline and maritime industries and the new drug testing program for the transit industry. The proposals contain safeguards that would ensure maintenance of an adequate level of deterrence and detection of illegal drug use.

Related Management Information System (MIS) final rules issued by FAA, FHWA, FRA, RSPA and the U.S. Coast Guard (USCG) that require employers to submit annual drug testing program information (USCG rule also contains alcohol requirements) were published December 23, 1993 (58 FR 68194 *et seq.*). FTA's final drug testing rule contains its MIS requirements. Similar MIS programs for alcohol are established in the OA alcohol rules.

Regulatory assessments that analyze the costs and benefits of and the alternatives considered for each of the final rules and NPRMs published in today's **Federal Register** have been placed in the individual rulemaking dockets.

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## Background

### *The Omnibus Transportation Employee Testing Act of 1991*

On October 28, 1991, President Bush signed the Omnibus Transportation Employee Testing Act of 1991 ("the Act"). (Pub. L. 102-143, Title V). The Act requires the Department to prescribe regulations within one year that require testing of safety-sensitive employees in the aviation, highway, rail, and transit industries and in the Federal Aviation Administration for use, in violation of law or Federal regulation, of alcohol and drugs listed in the Controlled Substances Act. The Act preempts inconsistent State and local laws, except certain State criminal laws, in the aviation, highway, and transit industries and requires that the regulations be consistent with U.S. international obligations. It specifically mandates, among other things, privacy in collection techniques, incorporation of the Department of Health and Human Services' (DHHS) mandatory guidelines for drug testing and comparable safeguards for alcohol testing, quantified confirmation of any positive screening result, collection of split samples of body fluid specimens, confidentiality of test results, and scientifically-random selection of employees to be tested. It requires pre-employment, random, post-accident, and reasonable suspicion testing; periodic testing is discretionary. Regulations prescribed under the Act must include provisions for the identification of, and opportunity for treatment for, covered employees in need of assistance due to misuse of alcohol or illegal use of controlled

substances. The Act states that current Federally-mandated programs are unaffected by the new statutory requirements.

At the time of enactment of the Act, several OAs already had implemented programs designed to address the use and misuse of drugs and alcohol by transportation workers, and the Department had published an ANPRM to explore whether additional steps were warranted concerning alcohol misuse by employees in the DOT-regulated transportation industries (54 FR 46326, November 2, 1989). In 1988, six of the Department's OAs—FAA; FHWA; FRA; FTA (formerly the Urban Mass Transportation Administration, (UMTA)); USCG; and RSPA—issued drug testing rules for members of their regulated industries (53 FR 47002 et. seq., Nov. 21, 1988). (The FTA rule was vacated by a Federal appellate court in January 1990 on the grounds that the agency lacked statutory authority to issue nationwide standards requiring drug testing.) The drug testing rules generally apply to persons performing safety-sensitive functions in commercial transportation operations. The Department also published in 1988, and revised in 1989, a Department-wide drug testing procedures rule (49 CFR part 40) that governs testing under all the OA rules (53 FR 47002, Nov. 21, 1988; 54 FR 49854, Dec. 1, 1989). As noted above, the Act requires certain changes to the existing drug testing rules (e.g., it requires split samples and extends coverage to persons required to obtain a CDL, generally intrastate truck and motorcoach operations under the FHWA rule). It also directs FTA to issue a drug testing rule.

In addition to the requirements discussed above, the Act requires alcohol and drug testing for safety-sensitive FAA employees. Air traffic controllers are the largest group of employees subject to this testing (they are already subject to drug testing under an existing DOT policy). In addition, DOT employees and other Federal agency employees in positions requiring a CDL are subject to coverage under the FHWA rule. The Department will issue a DOT Order (an internal program document) to conform the Department's drug testing program for its own employees to the requirements of the Act and to implement a similar alcohol misuse prevention program.

### *Regulatory History*

#### ANPRM

During the drug testing rulemakings, we noted that, although alcohol is a drug, the solution to the alcohol

problem may be very different from that concerning other drugs, such as cocaine or marijuana, and we would address it in a separate rulemaking. For that reason, with one exception, the OAs did not include alcohol among the list of substances to be tested for under the drug testing regulations. (The Coast Guard, which is not covered by this rulemaking, has mandatory post-accident alcohol testing and authorized reasonable cause (suspicion) alcohol testing. FRA had previously included alcohol in its post-accident testing mandate and had authorized alcohol testing for reasonable cause.)

On November 2, 1989, the Department published an advance notice of proposed rulemaking (ANPRM) to solicit public comment on whether the Department's existing regulatory requirements and programs were sufficient to respond to the hazards of alcohol misuse in DOT-regulated transportation industries and to determine what additional action, if any, should be taken. The ANPRM set forth a number of options for reducing alcohol misuse in DOT-regulated industries, if further action was deemed necessary. Over 225 comments were filed in response to the ANPRM; these comments were considered in developing the NPRMs.

### *The Public Hearing on Breath Test Device Capability*

After the enactment of the Act, to enable better evaluation and comparison of the capabilities of different alcohol testing methods, the Department of Transportation conducted a public hearing on November 18, 1991, to obtain specific information from the manufacturers of breath test devices. Our purpose was to examine the current or feasible capabilities of equipment to handle the problems of testing in the transportation industry, particularly verification of the identity of tested individuals and the validity of the test result. At the hearing, the Department noted that attempts to tamper with the test and refusals to acknowledge the test result may be problems because an immediate result is available.

The Department also indicated that it would need to ensure accurate test results without adding prohibitive costs to any proposed program. Representatives of eight manufacturers assured DOT officials that existing technology can keep adequate, verifiable records of tests. They claimed that they could incorporate safeguards against tampering with adjustments to hardware and software, such as the assignment of a serial number to each test. They pointed out, however, that currently



available equipment alone cannot provide an indisputable verification procedure or replace trained human supervision of the testing process.

The Department believes that the testing procedures set forth in the separate final rule establishing new alcohol testing procedures for 49 CFR part 40 published in today's *Federal Register* provide adequate safeguards for breath testing in response to the above concerns.

#### The NPRMs

On December 15, 1992, the Department published eighteen separate documents, including fourteen NPRMs and four ANPRMs, that proposed programs in several DOT-regulated transportation industries to reduce alcohol misuse and to amend existing industry drug testing programs (57 FR 59382 *et. seq.*, December 15, 1992). These included: A common preamble and an OST NPRM on alcohol testing procedures and conforming drug testing changes (part 40), both of which were incorporated by reference into the FAA, FHWA, FRA (also included drug changes), FTA, and RSPA NPRMs proposing alcohol misuse prevention programs; FAA, FRA, and FHWA ANPRMs on application of these requirements to foreign operators in the United States; an FTA NPRM proposing an anti-drug program for the transit industry; FAA, FHWA, FRA, RSPA, and USCG NPRMs proposing the new MIS (FTA drug NPRM included its MIS proposal); an FHWA NPRM proposing statutorily-mandated changes to its existing drug rule, including extending coverage to intrastate truck and motorcoach operations; and a DOT-wide ANPRM that sought comment on less costly alternatives to the current industry random drug testing requirements, particularly changes to the random drug testing rate. The alcohol misuse prevention NPRMs proposed prohibitions on alcohol misuse, related consequences, several types of alcohol testing, reporting and recordkeeping requirements, dissemination of alcohol information, supervisor training and referral of employees to a substance abuse professional (SAP) for evaluation.

#### Summary of Comments

Since there are common requirements, bases and purposes for the rules, each DOT organization (term includes OAs and OST) involved may have relied upon comments submitted to the dockets of the other participating DOT organizations in developing its final rule. Where a DOT organization has relied upon a comment directed to

the docket of another DOT organization, it will make available a copy of that comment. Comments addressing issues common to all of the OAs' alcohol prevention programs generally are addressed throughout this common preamble. Comments on OA-specific issues and the draft economic analyses have been addressed in the preambles to the OA rules. Comments on testing procedures, foreign application, drug testing rules and the drug testing random ANPRM have been addressed in the preambles to those documents.

Approximately 700 comments were filed in response to the NPRMs in the various OA alcohol misuse prevention rule dockets. (Some commenters filed identical comments to more than one DOT organization.) Commenters included local, State and Federal governmental agencies, trade associations, employers, employees, labor unions, consortia, medical professionals, substance abuse professionals and individuals. Most of the comments were filed by employers, followed by trade associations and governmental bodies. The majority of the commenters had a mixed reaction to the proposed alcohol misuse prevention programs and suggested changes on a variety of issues. Some commenters applauded the efforts of Congress and the Department to reduce accidents and save lives by removing from our nation's transportation systems employees in safety-sensitive positions who misuse alcohol. However, approximately one-third of the commenters opposed the specific proposals and only a small percent (less than 5 percent) were enthusiastic about them. A significant number of those in opposition to this effort cited its high cost unsupported by data indicating that there is a serious problem in their industry. Other commenters did not believe that mandatory alcohol testing will effectively deter or eliminate alcohol use among covered employees. As discussed below, many of the requirements of these rules are mandated by the Act and the Department has no authority to modify or ignore them.

In addition to soliciting written comments, the Department held three public hearings on part 40 and the OA alcohol misuse prevention and anti-drug rules in Washington, DC; Chicago; and San Francisco in February and March 1993. OST and all OAs, except USCG, which proposed only MIS requirements, participated in these hearings. The hearings, which ran for two days in each location, consisted of one day of testimony on part 40 and general issues and a second day for breakout sessions

on OA concerns. Approximately eighty people presented testimony at those hearings. (Some commenters made presentations at more than one hearing.) Transcripts of all the hearings and any written materials submitted at the hearings are available in the appropriate rulemaking dockets. All comments received at those hearings have been fully considered in developing the final rules.

#### The Public Meeting

In February 1993, the Department held a public meeting to facilitate presentation and discussion of relevant information on workplace random testing and its impact on drug use deterrence. 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 results of the meeting were inconclusive. 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. These issues also are relevant to alcohol random testing rates discussed later in this document.

#### The National Airline Commission

In April 1993, President Clinton established the National Commission to Ensure a Strong Competitive Airline Industry (also known as the National Airline Commission). Its charter was to review the financial condition of the airline industry and to make recommendations to assist the industry in recovering from the financial and operational difficulties it had faced during the last several years. The National Airline Commission met with industry, labor, and government representatives in a number of public meetings before drafting its final recommendations. Specific to this rulemaking, the Commission stated that "[n]ew pre-employment alcohol testing rules do not need to be adopted, and any random alcohol testing of airline employees should be at no more than a 10 percent rate."



## The Existing Safety Problem

### General Information and Definitions

Throughout this document, we have generally relied on or referred to the results of many studies concerning alcohol. Parenthetical references to these studies are included in the text; their full names are listed alphabetically in a bibliography in Appendix A. Copies of these studies have been placed in OST rulemaking docket 46574. It is important to note that the test data we have are not complete; often the database includes only those tests that were performed. Post-accident tests are conducted after some accidents, but not others, depending upon current regulatory requirements, the availability of testing personnel, and location and timing of accidents. When they are conducted, they may occur hours after the accident (e.g., in the railroad industry it takes an average of 5 hours before the post-accident tests can be conducted). Also, data are not comparable among the transportation modes, because of differences in reporting requirements, databases, and time periods. In addition, the referenced studies generally used different parameters and are therefore not comparable to each other.

Many of the words relating to alcohol are used interchangeably in our society, which may cause some confusion. In this document, we use the terms "driving while intoxicated" (DWI) and "driving under the influence" (DUI) to refer to the same thing: Violation of State and/or Federal alcohol concentration standards defining intoxication. "Zero tolerance" refers to an alcohol concentration standard of 0.00, or in some cases, 0.01 or 0.02. Limits on current testing technology establish the limit of detection at 0.02 concentration for accuracy and precision. "Impairment" and "under the influence" refer to the effect of alcohol ingestion on the performance of a safety-sensitive function, without regard to a specific alcohol concentration.

### The Effects of Alcohol

The potential effects of alcohol misuse are substantial in terms of lives lost, injuries and environmental and property damage. Alcohol misuse claims at least 100,000 lives annually, 25 times as many as all illegal drugs combined. In 1992, 39,235 deaths occurred on our nation's highways, of which 36 percent involved a legally intoxicated driver or non-occupant (e.g., pedestrian), and another 9 percent involved a driver or non-occupant with at least some alcohol (with an alcohol concentration over 0.01). Alcohol is

involved in 45 percent of total highway fatalities. (National Highway Traffic Safety Administration, "Traffic Safety Facts 1992—Alcohol").

Ethanol (the psychoactive component of alcoholic beverages) is a central nervous system depressant. It has been widely recognized for years that consumption of alcohol can degrade performance of demanding or delicate tasks. There is less agreement, however, about how much alcohol must be ingested before a significant degradation of performance occurs. Studies have indicated that the effects of alcohol vary among individuals, and, even for a given individual, alcohol will have varying effects depending on such factors as motivation, fatigue, and previous experience with alcohol (Zero Alcohol, 1987; Ryder, 1981; Landauer, 1983; Lister, 1983). One reason for the substantial variation among individuals is that ingestion of a specified quantity of alcohol by two people will not necessarily produce the same alcohol concentration in each, even if they have the same body weight (Zero Alcohol, 1987).

In one study, for example, it was found that a given body-weight-adjusted dose of ethanol could produce a range of alcohol concentrations of 0.036 to 0.095 (O'Neill, 1983). In addition, alcohol appears to enter the blood stream at different rates in different people (Zero Alcohol, 1987). In another study, subjects were given controlled doses and had equal amounts of food in their system. Nevertheless, the time required to reach the peak alcohol concentration varied from 15 to 90 minutes after ingestion (Wilson, 1984).

There also are performance differences between individuals that are unrelated to their blood alcohol concentration. It appears that highly skilled professionals may be better able to compensate for the physiological effects of alcohol than persons who are less skilled, particularly at lower alcohol concentrations. In two studies comparing the effect of alcohol on the performance of racing drivers and ordinary drivers on a closed track, the skill of the ordinary drivers showed some degradation at an alcohol concentration of 0.05, while the racing drivers showed no impairment until they reached substantially higher alcohol concentrations (Forney, 1961). Similarly, in a comparison of nonprofessional and professional pilots at alcohol concentrations of 0.04, 0.08, and 0.12, the nonprofessionals made numerous errors in tracking, while the professionals' tracking ability did not decrease even at the highest alcohol concentration (Billings, 1972). The

study noted, however, that the professional pilots committed more procedural errors than normal after alcohol consumption. Compounding factors, such as fatigue and unexpected challenges, also are likely to affect results in a real-world situation.

Most States have adopted an alcohol concentration of 0.10 as the definition of intoxication in connection with laws imposing civil or criminal penalties for driving under the influence for non-commercial as well as for commercial operators. Some use it as a rebuttable presumption of a violation; others as a *per se* violation. Ten states have lowered their alcohol concentration standards to 0.08; and a number of states have adopted or are in the process of considering adoption of the existing 0.04 FHWA alcohol concentration standard for commercial drivers established by previous rulemaking. States with alcohol concentration standards for operating recreational vessels or aircraft typically use 0.10.

As indicated above, however, a number of laboratory studies have shown that performance on some tasks can begin to degrade at alcohol concentrations well under 0.10 (Moskowitz, 1973; Drew, 1959; Landauer, 1983; NHTSA, 1988). Some studies have suggested that performance degrades in a linear fashion, beginning with the lowest levels tested (Moskowitz, 1985; Drew, 1959). Blood alcohol concentrations (BAC) lower than 0.05 have been associated with increases in errors in tasks requiring divided attention, and it appears that cognitive performance is decreased for most individuals at BAC's of 0.04 or less (Zero Alcohol, 1987; Evans, 1974). Low alcohol concentrations have also been shown to affect a driver's stopping distance and to increase errors in steering (Laurell, 1977). There is no definitive answer to how much the risk of accident occurrence increases as a result of the performance deficit, but some relationship can be assumed. Those OAs in the Department that have set existing alcohol concentration standards for transportation workers (FAA, FHWA, FRA and Coast Guard) generally have used 0.04 as the prohibited concentration.

In its most recent edition of "Fatality Facts," the Insurance Institute for Highway Safety notes that "even at BACs as low as 0.02%, alcohol affects driving ability and crash likelihood. The probability of a crash begins to increase significantly at 0.05% BAC and climbs rapidly after about 0.08%. For drivers with BACs above 0.15% on weekend nights, the likelihood of being killed in a single-vehicle crash is more than 380



times higher than it is for nondrinking drivers."

#### *The Alcohol Problem—Generally*

The National Institute on Alcohol Abuse and Alcoholism (NIAAA) reported in 1987 that two of every three adults in the United States drink, but 10 percent of those drinkers consume half of the nation's beer, wine and liquor. The National Institute on Drug Abuse (NIDA) reported that an estimated 17 million U.S. adults are alcoholics, which is about six times higher than the number of cocaine users. (NIDA study, 1989). While it is difficult to estimate the precise cost to society from alcohol misuse, there is no doubt that the cost is enormous. The potential effects of alcohol misuse are substantial in terms of lives lost, personal injuries, property damage, business losses (lost productivity, absenteeism, increased health care costs, etc.) and environmental damage.

According to a Research Triangle Institute study performed for the Department of Health and Human Services, the overall economic cost to American society from alcohol misuse was \$89.5 billion in 1980. This amount represents direct costs, such as medical treatment, and indirect costs, such as lost wages and reduced productivity. In 1987, the NIAAA estimated the economic costs to society of alcohol misuse to be nearly \$117 billion a year, including \$18 billion from premature deaths, \$66 billion in lost productivity, and \$13 billion for rehabilitation. Assuming the base numbers are still the same, inflation presumably has increased the cost in current dollars.

The National Academy of Sciences (NAS) recently released a study of drug use in the American workforce. The study reviewed the existing research literature on (1) the effects of drug and alcohol use on workplace performance and productivity, (2) the effectiveness of workplace interventions, and (3) the scope of alcohol and other drug use. The study concluded that more epidemiological and longitudinal research is needed and that the current research literature does not provide definitive conclusions about the scope of use, the specific effects of drug and alcohol use on work performance tasks, and the effectiveness of workplace interventions such as drug and alcohol testing and employee assistance programs. We believe that the existing research literature supports the actions that we are taking here and that data gathered as a result of these rules will provide useful additional information concerning these issues.

#### *National Health Care Reform*

Secretary of Transportation Federico Peña recently set a goal of reducing alcohol-related highway fatalities from 45 percent to 43 percent of total highway fatalities by 1997. He noted that alcohol-related traffic fatalities decreased by 20 percent between 1990 and 1992 due to increased alcohol awareness among teenagers and tougher enforcement measures that reduced impaired driving by repeat offenders. Motor vehicle accidents are a major health problem. They are the primary cause of death for the American population between 5 and 34 years of age, and account for half the total of injury deaths. More people are injured or die in motor vehicle-related accidents each year than from heart disease, cancer, and strokes combined. Alcohol involvement is the single largest factor in motor vehicle deaths and injuries, which as a whole cost the nation \$14 billion in health care costs each year; any reduction in impaired driving would directly contribute to reducing health care and other economic costs. The Department estimates that reducing highway alcohol-related fatalities to 43 percent of total fatalities and reducing related injuries by a proportionate amount would save 1,200 lives annually and save U.S. taxpayers \$282 million in health care costs annually. Obviously, reducing alcohol-related fatalities and injuries in other transportation industries would further reduce those costs.

The measures contained in these rules and the Department's partnership with industry and State and local governments to educate the public about impaired driving are part of a broad Department effort to reduce accidents and injuries resulting from alcohol misuse in each of the transportation industries, which will, in turn, reduce health care costs under President Clinton's health care reform initiative. Increased detection of alcohol misusers and their diversion into the health care system could increase health care costs in the short term, since individuals with serious alcohol problems tend to neglect health care until intervention. This increase would be mitigated to a certain extent by a decrease in alcohol-related absenteeism. However, long term health care costs should decrease because early intervention prevents more serious and more costly health problems later.

#### *Alcohol Misuse in the Transportation Industry*

##### *General*

The Department's previous alcohol misuse prevention efforts have

developed unevenly and vary across the transportation industries. The existing OA rules focus on alcohol in terms of: Its effect on an individual's medical qualifications; prohibitions against on-duty use; operating while under the influence; use during defined pre-duty periods; and sanctions for violations of the Federal regulatory scheme, as well as sanctions for violations of State alcohol laws. Alcohol testing, with limited exceptions, has been left to State enforcement. (Current FRA rules require post-accident and authorize reasonable cause testing. The FAA requires crewmembers to submit to tests upon request by State and local officials and to furnish the results to the Administrator. The Coast Guard also has existing requirements concerning alcohol misuse, including some testing.) Each of the following sections briefly describes the existing OA rules on alcohol and contains available Departmental data on the alcohol problem in each segment of the transportation industry.

##### *Aviation*

The current FAA regulations prohibit a person from acting or attempting to act as an aircraft crewmember if he or she is under the influence of alcohol, has consumed any alcoholic beverage within the prior 8 hours, or has an alcohol concentration of 0.04 or greater. The FAA may medically disqualify a pilot with a history of drug dependence, alcoholism, or mental problems.

In 1987, the Department's Inspector General checked the National Driver Register (NDR) against records in the Florida Department of Motor Vehicles; it found that nearly 8,000 FAA-certified pilots in Florida had been convicted of drunk-driving offenses. Recent legislation allowed FAA and the rail industry to use the NDR to locate and review individual driving records to screen qualifications of airline pilots and locomotive engineers. The FAA was unaware of these DUI convictions because the pilots had not reported them to the FAA as required. The FAA then issued a DUI enforcement policy and a rule that includes, among other matters, a process for examining driving records. Pilots with 2 or more drug- or alcohol-related driving offenses within 3 years are subject to FAA certificate revocation action.

In 1991, the FAA began checking the NDR to identify pilot certificate holders who had drunk-driving convictions. Of pilots seeking medical recertification during the period May 1991 through May 1993, 5.79 percent had at least one DWI conviction reported. The total number of pilots (for scheduled and



non-scheduled airlines) who had one or more DWI's was 4,386, or 6.4 percent. There is no research that directly links impaired driving behavior to commercial aviation performance; however, impaired driving behavior is often associated with alcohol abuse and/or alcoholism.

There has never been an accident involving a large U.S. passenger airline in which the probable cause was attributed to alcohol use. However, in 1990, three Northwest Airlines pilots were convicted of flying while intoxicated between Fargo, ND, and Minneapolis, MN. Two hours after the flight ended, the crew captain's alcohol concentration was found to be 0.13; he testified that he drank 20 rum and cokes the night before the 6 a.m. flight. Starting in the early 1970's, the Air Line Pilots Association and the major airlines, in cooperation with the FAA, developed a program to identify alcoholic pilots, so that they could be treated and, as appropriate, returned to duty. More than 1,500 pilots have been through this program, with a relapse rate of approximately 10 percent. Since the program provides for stringent surveillance of treated pilots, there has been no compromise of safety. Nevertheless, the existence of such an extensive program and the occurrence of the Northwest pilots incident demonstrate that the air carrier industry is not immune to the problem of alcohol misuse.

The National Transportation Safety Board (NTSB) has collected the following data concerning the relationship between alcohol and aviation accidents: From 1975 through 1986, eleven part 135 carriers (all except one were commercial air taxi cargo planes; the exception was a non-scheduled charter carrier with a foreign crew) were involved in accidents in which alcohol was determined to be a factor. As noted above, there have been no part 121 or part 135 (large or air taxi/commuter air carrier) accidents in which alcohol has been determined to be a cause.

Virtually all commenters to the FAA docket claimed that, in light of the current financial state of the airline industry, DOT should not mandate an overzealous random alcohol testing program that is not statistically justified. As we noted above, we are constrained by the requirements of the Act. To the extent possible, we have tried to provide flexibility to employers that will enable them to make cost-conscious decisions for their specific circumstances. With respect to our lack of data, it is difficult to know whether the lack of a large U.S. passenger aircraft accident caused by

alcohol is due to the fact that it has never happened or because we have no required testing and could not determine that alcohol was involved.

#### Motor Carriers

Currently, drivers found to be under the influence of alcohol or drugs are disqualified from operating a commercial motor vehicle (CMV). FHWA regulations prohibit the use of alcoholic beverages within four hours of reporting to work and also prohibit a driver from driving while having any measurable alcohol concentration or any detected presence of alcohol in his or her system. This effectively amounts to a zero alcohol limitation for CMV operators. In addition, a driver will not be considered physically qualified to drive a motor vehicle if, among other things, the driver has no current clinical diagnosis of alcoholism.

Accident statistics indicate that nearly half of the fatally injured noncommercial motor vehicle drivers had a measurable amount of alcohol in their blood (usually 0.10 or more) compared with about 15 percent of fatally injured drivers of medium and heavy trucks. Moreover, as the chart below indicates, for those truck drivers who had been drinking before an accident, the highest accident rate was among those consuming the most alcohol. Drivers of heavy and medium trucks with measurable alcohol concentrations are involved in about 750 fatal crashes annually, along with another 7,700 crashes resulting in personal injuries and 4,750 crashes involving only property damage (Zero Alcohol, 1987).

	Percentage of all fatal truck accidents	Percentage of the 15% of truck drivers who had alcohol in their blood
No Truck Driver Use of Alcohol .....	85.0	N/A
AC=0.10 or more .....	9.1	60
AC=0.04-0.10 ..	2.7	18
AC=.03 or less ..	3.2	21

(Zero Alcohol, 1987) (FARS data tapes, 1982-1985) (AC means alcohol concentration)

In 1990, the NTSB published the results of a study of alcohol (and other drugs) used by CMV operators in fatal-to-the-driver, heavy truck accidents. Thirteen percent of the fatally injured drivers tested positive for alcohol. (Another 20 percent of the drivers tested positive for other drugs.) We also know that the cost of accidents to employers is substantial, over and above the lives

lost, whether CMV accidents are caused by alcohol or something else. The National Safety Council estimates that an on-the-job accident is four times more costly than one that occurs in a personal vehicle, with an average cost to employers of \$168,000 for a fatal accident and \$6,900 for a non-fatal accident. The impact of on-the-job accidents caused by alcohol on employer costs is quite significant.

**FHWA Pilot Project.** The Act required the Secretary of Transportation to conduct a pilot program for the purpose of testing drivers on a random basis to determine if a driver has used alcohol or a controlled substance in violation of law or federal regulation. The pilot testing program was administered as part of the FHWA's Motor Carrier Safety Assistance Program (MCSAP) and implemented in four States for a period of one year. At the completion of the pilot program, the Department will issue a report of the program, including recommendations concerning the desirability and implementation of a MCSAP-administered random testing program. FHWA began the implementation of the required pilot project in Fiscal Year 1993 (October 1, 1993-September 30, 1994). (N.B.: the Fiscal Year for the Federal government may differ from that used by other entities.) Preliminary data from the pilot program show 88 breath test results of 0.02 alcohol concentration or greater out of 43,170 tests conducted (0.2 percent). However, in two States (Minnesota and New Jersey) submitting to the breath test was voluntary and from 5 to 10 percent of drivers randomly selected declined to take a breath test.

#### Rail

Current FRA regulations prohibit on-the-job use of, possession of, or impairment by, alcohol, or having an alcohol concentration of 0.04 or more, for employees covered by the Hours of Service Act. Workers who report for duty under the influence can be identified, removed from the workplace, and referred for assistance under Operation RedBlock or other similar peer prevention substance abuse programs operated by the railroad industry. The covered employee can be referred for assistance by a peer, a supervisor or himself/herself.

As part of the post-accident testing conducted under its current rules, FRA has gathered the following data. From February 1986, when mandatory FRA post-accident blood testing for alcohol began, through December 1992, 23 employees tested positive for alcohol (0.5 percent of employees tested). However, the number of positive



findings has declined from 6 (1.0 percent of all persons tested) in 1989, to 1 (0.3 percent of all persons tested) in 1992. Since 1986, alcohol appears to have played a causal role in 11 accidents/incidents involving four deaths, three injuries, and property damage in excess of \$3.3 million. In one, the engineer tested positive at an alcohol concentration of 0.16, and alcohol was found by the NTSB to be a contributing factor to the accident. The incident caused \$1.58 million damage and the death of the engineer. In another accident, eight injuries and \$194,000 in damages resulted, and a dispatcher tested positive at 0.15 alcohol concentration. In a 1990 accident, an engineer tested positive with an alcohol concentration of 0.05 after his train passed a stop signal and collided with another train, resulting in one injury and nearly \$500,000 in property damage. In 1991, two brakemen were killed, one by a train when struck during a switching operation and the other when he fell from the side of a train. Post-mortem toxicology revealed alcohol concentrations of 0.04 and 0.08, respectively.

Reasonable cause breath testing under the FRA program or pursuant to railroad authority (triggered by rule violations, less serious accidents and injuries, or reasonable suspicion) has produced the following results: 11 of 348 persons so identified tested positive in 1986 (3.2 percent); 24 of 593 tested positive in 1987 (4.0 percent); 46 of 1005 tested positive in 1988 (4.6 percent); 31 of 973 tested positive in 1989 (3.2 percent); 32 of 2662 tested positive in 1990 (1.2 percent); 37 of 2798 tested positive in 1991 (1.32 percent); and 30 of 2850 tested positive in 1992 (1.2 percent). FRA regulations define a "positive" breath test as one indicating an alcohol concentration of 0.02 or above. The significance of these results with respect to measuring prevalence in the population is difficult to determine. It should be expected that a higher percentage of reasonable suspicion tests will be positive, since prohibited use or impairment had already been identified or suspected.

#### Transit

FTA does not have any existing regulations concerning alcohol. Its primary mission is to provide grants for the financing and improvement of transportation systems. Many of FTA's grantees, however, are subject to other Federal requirements on alcohol use. All commuter rail operations funded by FTA, for example, are subject to FRA regulations. Ferry operations that receive FTA funds are subject to USCG

safety, drug and alcohol regulations, as well as the FTA drug and alcohol testing rules published today.

The need for alcohol testing of transit employees was highlighted by a December 28, 1990, accident in Boston, Massachusetts, where a transit operator, with an alcohol concentration above 0.10, crashed a trolley car, injuring 33 people. In addition, the Senate Committee on Commerce, Science, and Transportation's report on S. 676, No. 102-54 (May 2, 1991), noted that, in Philadelphia alone, transit operators have tested positive for drug or alcohol use in six major accidents between 1986 and 1990, involving at least 183 injuries and three deaths. (Separate figures for drug and alcohol involvement were not provided.) On August 28, 1991, a New York City Transit Authority motorman later found to have an alcohol concentration of 0.21 crashed a subway train resulting in 5 deaths and 171 injuries; this accident led to the prompt passage of the Act. Following issuance of the 1988 FTA anti-drug rulemaking, some industry members indicated that alcohol is a more serious problem than drugs.

An FTA document entitled, "Substance Abuse in the Transit Industry," November 1991, was based upon a transit agency survey and an employee survey. It revealed that responding transit managers perceived alcohol as the major substance of misuse and that 58 percent of the transit systems test for alcohol. Employee knowledge of coworker alcohol misuse was extensive; about 70 percent of employees surveyed had some knowledge, either through hearsay or by direct observation, of alcohol impairment of colleagues in the workplace during the previous year. About six percent of the safety-sensitive employees reported alcohol use during or just before duty. Another 15 percent of the safety-sensitive employees reported less frequent alcohol consumption, but at a nearly similar volume as those employees noted above. When comparing these data with those contained in the "National Household Survey on Drug Abuse: Population Estimates 1988" and the comparable 1990 NIDA survey, it appears that reported alcohol use in the transit industry is slightly lower than that reported for the general population.

#### Pipeline

RSPA has no specific regulations on alcohol. It does have a general regulation on health of pipeline workers at liquefied natural gas plants. Pipeline operators must look for any physical condition that would impair

performance, including any observable disorder or condition that is discoverable by a professional examination.

We have no specific data on alcohol-related accidents or lost productivity data in this area; however, a number of the commenters in the anti-drug rulemaking seemed to believe that alcohol is a more pervasive problem than drugs in the pipeline industry. We also are aware that many companies in the pipeline industry are known to have alcohol prevention programs. We do not have statistics or data on the prevalence of the problem in the industry, but we cannot assume that pipeline workers are immune from the problem and must err on the side of safety. The largest single cause of pipeline accidents is excavation damage by people digging into pipelines (people not regulated by RSPA).

#### Legal Authority/Issues

##### Background

The following legal analysis was included in the common preamble to the proposed DOT alcohol testing rules published in the *Federal Register* of December 15, 1992, (See 57 FR 59389-59391) and is republished with this document for ease of reference. Since that time, there have been no significant case law developments to raise any doubts concerning the Department's stated belief that existing legal precedents support this rulemaking. To the contrary, the case law addressing the constitutionality of alcohol and drug testing is even more settled. Of particular note in this regard is a recent Federal district court ruling that random testing of commercial motor vehicle operators for alcohol and controlled substances pursuant to a one-year pilot study in four States, as mandated by section 5(b) of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, title V, codified at 49 U.S.C. app. 2717 note, comports with the Fourth Amendment of the U.S. Constitution and is not an unreasonable search and seizure. *Owner-Operator Independent Drivers Association, Inc. v. Peña*, No. 93-1427, U.S. District Court for the District of Columbia, November 1, 1993.

##### General

The Omnibus Transportation Employee Testing Act of 1991 is a direct statutory mandate for alcohol testing in the aviation, motor carrier, rail, and transit industries. In addition to this authority, the general safety authority relied on for issuing the drug testing rules described above also provides a



basis for issuing alcohol misuse prevention rules by FAA, FHWA, FRA, and RSPA. Although the existing case law addressing the constitutionality of employee alcohol testing programs remains more sparse than that for drug testing, the existing legal precedents support this rulemaking effort to require alcohol testing in the regulated transportation industries.

Consistent with court findings in the area of government-mandated drug testing of employees, alcohol testing mandated by the government is considered a search within the meaning of the Fourth Amendment to the U.S. Constitution. See, *Schmerber v. California*, 384 U.S. 757, 767-768 (1966) ("compelled intrusions into the body for blood to be analyzed for alcohol content" must be considered a Fourth Amendment search); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 616-617 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis \* \* \* implicates \* \* \* concerns about bodily integrity and, like the blood-alcohol test \* \* \* considered in *Schmerber*, should also be deemed a search.")

In deciding whether a particular search comports with Fourth Amendment protections, courts must determine that under all the particular circumstances the search itself is "reasonable." As the leading case on bodily fluid testing, *Skinner*, makes clear, issuance of a warrant or the existence of probable cause or individualized suspicion is not a minimum essential requirement in establishing the reasonableness of a search under an administrative testing program.

In *Skinner*, the Supreme Court upheld regulations issued by the Federal Railroad Administration governing drug and alcohol post-accident and reasonable cause testing of railroad employees (49 CFR part 219). The Court concluded that the testing procedures and methods of procuring blood, breath, or urine for testing as set forth in subparts C and D of the FRA regulations "pose only limited threats to the justifiable expectations of privacy of covered employees." 489 U.S. at 628. In specifically focusing on the privacy implications of breath alcohol tests, the Court also pointed out that:

The breath tests authorized by subpart D of the regulations [testing for reasonable cause] are even less intrusive than the blood tests prescribed by subpart C [post-accident toxicological testing]. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a

hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in an employee's bloodstream and nothing more. Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. \* \* \* In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns. *Id.* at 625-626.

While the Court indicated that the collection of urine samples requires employees "to perform an excretory function traditionally shielded by great privacy, [thus] rais[ing] concerns not implicated by blood or breath tests[.]" it pointed out that the FRA collection procedures significantly reduced the degree of personal privacy intrusion. *Id.* at 626. The Court also examined the overall privacy expectations of covered railroad workers subject to the FRA testing requirements. It concluded that these expectations "are diminished by reason of ['covered employees'] participation in an industry that is regulated pervasively to ensure safety \* \* \*." *Id.* at 627.

By contrast, the Court found that the government's interests in seeking to determine the cause of an accident or incident, deterring alcohol and illegal drug use by rail employees, and safeguarding the general public are compelling. Under these circumstances, the Court held that alcohol and drug testing pursuant to the FRA regulations are reasonable within the meaning of the Fourth Amendment. Also, the Court found that the government's justification in testing for misuse of alcohol—a legal substance—was entitled to no less weight than its justification for testing for drugs, the possession of which is unlawful. Thus, as the Court pointed out, the FRA-prescribed toxicological tests were not designed "to assist in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* at 621-622, 633 (quoting FRA regulations at 49 CFR 219.1(a)).

The alcohol testing requirements for transportation industry workers published by each of the OAs in today's *Federal Register* are consistent with the Court's views in *Skinner*. Given the overwhelming public safety considerations associated with alcohol testing programs and the limited degree of intrusion into individual privacy interests engendered by the tests, the required testing programs would be

constitutionally permissible under the Fourth Amendment.

Also, the requirement that an employer perform random alcohol testing that is performance-related, i.e., related closely in time to an employee's actual performance of safety-related duties, further demonstrates the reasonableness of the rules for Fourth Amendment purposes by ensuring that testing for misuse of alcohol is clearly related to the employee's performance of these duties. With respect to use of particular testing devices or methods, we note that, as a number of courts have pointed out, the reasonableness of a testing program does not necessarily turn on the existence of other alternatives that might be less intrusive. See *American Federation of Government Employees v. Skinner*, 885 F.2d 884, 897 (1989), cert. denied, 495 U.S. 923-924 (1990).

The lack of a demonstrated substance abuse problem among the workforce in a particular industry should not, of itself, pose insurmountable constitutional impediments to a testing program for that workforce. This point was made clear by the Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674-675 (1989), which was decided the same day as *Skinner*. In *Von Raab*, the Court upheld urinalysis testing for illegal drugs of U.S. Customs Service employees slated for promotions into positions that involved either interdicting illegal drugs or carrying a firearm. Despite the Commissioner of Customs' stated belief that "Customs is largely drug-free," the Court concluded that there was little reason to suspect that the Customs Service was "immune" from society's pervasive drug abuse problem and held that the testing program was constitutionally defensible as a means to ensure that employees promoted to these sensitive positions are drug-free. *Id.*, at 660, 674. It stated that the government does not have to first establish that a specific industry has a problem. ("It is sufficient that the government have a compelling interest in preventing an otherwise pervasive societal problem from spreading through the particular context.") *Id.* note 3 at 675.

*Skinner* and *Von Raab* established the analytical framework for courts to resolve constitutional challenges to various employee substance abuse testing programs. Not surprisingly, Federal courts reviewing anti-drug abuse regulations issued by the Department have relied extensively on these two decisions in upholding drug testing of safety- and security-sensitive workers in industries regulated by the



Department. See, *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), cert. denied, 111 S.Ct. 954 (1991) (upholding constitutionality of Federal Aviation Administration regulations requiring random drug testing of flightcrew members, maintenance personnel, and other categories of employees in the commercial aviation industry); *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991) (upholding constitutionality of Federal Highway Administration regulations requiring random, biennial, pre-employment and post-accident drug testing of commercial motor vehicle drivers operating in interstate commerce); *Railway Labor Executives' Association v. Skinner*, 934 F.2d 1096 (9th Cir. 1991) (upholding constitutionality of Federal Railroad Administration's regulations requiring random drug testing of railroad workers in safety-sensitive positions); *International Brotherhood of Electrical Workers v. Skinner*, 913 F.2d 1454 (9th Cir. 1990), and *United Steelworkers of America v. Skinner*, 768 F. Supp. 30 (D. RI 1991) (upholding constitutionality of Research and Special Programs Administration's regulations requiring random, pre-employment, and post-accident drug testing of safety-sensitive employees engaged in natural gas, liquefied natural gas, and hazardous liquid pipeline operations.) See also, *Transportation Institute v. Coast Guard*, 727 F. Supp. 648 (D.D.C. 1989) (upholding constitutionality of Coast Guard regulations requiring pre-employment, periodic, post-casualty, and reasonable cause drug testing for merchant marine personnel; however, regulations requiring random drug testing of all vessel crewmembers were found to violate the Fourth Amendment because the safety-sensitive duties performed by this entire class of employees was not evident. Although the court noted that random testing for employees could be constitutionally acceptable, it held that the Coast Guard had not adequately described the safety-sensitive functions of the covered employees to allow the court to establish the necessary nexus. The missing safety nexus was established in a subsequent Coast Guard final rule reimplementing random drug testing). Even pre-*Skinner* and *Von Raab* court decisions addressing the constitutionality of various employee alcohol testing programs have concluded that such testing comports with the Fourth Amendment. Thus, a State regulation requiring jockeys to submit to mandatory warrantless breath alcohol tests on each racing day was

found to be constitutionally permissible. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986). Similarly, alcohol and drug testing during a pre-employment physical examination, work-related examination, return to work after unscheduled absence, or on the basis of reasonable suspicion or involvement in an accident or incident was upheld in the case of transit employees directly involved in the operation, maintenance, and decisionmaking of a public transit system. *Amalgamated Transit Union, Local 933 v. City of Oklahoma City*, 710 F. Supp. 1321 (W.D. Okla. 1988). *Accord, Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority*, 691 F. Supp. 898 (W.D. Pa. 1988) (mandatory drug and alcohol testing during annual physical examination does not violate Fourth Amendment).

Also, several more recent Federal court decisions upheld employee alcohol testing in the wake of *Skinner*. Thus, in *Transport Workers Union, Local 234 v. Southeastern Pennsylvania Transportation Authority*, 863 F.2d 1110 (3d Cir. 1988), vacated and remanded, 492 U.S. 902 (1989), *aff'd on remand sub nom. United Transportation Union v. Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (1989), the U.S. Court of Appeals for the Third Circuit upheld, inter alia, random breath testing of transit operating employees. See also, *Tanks v. Greater Cleveland Regional Transit Authority*, 930 F.2d 475 (6th Cir. 1991) and *Holloman v. Greater Cleveland Regional Transit Authority*, 741 F. Supp. 677 (N.D. Ohio 1990), *aff'd*, 930 F.2d 918 (6th Cir. 1991) (upholding transit authority's drug and alcohol testing program requiring testing of blood, saliva, and urine in the face of challenges by two bus drivers subjected to random, post-accident, and periodic testing); *Moxley v. Regional Transit Services*, 722 F. Supp. 977, 980 (W.D. NY 1989) (upholding constitutionality of transit authority's drug and alcohol testing program and noting that "the Government's interest in the efficient and proper operation of the workplace is at a zenith where public's [sic] lives depend on the reliable and sober performance of Government employees").

Consistent with the Supreme Court's analysis in *Skinner* and *Von Raab* and lower court decisions, if the Congress determines that there is a need for properly-administered alcohol testing to ensure that employees in transportation industries are not adversely affected by alcohol while performing safety-sensitive functions, that need would

outweigh the privacy interests of these employees and, thus, would be constitutionally permissible.

#### *The Americans with Disabilities Act and DOT Drug and Alcohol Testing*

The Americans with Disabilities Act of 1990 (ADA) (Pub. L. 101-36) does not, in any way, preclude or interfere with employers' compliance with the Department's new or existing drug and alcohol testing regulations. However, title I of the ADA, which prohibits discrimination against a "qualified individual with a disability," may affect the personnel actions an employer might wish to take with respect to some individuals who test positive for alcohol or drugs or otherwise violate the prohibitions of the Department's drug and alcohol rules.

Title I covers employers who have fifteen or more employees for more than 20 calendar weeks in a year (section 101(5)(A)). (Until July 26, 1994, only employers with 25 or more such employees are covered.) Covered employers may not discriminate against a qualified individual with a disability with respect to applications, hiring, advancement, discharge, compensation, or other terms, conditions or privileges of employment (section 102(a)).

Before discussing the effect title I may have on employer personnel actions following a positive DOT-mandated drug or alcohol test or other violations of DOT drug and alcohol rules, it is important to note the specific ADA provisions that address DOT drug and alcohol rules. The ADA specifically authorizes employers covered by DOT regulations to require their employees to comply with the standards established in those regulations, including complying with any rules that apply to employment in safety-sensitive positions as defined in the DOT regulations. (section 104(c)(5)(C)). By authorizing employers to require employees to comply with the standards in DOT rules, this provision authorizes compliance not only with testing provisions of the rules but also of other drug and alcohol-related provisions that affect safety-sensitive employees (e.g., pre-duty abstinence, on-the-job use). The legality under the ADA of employer compliance with DOT drug and alcohol requirements other than those concerning testing is underlined by several other provisions of title I. An employer may prohibit the use of drugs and alcohol in the workplace, may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace, and may require that employees conform to the requirements of the



Drug-Free Workplace Act (Pub. L. 100-690, title V, subtitle D) (section 104(c)(1-3)).

Concerning drug and alcohol testing and its consequences, the statute further provides that nothing in Title I shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to (1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c). (Subsection (c) includes the statutory language cited above.) (section 104(e)). These ADA provisions clearly specify that the ADA does not interfere with the compliance by covered employers with DOT regulations concerning drug and alcohol use, including requirements for testing and for removing persons who test positive from safety-sensitive functions. Under the ADA, an employer is not viewed as "discriminating" for following the mandates of DOT drug and alcohol rules.

In considering the effects on the personnel actions that employers choose to take after a safety-sensitive employee tests positive for drugs or alcohol or otherwise violates DOT drug or alcohol rules, it is important to note that the ADA's prohibition of employment discrimination applies only with respect to a "qualified individual with a disability." The ADA specifically provides that an employee or applicant who is currently engaging in the illegal use of drugs is not a "qualified individual with a disability" (section 104(a)). The ADA does not protect such an employee from adverse personnel actions. For purposes of the ADA, the drugs that trigger this provision are those the use, possession or distribution of which is prohibited by the Controlled Substances Act (section 101(6)). The five drugs for which DOT mandates tests fit this definition (alcohol is not a drug covered by the Controlled Substances Act).

What does "currently engaging" in the illegal use of drugs mean? According to the Equal Employment Opportunity Commission (EEOC), whose rules carry out Title I, the term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks of, the employment action in question. Rather, the provision is intended to apply to the

illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. (56 FR 35745-46, July 26, 1991). It is clear that an individual who has a positive result on a DOT-mandated drug test is currently engaging in the illegal use of drugs. Therefore, under Title I, an employer may discharge or deny employment to an individual who has a positive result on a DOT-mandated drug test.

This provision that an individual who is currently engaging in the illegal use of drugs is not a "qualified individual with a disability" does not apply, of course, if the individual is erroneously regarded as engaging in the illegal use of drugs. In addition, if an individual, even a former user of illegal drugs, is not currently engaging in the illegal use of drugs and (1) has successfully completed a supervised rehabilitation program or otherwise has been successfully rehabilitated, or (2) is participating in a supervised rehabilitation program, the individual can continue to be regarded as a "qualified individual with a disability," if the individual is otherwise entitled to this status (section 104(b)). An employer may seek reasonable assurance that an individual is not currently engaging in the illegal use of drugs (including requiring a drug test) or is in or has completed rehabilitation. Some employers (EEOC uses the example of a law enforcement agency) may also be able to impose a job qualification standard that would exclude someone with a history of drug abuse if it can show that the standard is job-related and consistent with business necessity (56 FR 35746, July 26, 1991).

Unlike the situation with respect to the current use of illegal drugs, the use of alcohol contrary to law, Federal regulation, or employer policy does not deprive an individual of status as a "qualified individual with a disability" that he or she would otherwise have under title I. An individual is protected by title I, however, only if the individual has a disability in the first place. (This is also true with respect to a former drug user or any other individual who seeks the protection of the ADA.) To have a disability, an individual must have a "physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such impairment, or being regarded as having such an impairment" (section 1(2)). While, as the EEOC notes in its title I regulation, "individuals disabled by alcoholism are accorded the same protections accorded other individuals with disabilities" (56 FR 35752, July 26,

1991), not all individuals who use alcohol in violation of law, Federal regulation, or employer policy are "disabled by alcoholism."

The courts interpreting section 504 of the Rehabilitation Act of 1973 (with which ADA employment provisions are intended to be consistent) have concluded that alcoholism can be a disability which may call for reasonable accommodation. See, e.g., *Walker v. Weinberger*, 600 F. Supp. 757 (D.D.C., 1985); *Tinch v. Walters*, 765 F.2d 599 (6th Cir., 1985); *McKelvey v. Walters*, 596 F. Supp. 1317 (D.D.C., 1984); *Anderson v. University of Wisconsin*, 665 F. Supp. 1372 (W.D. Wis., 1987); *aff'd* 841 F.2d 737 (7th Cir., 1988); *Richardson v. Postal Service*, 613 F. Supp. 1213 (D.D.C., 1985); *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3rd Cir., 1987).

The logic of the ADA, and EEOC's regulatory provisions implementing the statute, suggest that, in determining whether an employee or applicant who has a positive result on a DOT-mandated alcohol test or otherwise violates a DOT alcohol rule is disabled by alcoholism, the employer would answer two questions. First, does the individual have a physical or mental impairment; e.g., is the individual an alcoholic? (People who test positive for alcohol are not necessarily alcoholic.) This question would probably have to be answered with the assistance of a physician or substance abuse professional. Second, if the individual is an alcoholic, does this impairment substantially limit a major life activity or is it (even erroneously) regarded as substantially limiting a major life activity? This question would be answered on a case-by-case basis, following EEOC's guidance (see 56 FR 35740-44, July 26, 1991). Under DOT's alcohol prevention rules, these determinations will be made by or in cooperation with the substance abuse professional that the rules require to be involved following a positive test or rule violation.

The determination of whether an individual is a qualified individual with a disability is made in two steps: (1) Whether the individual has the appropriate education, experience, skills, and licenses, and meets the other prerequisites of the position; and (2) whether the individual can perform the essential functions of the job desired or held with or without reasonable accommodation. Essential functions are the functions that the individual holding the position must be able to perform unaided or with reasonable accommodation. Several factors are considered in determining whether a job



function is essential, including whether the employer actually requires employees in this position to perform the function, whether the position exists to perform the function, whether there are other employees who could perform the function, and whether there is a high degree of expertise or skill required to perform the function.

If the individual is qualified and determined to be disabled by alcoholism, then the employer may not discriminate against the individual on the basis of his or her disability and, if job performance and behavior are not affected by alcoholism, must make "reasonable accommodations" to the individual's known physical or mental limitations, unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer's business.

The selection of an appropriate "reasonable accommodation" is done on a case-by-case basis, as EEOC guidance provides (see 56 FR 35744, July 26, 1991). Reasonable accommodation for an individual disabled by alcoholism could include such actions as referral to an Employee Assistance Program or other rehabilitation program, provision of rehabilitation services, and giving an employee sufficient time to demonstrate that rehabilitation had been successful. See, e.g., *Washington v. Department of the Navy*, 30 M.S.P.R. 323 (1986); *Swafford v. Tennessee Valley Authority*, 18 M.S.P.R. 481 (1983).

Even when an individual is disabled by alcoholism, however, the employer is not required to provide a reasonable accommodation that creates an "undue hardship." Undue hardship involves significant difficulty or expense in, or resulting from, providing an accommodation. EEOC describes an undue hardship as "an accommodation that would be unduly costly, extensive, substantial or disruptive, or that would fundamentally alter the nature or operation of the business." (*Id.*) This concept takes into account the financial resources of the employer (e.g., an accommodation that would be reasonable for a large business may be an undue hardship for a small business). But the concept is not limited to financial difficulty. For example, if a small trucking company determined that the accommodation that one of its drivers needed for an alcoholism-related disability was lengthy in-patient rehabilitation, the company not only might find the accommodation beyond its financial resources but also too disruptive of its operations (i.e., a temporary replacement would have to be hired or the work of the firm be reduced significantly).

Under title I, an employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance or behavior as it holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee (Section 104(c)(4)). For example, if, as the result of alcoholism, an employee is chronically late or absent, or makes frequent job errors, the employee would be subject to personnel action on the same basis as any other employee who exhibited similar behavior for other reasons. (However, if the alcoholic employee were subjected to personnel actions that were not used against non-alcoholic employees who were chronically late or absent, or made frequent job errors, then the alcoholic employee might have a cause of action under the ADA.) The employer is not precluded from accommodating this alcoholic employee, but is not required to do so.

It should also be pointed out that the ADA does not preclude an employer from disciplining or dismissing an employee who commits a violation of the employer's conduct and performance standards, even if the individual is an alcoholic or has another disability. For example, a violation of a DOT operating administration's alcohol misuse rules (e.g., a test demonstrating a prohibited alcohol concentration) could be a violation of the employer's performance and conduct rules, for which the employer's policy could call for the employee's dismissal. This result would not violate the ADA.

There are also situations in which meeting qualification standards of DOT safety rules, or having a valid license or certificate from a DOT operating administration, is an essential job qualification. If a truck driver does not meet FHWA qualification standards to obtain a Commercial Driver's License from a State, or if a pilot does not qualify for an FAA medical certificate, that individual is not a "qualified" individual with a disability, even if the reason for the failure to meet DOT qualifications is a condition that an employer might be required to accommodate under the ADA. The legislative history of the ADA specifically recognizes this special status for DOT qualification standards (see Senate Report 101-116 at 27, August 30, 1989).

Another issue that has been raised in context of the relationship between the ADA and alcohol testing concerns whether an alcohol test is a "medical examination." Non-regulatory guidance

issued by the EEOC suggests that "a test to determine an individual's blood alcohol level would be a 'medical examination' and only could be required by an employer in conformity with the ADA." It should be pointed out that this statement does not, on its face, apply to breath testing (or other methods that do not involve blood samples) for alcohol. The EEOC has not determined whether it views breath testing for alcohol as a "medical examination."

The Department of Transportation takes the position that alcohol testing under the program required by these rules is not properly viewed as a required medical examination. It is not the collection of a breath or body fluid sample that makes a test "medical" in nature. The tests in question are solely for the purpose of determining whether an employee has violated a DOT-mandated safety requirement. The tests are not used for any diagnostic or therapeutic purpose. They are not intended to ascertain whether an employee has any medical condition, and they will not be used for such a purpose. Under these circumstances, the policies underlying the ADA provisions on medical examinations do not apply. Because of the uncertainty that may be created by the EEOC guidance, however, it is useful to consider the implications of regarding alcohol tests as "medical examinations." (The Department is working with the EEOC to resolve this uncertainty.)

Even if alcohol tests are considered to be "medical examinations" for ADA purposes, the effects on compliance with DOT-mandated alcohol testing would be minimal. "Medical examinations" are permitted by the ADA if made after a conditional offer of employment. The pre-employment testing approach set forth in the rules clearly fits this model. For this reason as well as for reasons of efficiency, the Department believes that conducting pre-employment testing after an offer of employment, but before the first performance of a safety-sensitive function, has much to recommend it. In addition, EEOC has stated to the Department that, because of the statutory requirement in the Omnibus Transportation Employee Testing Act of 1991 for pre-employment testing, EEOC does not object to pre-offer alcohol testing under the DOT rules mandated by the statute. Other types of testing mandated by these rules, such as reasonable suspicion, post-accident, and random testing, are likewise acceptable under the ADA. (See 29 CFR 1630.15(e), which makes compliance with the requirements of Federal law or



regulation a defense to an allegation of discrimination under Title I of the ADA.) Congress passed the Omnibus Act more than a year after it passed the ADA, and the former statute's specific mandates for various types of testing clearly, as a matter of statutory interpretation, would prevail over any contrary inferences anyone would attempt to draw from the more general provisions of the latter.

A related issue concerns the confidentiality of the records of alcohol tests. To the extent that an alcohol test is regarded as a medical examination, the records of the test would be "treated as a confidential medical record" under the ADA (see Section 102(c)(3)(B) of the ADA). Under this provision, records of a medical examination are required to be kept in a separate medical file. The purpose of any requirement for confidentiality of a medical record is to safeguard the employee's right of privacy with respect to personal medical information. An employee may, of course, waive such a right. (As a general matter, medical confidentiality provisions allow a patient to permit medical information to be provided to third parties.) The DOT rules, by requiring the employee to consent, in writing, to the provision of test records to subsequent employers or third parties, are fully consistent with normal medical confidentiality waiver practices and with the ADA. It would clearly be anomalous to view a medical records confidentiality provision as prohibiting an employee from voluntarily agreeing that a previous employer, or physician, could send a medical record to a current employer or physician.

#### *The Family and Medical Leave Act of 1993*

The Family and Medical Leave Act of 1993 (FMLA) provides certain protections for employees with "serious health conditions." These protections include time off for treatment of these conditions and reinstatement in the employee's position or an equivalent position. Under Department of Labor (DOL) regulations implementing FMLA, "treatments for \* \* \* substance abuse are serious health conditions if all conditions of the regulation are met" (29 CFR 825.114(c)). The inclusion of substance abuse treatment under the DOL regulations has raised some concerns about the potential effect of FMLA requirements on DOT drug and alcohol testing requirements.

As is the case with the ADA, the FMLA does not conflict with DOT drug and alcohol rules. FMLA requirements do not prevent an employer from testing employees as required by DOT rules;

nor do they excuse employees from testing requirements or prohibitions on the use of drugs or the misuse of alcohol. They do not interfere with DOT's requirement that an individual who tests positive may not perform safety-sensitive functions again until the conditions established by DOT rules have been met. (We would point out that, just as every employee who tests positive for alcohol or drugs does not necessarily have a "disability" for ADA purposes, such an employee does not necessarily have a "serious health condition" for FMLA purposes.)

DOT drug and alcohol rules do not prescribe what personnel actions, if any, an employer may take with respect to an individual who tests positive. In certain circumstances, Federal law (e.g., the ADA), State law, or labor-management agreements may constrain the discretion that employers would otherwise exercise with respect to such personnel actions. The FMLA may create additional constraints in some situations.

The scope of additional constraints on employer personnel actions stemming from the FMLA is limited. The statute applies only to employers with 50 or more employees. The statute's protections apply only to employees who work for such an employer at least 1250 hours during a 12-month period. DOL's rules establish a number of procedural requirements that employees must meet to avail themselves of the FMLA's protections. DOL also sets some substantive limits on the applicability of FMLA protections to treatment for substance abuse:

Treatment of substance abuse may also be included, such as where a stay in an inpatient treatment facility is required. On the other hand, absence because of the employee's use of the substance, without treatment, does not qualify for leave. It should be pointed out that the inclusion of substance abuse as a "serious health condition" does not prevent an employer from taking employment action against an employee who is unable to perform the essential functions of the job—provided the employer complies with the ADA and does not take action against the employee who has exercised his or her right to take FMLA leave for treatment of that condition. (58 FR 31799; June 4, 1993).

The Department will work with DOL to resolve any questions that arise concerning the relationship of DOT drug and alcohol testing requirements and FMLA requirements.

#### **Overview of the Operating Administrations' Final Rules**

##### *Purpose*

The OAs covered by the Act and RSPA are establishing alcohol misuse prevention programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in their industries. Generally, the OA rules prohibit any alcohol misuse that could affect performance of a safety-related function, including (1) Use on the job; (2) Use during the four hours (in most cases) before performance of a safety-sensitive function; (3) Having prohibited concentrations of alcohol in the system while performing safety-sensitive functions; (4) Use during the 8 hours following an accident if the employee's involvement has not been discounted as a contributing factor in the accident or until the employee tests below 0.02; and (5) Refusal to take a required alcohol test. The rules require pre-employment (except for RSPA), reasonable suspicion, random (except for RSPA), post-accident, return-to-duty and follow-up testing for alcohol. The rules also establish a performance standard for adjusting the initial 25 percent random alcohol testing rate for each transportation industry (except for RSPA). Published elsewhere in today's **Federal Register** is a proposal to establish a somewhat different performance standard for adjusting the random drug testing rate for each transportation industry.

The part 40 procedural final rule published elsewhere in this **Federal Register** provides for two tests to ensure accuracy: A screening and a confirmation test. It provides more flexibility to use different testing technologies for screening tests than we had proposed. However, until additional devices can be evaluated and approved as meeting DOT precision and accuracy criteria and procedures for their use are established, the screening tests must be conducted using breath testing devices on the NHTSA CPL, which includes devices with and without printers. Evidential breath testing devices that provide printed results and sequential numbering of tests must be used for confirmation tests. We are separately proposing to permit blood testing in reasonable cause and post-accident situations where an EBT is not readily available. The primary purpose of the testing provisions is to deter and detect misuse of alcohol.

Following a finding that an employee has misused alcohol, as determined



through testing or other means, the rules generally require the employee's removal from safety-related functions and provide a bifurcated system of consequences:

(1) Following a determination that the employee has violated prohibitions in these rules, the employer must remove the employee from and cannot return the employee to a safety-sensitive function until, at a minimum,

(a) The employee undergoes evaluation, and where necessary, treatment,

(b) A substance abuse professional determines that the employee has successfully complied with any recommended course of treatment, and

(c) The employee tests at less than 0.02 on a return-to-duty test.

(2) An employee with an alcohol concentration of 0.02 or greater but less than 0.04 is not permitted to perform safety-sensitive functions for

(a) A minimum of eight hours (except FHWA), or

(b) Until a retest shows that the employee's alcohol concentration has dropped below 0.02.

The rules also impose reporting and recordkeeping requirements and provide for alcohol misuse information for employees, supervisor training, and referral of employees to a substance abuse professional (SAP) for evaluation.

There are some differences among the OA final rules. For example, some OAs have regulatory authority over employers/companies only; others have regulatory authority over employees. Also, employees holding a license or certificate may be subject to agency action against their license or certificate under other rules in addition to the consequences established for violations of these rules. See the individual OA rule preambles for an explanation of any differences from the general requirements discussed above.

#### Applicability

The existing OA drug rules generally cover persons who perform safety-sensitive functions in commercial transportation. Initially, they affected approximately 4 million persons and include, for example, commercial truck/bus drivers, pilots, pipeline employees, licensed and documented mariners and others serving on board a vessel with a licensed operator, and railroad workers subject to the Hours of Service Act. An FTA final rule published elsewhere in today's *Federal Register* adds drug testing for such workers as transit bus and subway operators. In accordance with the mandates of the Act, the FHWA rule adopting the alcohol

preamble extends their coverage as well as the coverage of the existing FHWA drug rules to persons required to obtain a CDL, including intrastate truck and motor coach operators. This includes drivers and employers not currently covered by the Federal Motor Carrier Safety Regulations (FMCSRs) such as: Federal, State and local government agencies, and church and civic organizations. As a result, the total number of persons covered by the alcohol and drug testing rules has increased to over 7 million. (Maritime industry personnel are covered by the drug rules, but not by these alcohol rules (other than certain ferry boat personnel), although USCG does have some alcohol testing requirements and intoxication standards already in effect.)

In the common preamble to the NPRMs, we asked whether there is any rationale for covering a different population for alcohol testing than drug testing; no one provided such a rationale. The same employees who would cause safety problems if they are using illegal drugs would cause problems if they misuse alcohol. Consequently, the Department continues to believe that the basis for imposing alcohol misuse prevention requirements should be the performance of safety-sensitive functions. Each OA rule defines "covered employee" with respect to its industry and generally covers the same population under its alcohol prevention program. Numerous commenters addressed the categories included in the OAs' definitions of "covered employee." Please refer to the specific OA preamble for the OA's disposition of those comments. Although the term "security" is used with respect to aviation passenger and baggage screeners, that term is redundant and unnecessary; these persons are performing what the FAA defines as safety-sensitive functions—maintaining aircraft security—as opposed to simply having a security clearance (which results in coverage of many Federal employees under government drug testing programs).

The OA rules focus on function rather than a defined job or position. An individual's job may encompass several different functions, some of which are not safety-sensitive. Since alcohol is a legal substance, alcohol use is relevant only to the extent it affects performance of a safety-related function. As a safety regulatory matter, for example, we are not concerned if an aircraft mechanic has a drink before or while performing functions that are not safety-related (as long as no other rule is violated); if the mechanic is receiving all-day training on retirement planning along with non-

safety employees and the other employees can have a drink at lunch, the mechanic may also.

#### Alcohol Testing Procedures

Each of the OA final rules requires employers to ensure that all alcohol testing conducted under these rules complies with the procedures for alcohol testing contained in the amended 49 CFR part 40 entitled "Procedures for Transportation Workplace Drug and Alcohol Testing" issued by DOT elsewhere in today's *Federal Register*. Each OA final rule incorporates the new 49 CFR part 40 by reference. Since all of those OAs publishing final rules today require alcohol testing conducted by their covered employers to comply with the part 40 testing procedures, the DOT is issuing these procedures separately in order to avoid their unnecessary duplication in each OA rule.

Part 40 requires both screening and confirmation tests for alcohol. The rules require that screening tests with a result of 0.02 alcohol concentration or greater be confirmed by an EBT listed on the NHTSA CPL, which also is capable of printing out each test result and air blank (test of ambient air), and sequentially numbering each test. This provides an immediate confirmed result, which enables immediate removal of the employee who has misused alcohol and also provides a printed record of the result that will prevent disputes about the accuracy and integrity of the testing process. EBTs are reliable and highly accurate at detecting low alcohol concentrations and their use is possible in all transportation settings envisioned in those industries for which the OAs are issuing rules today.

Breath testing devices have been in use a long time; all States accept evidential breath test device results as credible evidence of an individual's violation of a law establishing a *per se* prohibited blood alcohol concentration, so long as the devices are properly calibrated and operated by trained personnel. Each device on the NHTSA CPL, with or without printed results, has been accepted by at least one State for use in court proceedings in that State. (Acceptance by a State of a particular device is not, however, necessary for the use of that device in that State for purposes of the DOT testing program.) In addition, part 40 establishes training requirements for breath alcohol technicians (BATs), maintenance and calibration requirements in a quality assurance plan for EBTs, and additional testing



procedures to protect the integrity of the process.

In response to the comments received, the Department believes that greater flexibility to use different testing technologies would benefit employers, especially for testing in remote locations and tests for which employers do not control the timing or "triggering" event—reasonable suspicion and post-accident. At the same time, the Department believes that any devices used in the testing program must meet the precision and accuracy criteria established by part 40 that the Department has determined are necessary to the integrity and success of these programs and to ensure protection for employees. Only EBTs on the CPL, including those without printers, currently meet these criteria; those without printers can be used for screening tests but part 40 requires that a logbook be kept with each such device to provide a crosscheck for the occurrence of a test and its result.

In addition to the changes concerning EBTs without printers, part 40 will, in the near future, provide more flexibility to use different testing technologies for screening tests than we proposed in the OA NPRMs. NHTSA will develop model specifications (using precision and accuracy criteria), evaluate additional screening devices against them and periodically publish a conforming products list of those additional screening devices (not exclusively breath testing devices) that meet the model specifications. We expect that publication of the model specifications will encourage manufacturers to develop products that meet them. NHTSA will approve those devices that meet its criteria for use in our alcohol testing programs. Please note that the Department also will have to undertake separate rulemaking proceedings to establish procedures for the use of any devices after they are approved. The proposed NHTSA model specifications are published elsewhere in today's *Federal Register*. NHTSA expects to begin evaluation of screening devices after the final model specifications are published. The device manufacturers also would have to certify that they meet existing Food and Drug Administration (FDA) good manufacturing practices and labeling requirements. The timing for the NHTSA approval of screening devices will depend on the volume of devices submitted for approval. The Department is continuing to coordinate with the FDA and other appropriate agencies to determine if additional product evaluations for alcohol screening devices will be necessary.

We also are considering requiring blood alcohol testing in those reasonable cause and post-accident situations where an EBT is not readily available. It would provide increased flexibility to employers to use blood testing where an EBT is available, but would be difficult or expensive to transport to the test site. One benefit of requiring blood alcohol testing in these limited situations is that employers would not have to make EBTs available in as many locations as otherwise would have been necessary. This would also mean that an employer must conduct a blood test where a test would otherwise not occur because an EBT is unavailable. The blood alcohol testing proposal, including blood alcohol testing procedures, is addressed in a separate NPRM published elsewhere in today's *Federal Register*. Before we issue a blood alcohol testing final rule, we need to resolve specimen collection issues and determine how to identify those laboratories that we can rely on to test blood samples accurately. The NPRM also seeks comment on other issues, such as safeguards for employees and procedures for shipping and documentation of blood samples.

Please refer to the part 40 preamble for discussion of other testing methods that are not appropriate for use in these programs at this time, such as urine, saliva, or non-alcohol-specific devices for "performance" or "fitness-for-duty" testing. The flexibility provided by part 40 will enable reconsideration of alcohol-specific testing devices for future use if the device or method meets our precision and accuracy standards and other requirements.

#### Definitions

Some of the definitions, such as those defining *accident*, *covered employee*, and *safety-sensitive function*, among others, will be different in each OA final rule based on differences in the individual regulated industries. Other definitions, such as *alcohol*, are identical in all of the OA final rules. In response to comments, we have changed the definition of *alcohol* to include other low molecular weight alcohols, such as methyl and isopropyl alcohols that could be used as intoxicants, in addition to ethyl alcohol. This will avoid arguments that a positive reading on a testing device could reflect the presence of other non-prohibited alcohols. They also should be prohibited since they have the same adverse effect. *Alcohol concentration* in all of the rules means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test

under these rules. For example, a breath alcohol concentration of 0.04 means 0.04 grams (four one-hundredths of one gram) of alcohol in 210 liters of expired deep lung air. This breath standard is analogous to a blood alcohol concentration of 0.04.

The definition of *alcohol use* means consumption of any beverage, mixture, or preparation, including any medication, containing alcohol. Some commenters suggested an exception for medication if the employee notifies the employer and the employee's alcohol concentration never reaches 0.02; others strongly opposed such an exception. (See FAA preamble to its alcohol prevention rule for discussion of this issue in the context of the more severe consequences for certain aviation employees imposed by the Act.) Alcohol-based drugs could be used to satisfy alcohol needs rather than medical needs, if permitted. Since ingestion of a given amount of alcohol produces the same alcohol concentration in an individual whether the alcohol comes from a mixed drink or cough syrup, the Department is applying the prohibitions in these rules to the use of any substance containing alcohol, such as prescription or over-the-counter medication or liquor-filled chocolates. Allowing an exception for medication would make it very difficult, if not impossible, to enforce the rules. We believe there are now non-alcohol alternatives for all non-prescription medications. In addition, prescription medications containing alcohol may have a greater impairing effect due to the presence of other elements, e.g., antihistamines. We are not aware of prescription medications used (over a long term) that cannot be formulated in an aqueous preparation and that would themselves be safe to use while at work. Therefore, we have decided to prohibit the use of all medications containing alcohol during, and in the four hours prior to (eight hours for FAA), the performance of a safety-sensitive function. Several commenters opposed a prohibition on the possession of medication containing alcohol. We do not impose such a prohibition in these rules. However, some DOT agencies already have existing regulations tailored to their industries that prohibit or impose conditions on the possession of medications containing alcohol while on the job.

The definition of *substance abuse professional* (SAP), as proposed, encompassed licensed physicians, limited to medical doctors and doctors of osteopathy; as well as licensed or certified psychologists, social workers and employee assistance professionals;



we had asked commenters who else should be included. In response to comments, we have included alcohol and drug abuse counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC), a national organization that imposes qualification standards that we believe are necessary to perform a SAP's functions. We rejected suggestions that the definition include State-certified counselors, because the standards vary dramatically by State; in some States, certified counselors do not have what we consider the necessary experience and/or training. All of the categories listed in the definition must have knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders in order to become a SAP.

We have added a definition of *violation rate*, which each OA will use in annually determining whether covered employees in a particular industry meet the performance standard for adjusting the random alcohol testing rate for that industry. The violation rate represents the total of the number of covered employees as reported in OA MIS data annually found during required random tests to have an alcohol concentration of .04 or greater plus the number of employees who refuse a random alcohol test, divided by the total of the number of employees in the industry given random alcohol tests plus the number of those who refused a random alcohol test.

#### *Preemption of State and Local Laws*

The Act contains an express preemption of State and local requirements that are inconsistent with the Federal alcohol rules applicable to the aviation, highway, and transit industries. Through its implementation of the Hazardous Materials Transportation Act (HMTA), the Department has long interpreted statutory preemption under an inconsistency standard by using a two-pronged test. The test was derived from Supreme Court decisions on preemption under the Constitution, has been followed successfully by the Department, and has been upheld by court decisions on preemption under the HMTA. In 1990, at the request of the Department, Congress recognized this long-standing interpretation by incorporating it into the statutory preemption provision of the HMTA. (49 U.S.C. App. 1804) The final rules adopt this interpretation of the inconsistency standard for preemption by incorporating the two-pronged test.

Generally, the OA rules preempt any State or local requirement if it is not possible to comply with both the Federal and the State or the local requirements, or if compliance with the State or the local requirement will frustrate the Federal requirement. For example, a State requirement prohibiting the alcohol testing of transit employees is preempted. Also a local requirement for a blood test (outside the limited exception proposed elsewhere in today's *Federal Register*—assuming the proposal will be adopted) to confirm alcohol use by a commercial truck driver is preempted since it will frustrate accomplishment of the Federal rule by adding additional complicated procedures that may make it difficult to fully and accurately comply with the DOT procedures and by adding costs that may make compliance impossible for many companies. The rules do not preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the rule applies specifically to transportation employees or employers or to the general public. One commenter asked whether a State could adopt and enforce the same alcohol prevention requirements as those we establish here. Since the same rules would not burden or conflict with the Federal program, a State would be free to do so.

The purpose of preemption is to avoid the confusion and expense of inconsistent requirements for employers or testing entities that operate in several States and to prevent interference with the functioning of the Federal program by extraneous, burdensome requirements that may defeat its purpose and benefits by making effective implementation difficult or impossible (e.g., by requiring that employers pay for any rehabilitation or requiring confirmation tests beyond those required by DOT). Because of the nationwide application of the Federal program and the interstate nature of the operations covered, even minor requirements in the aggregate may become unduly burdensome. For this reason, we intend to scrutinize closely State and local requirements under this preemption authority. Comments on preemption are specifically addressed in the OA preambles.

#### *Other Requirements Imposed by Employers*

Some employers commented that they want to be free to impose stricter requirements on their workforce. Except as provided in the OA rules, employers retain their existing authority with respect to alcohol testing and

termination or rehabilitation of their employees and employees retain their rights with respect to the use or possession of alcohol. An employer may continue to conduct alcohol testing under his/her own authority in addition to meeting the requirements of these rules and provide or support alcohol rehabilitation programs. Employees are free to consume alcohol on their own time so long as that consumption does not violate any of the provisions of these rules or other applicable rules. Some commenters asked us to preserve their right to collectively bargain certain testing requirements. The rules contemplate that many aspects of the employer/employee relationship with respect to these programs will be subject to collective bargaining. For example, who pays for assessment and evaluation is one area we explicitly do not regulate. However, employers and employees are not free to bargain away any of the requirements of these rules. Whatever rights they may have to bargain collectively or otherwise agree on employer-employee relations, they cannot change or ignore Federal safety standards.

#### *Requirement for Notice*

Before performing an alcohol test under these rules, the employer must notify the employee being tested that the alcohol test being administered is required by these rules. The notice can be oral, written or as specifically provided in an OA regulation. An employer shall not falsely represent that a test administered under other authority is being administered under Federal rules. The few comments that we received on this issue were evenly divided between those that supported the requirement and those that opposed it. Generally, we think the required alcohol testing form is sufficient to constitute adequate notice.

#### *Starting Date for Alcohol Testing Programs*

Most commenters seemed satisfied with the proposed implementation schedule. Several larger employers requested additional time to develop their programs, enter into service provider contracts and to complete collective bargaining; some large employers believed that it would be fairer if all employers had to implement their programs in one year. The attached OA final rules establish the specific implementation schedules for each industry. The schedules are similar to those proposed in the NPRMs and those used in the DOT drug testing rules.

Generally, large employers will have the better part of one year from the



effective date of the final rules in which to implement the requirements and small employers have nearly two years. To accommodate the annual reporting requirements, large employers must implement these programs on January 1, 1995 and small employers must implement these programs on January 1, 1996. Each OA final rule defines employer size and notes variations justified by industry differences; FAA and FRA have a three tier phase-in for covered employers and contractors. The timetables generally allow smaller employers to join alcohol misuse programs already established by larger employers or consortia, which should reduce their costs. Consideration and appropriate mitigation of the rules' impacts on smaller employers is required by the Regulatory Flexibility Act and Executive Order 12866, "Regulatory Planning and Review." We believe it appropriate for small employers to have more time since their size alone may make it more difficult to implement an alcohol misuse prevention program within one year (lack of expertise, resources, etc.). Our experience in the drug testing area shows that these implementation schedules provide sufficient time for larger employers to establish their programs.

All employers must have an alcohol misuse program in place January 1, 1996. Thus, employers that begin to operate after the effective date of these rules must have their programs in place by the deadline according to size or by the time they initiate their operation, whichever is later. These timetables also take into account the time needed by the manufacturers to produce the required modifications to breath test devices or to develop alternative devices. In addition, they will allow time to develop conforming products lists (CPLs) for other screening devices and to complete the blood alcohol testing rulemaking.

#### Prohibitions

The OAs are establishing the following combination of prohibitions designed to prevent any adverse alcohol effect on a covered employee during performance of safety-sensitive functions.

#### *Alcohol Concentration*

Unlike some other drugs, alcohol is a legal substance with legally and socially acceptable uses for persons 21 years of age and older. The Department already has some prohibitions on alcohol misuse. Those OAs that traditionally have regulated employee safety-related conduct in commercial transportation (FAA, FHWA, FRA and USCG) have

selected a 0.04 alcohol concentration as the *per se* standard for determining whether an individual is under the influence of alcohol, and prohibit any use of alcohol on the job. Some OA's (FAA, FHWA and USCG) subject certain persons to pre-duty abstinence periods. FHWA rules require that commercial vehicle operators with any measurable amount or detectable presence of alcohol be placed out-of-service for a 24-hour period. Until adoption of these rules, RSPA and FTA did not have alcohol concentration prohibitions, primarily because neither directly regulates employees.

Today's final rules prohibit covered employees from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. It is not possible to relate a given alcohol concentration definitively to impairment in specific individuals. However, as noted earlier, the presence of any alcohol can have an adverse effect on an individual. As a result, the rules define alcohol concentration in terms of breath testing measurement and specifically relate a violation of this prohibition to the alcohol concentration as indicated on the breath testing device. In addition, no employer who actually knows that an employee has that concentration can permit the employee to perform or continue to perform safety-sensitive functions.

Commenters addressing the proposed breath alcohol concentration standard generally supported one of three choices: a 0.04 alcohol concentration standard that triggers the full sanctions of the rule with no consequences attached to lower levels; a similar 0.02 standard; or the proposed 0.02/0.04 standard with its bifurcated consequences.

Most commenters supported a 0.04 alcohol concentration standard. These commenters noted that this standard has been in place in aviation, maritime, and railroad regulations for a number of years, and is the standard that the States are required to adopt for commercial motor vehicle drivers. Many commenters also noted that the evidence of impairment below 0.04 was equivocal, with as many or more studies finding no impairment below that concentration as those that identified some impairment. Commenters further stated that the bifurcated system would be difficult to implement and hard for employees to understand. Finally, both labor organizations and employers stated that a likely consequence of a test result between 0.02 and 0.039 would be termination of employment under

company authority. Labor organizations stated that this consequence would be unfair and that, if the final rules imposed a standard lower than 0.04, employers should be prohibited from terminating employees based on such a result.

We agree with commenters that an alcohol concentration of 0.04 represents the point at or above which impairment for most individuals rises dramatically, thus justifying its use as the standard for commercial transportation employees and for imposing full sanctions under the rules issued today. However, adoption of a "bright line" 0.04 alcohol concentration standard, while consistent with current regulations, does not address what to do with an employee who tests below 0.04.

The existing rules that impose a 0.04 standard generally do not require testing unless there is a triggering event, so the problem of what to do with lower alcohol concentrations is not faced. In addition, when individuals exceed the standard, action is generally taken against a license or some other significant sanction is imposed. Under the rules the OAs are issuing today, we face the problem of whether a person who tests below 0.04 should be permitted to continue performing safety-sensitive functions. Studies about the effects of any alcohol raise our concern about the effects of lower alcohol concentrations on transportation employees. For example, the National Academy of Sciences (NAS) noted that several credible studies measuring task performance at low blood alcohol concentrations indicate that, "[a]lthough individual reactions to alcohol vary depending on \* \* \* [various] factors \* \* \*, sensory and cognitive performance is significantly reduced at or below 0.04 percent BAC." (Zero Alcohol, 1987) The study concluded that "across broad populations of drivers, BACs exceeding about 0.04 to 0.05 clearly increase the probability of causing a crash. \* \* \* [W]hen the driver's age and experience with alcohol are controlled for statistically, the risk of crash involvement increases at any recorded BAC above zero."

A recent NHTSA report to Congress stated that "[a]lthough the effects of alcohol on impairment and crash risk appear more dramatically above 0.05 or 0.08, for some drivers, any measurable alcohol puts them at increased risk." (Alcohol Limits, 1991) It noted that relatively few studies have looked at alcohol concentrations below 0.04; therefore, only a small number of studies have found clearly impairing effects for alcohol concentrations below 0.04 (commenters noted this as well).



NHTSA noted that individuals performing more complex tasks (especially those involving a subsidiary task requiring time-sharing or divided attention) often show evidence of impairment at alcohol concentrations as low as 0.02. NHTSA concluded that one cannot specify an alcohol concentration above which all drivers are dangerous and below which they are safe or at "normal" risk.

The Transportation Research Board, in a study performed for the FHWA during its Commercial Driver's License rulemaking, recommended a 0.04 BAC as the concentration where the serious penalties should apply to commercial motor vehicle drivers, but it noted that some degree of impairment such as slowed reaction time, loss of coordination, and deterioration in judgment begins with any BAC above zero. (Zero Alcohol, 1987) FHWA, in fact, adopted this recommendation in promulgating its existing rules, from which we derived the bifurcated alcohol concentration standard proposed in the NPRMs. The FHWA rule imposes full sanctions for alcohol tests results of 0.04 and over. It requires removal of the employee from service for 24 hours for any alcohol test result between 0.00 and 0.04. Commercial motor vehicle operators engaged in interstate commerce have understood and complied with this bifurcated standard for several years, so other transportation industry employees should not have trouble understanding the standard. We do not believe that it is necessary to adopt a "bright line" 0.02 or 0.04 alcohol concentration standard to avoid confusion.

Commenters who supported a 0.02 standard generally favored a "zero tolerance" policy, and believed that the rules should set the standard at the lowest level of accurate detection. Many of these commenters stated that any person who would use alcohol sufficiently close in time to the performance of safety-sensitive duties to have any measurable alcohol concentration was acting in a manner contrary to safety and should be appropriately sanctioned. Additionally, like those commenters supporting a 0.04 standard, many commenters believed that a single standard would be easier to implement, understand, and enforce. We believe that the imposition of the relatively severe rule sanctions at the 0.02 "bright line" alcohol concentration proposed by some commenters is not justified. Although the available studies support removing the employee from safety-sensitive functions, the level of impairment or adverse effect does not warrant the additional actions required

for concentrations of 0.04 and above. Employers will likely review employee test results between 0.02 and 0.04 on a case-by-case basis to determine any appropriate action under their own authority.

A few commenters supported one of two other positions: absolute zero tolerance, with anything over 0.00 resulting in a rule violation, or a standard similar to those used by the States for driving while intoxicated (0.08 or 0.10). They presented the former position as being most consistent with safety. The NAS and the National Transportation Safety Board (NTSB) have favored setting an explicit policy of zero BAC. The NTSB said that "[i]t should be absolutely clear that no alcohol is acceptable in commercial transportation because research has demonstrated that low blood alcohol levels can produce impairment." Its comments on these rules reiterate this position. As several commenters who favored an 0.02 standard noted, adoption of an absolute zero standard is not possible, as discussed below, because of the current limits on testing technology. Commenters supporting the latter standard based on State law believed that it would sufficiently protect safety without unnecessarily infringing on employees' rights. Adoption of either the 0.08 or 0.10 standard would be a step back from the current requirements imposed on commercial operators. In light of the studies referred to above, it also would be inconsistent with ensuring public safety.

Those commenters who favored the proposed bifurcated system believed it would provide employers with the greatest flexibility in ensuring that alcohol use at very low levels did not adversely affect safety while not requiring the more significant costs (evaluation, replacement, etc.) or stigma associated with a rule violation. These commenters did not believe that the provision would be difficult to understand or enforce. We agree with them.

Having any standard other than 0.00 raises troubling questions about whether an employer should allow an employee whose test shows an alcohol concentration between 0.00 and 0.04 to continue performing a safety-sensitive function. Clearly, the Department's concern about public safety and an employer's additional concern about liability are raised in a situation in which an employee "passed" a test with an indicated alcohol concentration below 0.04 and then begins or resumes performing safety-sensitive functions. The likelihood of being involved in an

accident when performing safety-sensitive functions with a measurable alcohol concentration is increased. Therefore, we are adopting the 0.02-0.04 standard, as proposed, with the two-tiered system of consequences. The covered employee must be removed from a safety-sensitive position at any alcohol concentration of 0.02 or greater. If the employee's alcohol concentration is 0.02 or greater but less than 0.04, the employee will not be allowed to perform safety-sensitive functions until (1) the next scheduled duty period (usually the next day), if at least eight hours has elapsed (24 hours for those regulated by FHWA), or (2) a retest shows the alcohol concentration has fallen below 0.02. If the employee has an alcohol concentration of 0.04 or greater, the employee cannot return to a safety-sensitive function until (1) evaluated, (2) treated, if required by a SAP, and (3) retested with a result below 0.02. In either case, the employee will be prevented from posing any danger to the public. An employer can take more serious action for the presence of alcohol at any concentration if it has authority to do so independent of DOT regulations.

The Department has used the 0.02 alcohol concentration as the lower standard rather than 0.00, because it represents the lowest level at which a scientifically accurate alcohol concentration can be measured given the limitations of any current technology (e.g., blood, breath). Results below 0.02 cannot be verified as indicating consumption of alcohol (could represent natural ketosis) and would be forensically insufficient to support consequences under these rules. We cannot be sure if such results indicate if the employee really has any alcohol in his or her system. In essence, use of a 0.02 standard represents a zero tolerance standard for alcohol.

Some commenters raised questions about relying on the NHTSA CPL for testing devices that must measure as low as 0.02. NHTSA's model specifications for devices on the CPL were developed for police use under criminal laws prohibiting alcohol concentrations of 0.10 and above. Although all of the EBTs on the CPL exceed existing requirements, on September 17, 1993, NHTSA published a notice modifying the model specifications for evidential breath testing devices to be consistent with the requirements of these rules and updating the list of conforming products (58 FR 48705). The new specifications establish evaluations for precision and accuracy of devices at the 0.0, 0.02, 0.04, 0.08 and 0.16 alcohol



concentrations. When the OAs proposed the rules being issued in final today, we were aware that NHTSA was going to take this action to respond to the ongoing efforts of States to lower prohibited alcohol concentrations to 0.08 in general and to 0.02 for drivers under 21 and to the prohibition on 0.04 alcohol concentration or greater for commercial drivers.

#### *On-duty Use*

The rules also prohibit a covered employee from using alcohol while performing safety-related functions and prohibit an employer who actually knows of such use from allowing the employee to perform or continue to perform safety-sensitive functions. The need for this prohibition is self-evident. Some commenters suggested an exception for medication if the employee notifies the employer and the employee's alcohol concentration never reaches 0.02; others strongly opposed such an exception. As discussed above under the discussion on the definition of alcohol use, we have decided not to allow a medication exception in these rules.

#### *Pre-duty Use*

Commenters had a mixed reaction to the pre-duty use prohibition. Several opposed it as unnecessary due to the on-duty prohibition, intrusive on an employee's private life (and legitimate use of a legal substance), unfair to "on-call" employees and unenforceable. Others supported the prohibition, but several of them wanted it extended from the proposed four hours to a range of five to 12 hours; eight hours proved to be the most popular and the choice of the NTSB for all OAs. One commenter wanted a clearer definition of what actual knowledge means. Some commenters wanted a medication exception for pre-duty use.

Drinking during off-duty periods may impinge upon a person's ability to function safely on the job. Although the alcohol was consumed during the employee's private or off-duty time, it may still be in the employee's system when he or she reports for work. We do not and cannot effectively require the testing of all employees when they report to work, so the existence of testing is not in itself sufficient. Setting a pre-duty abstinence period also provides clear instructions to an employee who might not otherwise appreciate or understand that drinking before coming to work could result in a positive test. Therefore, we believe that we need to retain a pre-duty abstinence period in addition to the on-duty prohibition to avoid the possibility of

adverse effects from alcohol in the system due to pre-duty ingestion.

The OA rules generally prohibit a covered employee from using alcohol within the four hours preceding the performance of safety-sensitive functions. Four hours is sufficient to ensure that an employee is alcohol-free in most situations, without unduly intruding upon the employee's private life; a longer period would be more intrusive. The rules also prohibit an employer, who actually knows that the employee has used alcohol within that period of time, from allowing the employee to perform or continue to perform safety-sensitive functions. An employer cannot always be aware of an employee's pre-duty behavior, but actual knowledge can come from the employer's direct observation of the employee, a reliable witness or the employee's admission of alcohol use. Generally, this prohibition is enforceable vis-a-vis the employer only in "actual knowledge" situations.

The FAA's long-standing eight-hour pre-duty use prohibition for crewmembers will remain in effect. The applicability of the four-hour prohibition to "on-call" employees varies by industry. Please refer to the specific OA rules on this issue. Because duty tours often are not predictable in the rail industry, the four-hour period is shortened for unscheduled assignments to the interval between being "called to duty" and "reporting for duty." RSPA's rule provides an emergency exception to the prohibition on pre-duty use. For example, the only qualified employee in the area, who has used alcohol within the previous four hours, can be called to respond to an emergency call to perform the simple act of turning the valve to shut down a ruptured pipeline. The rule prohibits alcohol use after the employee has been notified to report for emergency duty. The exception does not support the employee's continued performance of the safety-sensitive functions once safety is achieved or if a replacement employee is readily available. As discussed above under the discussion on the definition of alcohol use, we have decided not to allow a medication exception in these rules.

#### *Use Following an Accident*

Most commenters had problems with this prohibition, although many supported the concept. Several noted that it would be unenforceable because the employer often does not have control over the employee and is unnecessary where the employee is in "on-duty" status, since the on-duty prohibition applies. Numerous commenters pointed out that the

prohibition is too difficult to apply to employees who do not know about the accident or to mechanics who may have worked on the vehicle involved in the accident. Those comments on mechanics are specifically addressed in the OA preambles.

Since it is important to determine whether alcohol is implicated in an accident, a covered employee who has actual knowledge of an accident in which his or her performance of a safety-sensitive function has not been discounted by the employer as a contributing factor to the accident is prohibited from using alcohol for eight hours following the accident. The prohibition ends eight hours after the accident (when a test is no longer required), once the covered employee has taken a post-accident test under these rules, or once the employer has determined that the employee's performance could not have contributed to the accident.

While we recognize that there are some situations where it may be difficult to enforce, the prohibition is important. The Department is aware of accidents in which employees, who should have been tested, left the scene and then, when they were brought in for testing, alleged that they consumed alcohol after the accident. This rule prevents employees who know they are subject to testing from explaining "positive" findings on an alcohol test by alleging they had a drink after the accident, since such action also constitutes a rule violation. It also is useful for employees who may not know whether or not they remain in "on-duty" status after an accident to be aware of this prohibition. We are imposing an "actual knowledge" requirement, because, in some situations, the employee involved in an accident may not know of the accident. For example, a mechanic makes a mistake that causes an accident a couple of hours later or half a continent away. If the mechanic is unaware of the accident, we agree with those commenters that do not believe a ban on drinking can be effectively enforced. However, if it is established that the mechanic did know of the accident and his or her potential involvement (e.g., was told by a supervisor) and performance of the safety-sensitive function was not too removed in time to make conducting a test futile, the mechanic would be prohibited from drinking. See the specific OA rules that limit the application of this prohibition to performance of a safety-sensitive function at or near the time of the accident or on the vehicle or aircraft involved. Also, the FRA rule does not



include this requirement because under current FRA rules the employees involved remain in on-duty status after an accident.

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

The rules prohibit a covered employee from refusing to submit to required post-accident, random, reasonable suspicion or follow-up alcohol tests. The RSPA rule provision applies only to those types of tests it requires. This, in effect, provides that the employee must take those tests when required. The consequences for a refusal to submit to a required test are the same as if the employee had tested at 0.04 or greater or had violated any of the other prohibitions in these rules. Failure to provide adequate breath for testing when required without a valid medical explanation, engaging in conduct that clearly obstructs the testing process, or failure to sign the alcohol testing form (if the employee did not take test) constitute a refusal to submit to testing. For further discussion of these points, see the preamble to part 40. A covered employee subject to a post-accident test who leaves the scene of the accident before being tested (except, for example, when necessary to receive medical treatment) and is not reasonably available for a test is deemed to have refused to submit to a required test. A refusal also can occur where an employee, who screens positive for alcohol, decides to admit alcohol misuse in violation of the rules and refuses the confirmation test. This situation is different from allowing employees to voluntarily "mark off" from duty when not threatened with a test under these rules, if they feel that they are unable to perform their jobs due to alcohol misuse. The employer must still confirm the positive screen to protect the integrity of the process and to comply with the statutory requirement for a confirmation test. In the absence of the confirmation test result, the employee could later disavow the admission and challenge the screen test result. The rules prohibit an employer from permitting an employee who refuses to submit to testing to perform or continue to perform safety-sensitive functions. In addition, the FRA rule prohibits anyone refusing a required test from engaging in covered service for nine months.

Some commenters, including the NTSB, wanted the penalty for a refusal to test to be removal from safety-sensitive functions for 24 hours. We disagree and intend to apply the full consequences of these rules to an employee's refusal to take required

alcohol tests. Failure to treat a refusal as a positive has two major shortcomings: it eliminates deterrence since those misusing alcohol can simply refuse the test if caught and get only a "minor" penalty; in addition, simply removing them from safety-sensitive duties for 24 hours does not help fix the problem—the employee should be evaluated by a SAP before returning to a safety-sensitive function.

An applicant's or employee's refusal to submit to a pre-employment test or a return-to-duty test does not trigger consequences under the rules that result in the need for evaluation. In those cases, the applicant or employee is not in a safety-sensitive position and does not have to be removed from a safety-sensitive position. Since those tests are a condition precedent to starting or returning to safety-sensitive functions, the applicant or employee simply could not be hired or returned to duty.

#### **Tests Required**

##### *General*

The Act requires that the industry alcohol misuse prevention programs provide for pre-employment, reasonable suspicion, post-accident and random testing. Periodic tests, which generally are performed as part of required physical examinations for certification of some employees, are discretionary under the Act. The OA rules require the forms of testing mandated by the Act, as well as return-to-duty and follow-up testing; however, the Department has decided not to require periodic testing for alcohol. We agree with the commenter who questioned the value of periodic alcohol testing if the employee knows when the test is to be conducted.

The testing programs are designed for the deterrence and detection of alcohol misuse, which, in turn, promote our compelling interest in ensuring transportation safety. Whether conducted by breath, blood or other method, alcohol testing is considered a Federally-mandated "search", under the Fourth Amendment. Accordingly, we are limiting alcohol testing to the specific time periods surrounding the performance of safety-related functions. That limitation provides the requisite nexus to ensuring proper performance of safety-related functions that is our primary concern and the principal purpose of these rules. The tests required by these rules will be conducted after a triggering event (pre-employment, post-accident, reasonable suspicion, return-to-duty, follow-up) and just before, during or just after performance of a safety-sensitive function (random). The determination

(triggering event) that a reasonable suspicion test is necessary must occur during the time surrounding the performance of a safety-sensitive function. Many commenters raised practical and policy concerns about at least one of the different types of testing. These concerns are specifically addressed below in the discussions relating to each type of testing.

##### *Pre-employment Testing*

A substantial number of commenters were concerned about the costs of pre-employment tests and considered them silly "intelligence" tests and a waste of time. The National Airline Commission specifically recommended that "[n]ew pre-employment alcohol testing rules do not need to be adopted \* \* \*". The Act explicitly requires pre-employment testing for covered transportation industry employees, so we do not have the discretion to eliminate it from these programs. We recognize that, as the commenters noted, drinking off duty generally is legal and that alcohol remains in the body for only a short period of time. Often, a test result indicating alcohol use may only indicate bad judgment or bad timing (e.g., one notices an employment advertisement after having beer and a hamburger for lunch, immediately applies, and is tested) instead of alcohol misuse.

To make such a test more meaningful, we are requiring a covered employee to undergo alcohol testing any time prior to the first time the employee performs safety-sensitive functions for an employer. This could occur the first time that the employee performs a safety-sensitive function after being hired or after a transfer within the employer's organization. Some commenters suggested that such tests only be required upon a conditional offer of employment. The rules give the employer the flexibility to test at any time during the hiring process, including before or after the employee receives a conditional offer of employment, or before (preferably just before) the employee starts performing safety-sensitive functions. (Please refer to earlier ADA section for discussion of treatment of alcohol testing as a medical test, which would have to be done after a conditional offer.) The latter choice will enable the employer to avoid the cost of testing several applicants for each job, tie pre-employment tests to the performance of safety-sensitive functions and accommodate the statutory language requiring a pre-employment test for an "employee", rather than an applicant. The former option will permit identification of



someone with alcohol in his/her system before incurring additional hiring expenses. For the above reasons, the definition of "covered employee" used in these rules includes applicants for a safety-sensitive function as well as current employees applying to move into a safety-sensitive function. Many commenters thought that the rules would require every employee to report for work early every day for a regularly scheduled or randomly-conducted pre-duty test. The pre-employment testing requirement does not apply each time the employee reports for safety-sensitive duties, only the first time. Some commenters were confused by the use of term "pre-duty" in "pre-employment/pre-duty" testing and to describe the prohibition on using alcohol during a time period before performing a safety-sensitive function. For that reason, we have changed the name of the test to "pre-employment", but note that it covers both new and transferring employees.

The rules prohibit an employer from allowing an employee to perform safety-sensitive functions unless that employee has been pre-employment tested with a resulting alcohol concentration less than 0.04. If the pre-employment test result indicates an alcohol concentration of 0.02 or greater but less than 0.04, the employee cannot perform or be allowed to perform safety-sensitive functions until the alcohol concentration falls below 0.02 on a subsequent test or until the next scheduled duty period, if it is not less than eight hours following the test. Nothing in the rules prohibits an employer from later retesting an applicant with a positive result. The rules do not confer any rights or consequences upon applicants or employees who have a positive result on a pre-employment test.

Under the rules, an employer may elect not to administer a pre-employment test if the employee has had an alcohol test conducted under any OA alcohol misuse rule following part 40 procedures with a result less than 0.04 within the previous six months and the employer ensures that no prior employer of whom the employer has knowledge has records showing a violation of these rules within the previous six months. Generally, this means that, when checking with a prior employer to verify that the applicant had "passed" a previous alcohol test, the new employer also must verify that the prior employer has no records of a violation of a OA alcohol misuse rule. If the new employer knows the applicant had other employers within the last six months, the new employer must check them too.

This option provides the greatest flexibility for avoiding the constant retesting and related costs involved in an industry, such as trucking, which has a high employee turnover rate. Some commenters did not approve of the requirement to release previous test results to a new employer. We believe that it is important to include this option in these programs; therefore, we do not intend to allow employers to refuse to provide information on a former employee, so long as the request meets the requirements of these rules. Since the information can only be released with the employee/applicant's permission, we do not believe there is a sound basis for the former employer refusing to release the information. An employer, of course, can choose to conduct pre-employment tests in lieu of reviewing information on past employment authorized by the employee and provided by a former employer.

One commenter asked that the proposed exception to pre-employment testing be extended to include negative test results from the previous 12 months, instead of the previous six months. We have decided not to extend the exception period to 12 months; we are trying to provide some flexibility, but beyond 6 months it does not seem to us that it would be a reasonable assumption that the employee continues to be free of alcohol misuse.

In the common preamble to the NPRMs, we asked whether we should require employers to give notice that a pre-employment test will be conducted. We have decided not to impose such a requirement, because it would be too time-consuming and burdensome on the hiring process, particularly in those industries where hiring occurs on the spot. The fairness issue (testing positive after a beer at lunch) is likely to diminish over time as more and more employers conduct these tests and applicants become more aware of their use.

#### *Post-accident Testing*

Post-accident alcohol testing already is required by Federal regulation in some transportation modes and is used as a valuable accident investigation and enforcement tool. States also conduct post-accident tests, depending upon the circumstances and their authority to test.

Effective post-accident testing for alcohol at remote locations can be more difficult to accomplish than drug testing, because alcohol passes from the blood and breath more quickly than most drugs. Also, delays in transporting trained personnel and testing equipment

to an accident site can result in negative tests.

The OA rules generally require that as soon as practicable during the 8 hours following an accident, each employer shall test each surviving covered employee for alcohol, if that employee's performance of a safety-sensitive function either contributed to an accident or cannot be discounted as a contributing factor to the accident. The need for testing is presumed; any decision not to administer a test must be based on the employer's determination, using the best information available at the time the determination is made, that the employee's performance could not have contributed to the accident. The definitions of accidents or occurrences that will trigger a post-accident test vary by industry and are discussed in each OA's final rule. They generally are the same as the triggering events for post-accident drug testing. See the OA final rules for modifications to the general approach or for disposition of comments on the events that trigger post-accident testing. For example, under the FTA rule, post-accident testing is mandatory if there is a fatality.

Any employee subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing; such a refusal is treated as if the employee recorded a test result of 0.04 or greater. Where possible, employers should make every effort under the circumstances surrounding the accident to ensure that the employee, even one who has been permitted to leave—or has had to leave—the site, is available for a post-accident test. This, of course, does not mean that necessary medical treatment for injured people should be delayed or that an employee cannot leave the scene of an accident for the period necessary to obtain assistance in responding to the accident, materials to secure the accident site, or necessary emergency medical care.

A number of commenters believed that conducting a post-accident test within eight hours is unrealistic; they wanted a 32-hour maximum limit as required in most OA drug rules. Because alcohol is eliminated from the body much faster than drugs are, using a 32-hour limit for alcohol testing is inappropriate. We chose an eight-hour maximum time limit for post-accident alcohol tests, because if a test is not administered within eight hours following the accident, there is little likelihood of finding a meaningful alcohol concentration resulting from use preceding the accident. Some commenters, including the NTSB,



wanted the post-accident time limit shortened to two to four hours because no alcohol is likely to be detected after eight hours. Although shorter time limits may result in a more useful test result, they may not be reasonable; they ignore the likelihood that additional time may be needed for those accidents that occur in remote areas or are not discovered right away.

It is important that the employer administer a post-accident test as soon as possible to determine whether there was any alcohol misuse. If a post-accident test is not administered within two hours following the occurrence of the accident, the employer must prepare and maintain on file a record stating why the test was not promptly administered. Some commenters wondered if the time ran from the accident or from the time the site was secured. One commenter suggested that the two hours should begin after the determination that the employee may have caused the accident. Because alcohol metabolizes so rapidly, we disagree that the two hours should run from the determination that an employee may have caused the accident or after the site has been secured; those actions could take several hours.

After eight hours has passed, the employer then shall cease attempts to administer the test and record why the employer was unable to administer a test. Some commenters grumbled about the record requirements. We believe that recording this information is necessary for program oversight and to encourage employers to make the maximum effort to conduct any necessary post-accident tests in a timely manner. The Department recognizes there may be valid reasons for not conducting the tests in these time frames, but every effort must be made to do so. We have tried to ease the reporting burden by dropping the proposed requirement that employers submit these post-accident reports to the appropriate OA. Instead, rules now require only that the employer maintain records on why a post-accident test could not be conducted and make the records available to the appropriate Department officials upon request. It is important to note that this test is not meant to be a full toxicological workup for the purpose of determining accident causation. The primary purpose of the test is to determine whether the employee(s) involved should be removed from safety-sensitive functions.

Most commenters who addressed the issue of who should be required or permitted to perform the post-accident test supported OA acceptance of tests conducted by law enforcement officers,

even if the testing does not comply with part 40 in every respect; a couple of commenters opposed this idea. One commenter pointed out that most States have implied consent laws; once the police test the employee and place him or her in jail (presumably after a positive test), the employer will not have access to the employee during the critical eight hours and must be able to use the police test as a substitute, if made available. Generally, we believe that employers should conduct their own post-accident testing under these rules. However, as commenters have pointed out, the nationwide highway transportation system presents difficult post-accident testing problems. Motor vehicle operators can range far beyond the control of their employers, who may not be informed of the occurrence of an accident for an extended period. We agree that breath or blood alcohol tests conducted by on-site State and local law enforcement or public safety officials should be acceptable in lieu of post-accident testing by FHWA employers in situations where that test can be administered earlier than the employer can get to the scene or when an alcohol test cannot be conducted by the employer within eight hours. These local authorities often are first to arrive at an accident site, particularly if the accident occurs in a remote area, and sometimes are equipped to conduct tests. Such tests must meet State standards that would already make them acceptable in court. Although commenters to other OA rules expressed support of acceptance of such tests in their industries, only the FHWA rule will provide for the exception because the need is most acute for motor vehicle operations. Other OAs, e.g., FAA, have separate rules that would enable them to obtain the results of these tests, if necessary, or face fewer difficulties in finding out about or locating an accident. We recognize that we cannot always ensure cooperation in getting test reports from the police. However, where such results are made available, they would be acceptable under the FHWA program and part 40, provided that breath testing is conducted with an EBT on the CPL and by a law enforcement officer certified on that EBT, and that blood testing is conducted in compliance with State-approved procedures. Please refer to the FHWA preamble for additional discussion.

Numerous commenters believed that post-accident testing is necessary, but that it is unreasonable and impracticable without the option to use other methodologies, such as blood, saliva and urine. As stated earlier, we

are considering permitting the use of post-accident blood testing and the possible use of other devices for screening tests. Until more is done, we cannot ensure the reliability and integrity of other devices. FRA has its own preexisting procedures for conducting a full toxicological analysis following an accident; see the FRA rule for its post-accident testing requirements.

#### *Random Testing*

A significant number of commenters opposed random testing, citing its costs and burdens in comparison to the perceived lack of significant problems in their industries. Several viewed training, educational efforts and employee assistance programs as better investments than random testing. Some commenters supported the need for random testing. The Act requires random alcohol testing of safety-sensitive employees in the aviation, rail, motor carrier and transit industries. It is the only type of testing not triggered by or conducted in reaction to another event; its primary objective is deterrence. Although we agree that investment in education and employee assistance efforts will deter some employees from alcohol misuse and contribute to the overall success of the alcohol misuse prevention programs, some employees will only be deterred by the existence of random testing. The additional deterrence provided by random testing is critical to ensuring public safety. Court decisions have indicated that the lack of good data indicating a specific problem in a particular industry is not a bar to our taking action to prevent or address the spread of a societal problem to that industry. Moreover, the lack of data may be due to the fact that currently there is little or no testing. Finally, and most importantly, the Act provides no discretion; we must require random testing. The rule does provide, however, that two consecutive years of very low industry positive random alcohol rates will result in a lowering of the random alcohol testing rate for that industry, thereby reducing employers' costs.

The OA rules (except RSPA) require each employer to randomly select a number of covered employees at various times during each year for unannounced alcohol testing. The number of employees selected must be sufficient to equal an annual rate of not less than 25 percent (initially) of the total number of employees subject to alcohol testing under a particular OA's rules. Thereafter, the industry's random alcohol rate will 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. (See more specific random rate discussion below.)

The employer must select covered employees for testing through 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. One commenter believed that in-house random selection is discriminatory in practice and employers need to use the services of an outside firm. Each covered employee must have an equal chance of being tested under the random selection process used. A system using random number table or random number generator would not be discriminatory because the employer could not designate particular employees for testing. The dates for administering random tests must be spread reasonably throughout the year (the deterrent effect would disappear if employees know that the employer had completed all required random tests for the year) and should not be predictable (e.g., every Monday or the first week of each month). To achieve this, many employers may find it best to join a consortium. Because of the randomness of the testing, some employees may be tested more than once during the year, while others will not be tested at all.

In the view of some commenters, random testing would provide few safety benefits since it is limited in time to performance of safety-sensitive functions. A few commenters suggested removing those limitations and applying the requirement to all employees at any time. As stated above, we believe that the deterrence provided by random testing will increase safety. To ensure their reasonableness for Constitutional purposes (discussed earlier in this document), the rules provide that an employee can be tested for alcohol only while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions. Obviously, the best time to test is before the employee begins to perform the safety-sensitive function. Detection at that point will prevent the employee from actually performing the function while he or she had alcohol in his or her system. However, if the employee understands that a random test can be administered only before he or she begins work and there is an

opportunity to drink during work, deterrence is limited. The ability to test just before, during or just after performance increases the deterrent effect and may enable detection of employees who use alcohol on the job. Although it may be easier to test at any time, if the test is not tied to safety, we do not believe there would be a sufficient basis under the Constitution to conduct the test.

One commenter wanted a better explanation of "just before, during and just after" performance of safety-sensitive functions. The purpose of the concept of "just before" and "just after" is to avoid the problem that some safety-sensitive functions cannot be interrupted for the performance of a test (e.g., piloting an aircraft). We have not defined the concept in terms of a specific time, but it is intended to be close enough to the actual performance of the safety-sensitive function that the test results will clearly indicate that the employee would be or was at 0.04 or above (or 0.02 or greater but less than 0.04) at the time when performing those functions. To accomplish this, employers should ensure that each covered employee selected for random testing proceeds to the testing site immediately. In the event the employee is performing a safety-sensitive function when notified, the employer must ensure that the employee ceases the function consistent with safety and proceeds to the site as soon as possible. See discussion in the specific OA preambles on what the OAs expect "immediately" to mean in the context of reporting for a random test.

#### Consortia/Random Testing Pools

To promote efficiency and reduce costs, particularly for smaller employers and employers subject to more than one OA rule, we generally permit the combination of geographically-proximate employees covered by different OA rules into one random testing pool. To maintain fairness and the equal chance of each type of employee for selection, certain conditions apply. For example, employees in any industry who travel most of the time could constitute one pool; others who remain in the vicinity of the testing site would be in another. However, if the testing method chosen required testing of employees immediately upon selection or whenever they arrived at the testing location after their selection (but still unannounced), there would be no need for separate pools. Any acceptable method must ensure that each employee has an equal chance of being selected for testing. Although multi-modal pools

are permitted, they must meet any other specific OA requirements, such as possible differing industry random testing rates.

If the employer joins a consortium, the rules permit the calculation of the annual rate (where the rates are the same) on either the total number of covered employees for each individual employer or the total number of covered employees subject to random testing by the consortium's pool covering the employer. This means that a consortium member could have less than its required number of random tests conducted if the overall consortium rate equals the required rate. Thus, if Employer A has twenty covered employees and the consortium has 500 covered employees in the pool covering Employer A, and a 25 percent rate applies, if Employer A chooses to have the rate based on the consortium, the consortium must conduct at least 125 tests even if none of the covered employees of Employer A are actually tested. So long as each employee has an equal chance of being tested each time the consortium conducts random tests, the requisite deterrence factor exists. Membership in a consortium should improve deterrence for small companies because their employees would continue to perceive an equal chance of being selected throughout the year.

#### Random Alcohol Rate Performance Standard

In the NPRMs, we requested comment on what annual rate to require for random alcohol testing within a 10 to 50 percent range. Most commenters, particularly employers, wanted a 10 percent random alcohol testing rate beginning the first year; although substantial numbers selected 25 percent or a range between 10 and 25 percent and several wanted to use 50 percent as currently required in the drug testing rules. Many commenters expressed a greater preference for having the same testing rate (and the lower the better) for both drugs and alcohol, because combining the programs would save more money than just lowering the testing rate. They argued that, with drug testing, studies have shown that lowering the testing rate did not affect deterrence. (At least one commenter argued, candidly, that since in its view random alcohol testing is worthless but the Act required it, we should set the lowest random rate possible to reduce employer costs.) According to commenters, lower random alcohol testing rates are appropriate because alcohol use has declined, and many employers have strong employee assistance programs in place, which did



not exist when drug testing was phased in. Finally, most noted that it is easier to detect alcohol misuse through supervisor or co-worker observation. Specific to this rulemaking, the National Airline Commission stated that " \* \* \* any random alcohol testing of airline employees should be at no more than a 10 percent rate."

We note that in July 1991, the FRA initiated a comparative study of random drug 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's 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.

Many would argue that the higher the random testing rate, the greater the likelihood of getting "caught" and, therefore the greater the likely deterrence. Detection is also higher at higher rates. However, if the likelihood of detection is small (e.g., because alcohol metabolizes so quickly), testing may result in little deterrence unless very high rates are used. But costs also rise as the number of tests increases. The concern is whether extra deterrence is worth the extra cost.

The Department agrees with commenters that, since alcohol symptoms are somewhat better known and easier to detect, more alcohol misusers than drug users are likely to be caught by observation, which justifies a lower random alcohol testing rate. (Of course, observation alone will not always detect employees with very low alcohol concentrations, unless they have an open bottle of liquor.) The deterrent effect of random alcohol testing may not equal that provided by random drug testing because the window for detection is limited by the rapid elimination of alcohol from the body. An individual who has alcohol in his or her system while performing safety-sensitive functions may be "negative" by the time he or she gets to the testing site and the testing is completed. In addition, there are many more programs in place to handle alcohol misuse problems than there were to handle drug use problems when we issued the drug rules. There is also no indication

that alcohol is a growing problem; drug use was, and there is still much evidence that strong steps must continue to prevent drug use from increasing. Consequently, we believe that a lower initial random testing rate is appropriate for alcohol.

For the above reasons, we believe we can permit the alcohol random testing rate to drop to 10 percent if performance criteria in our rules are met, but cannot permit a comparable drop in the drug testing random rate for a similar performance. In view of the small window of opportunity for detecting alcohol misuse, we agree with commenters that the added cost could be more useful if applied to other areas of the alcohol prevention program, such as training and employee assistance. On balance, we believe that an initial 25 percent random alcohol testing rate will best achieve deterrence and detection at a reasonable cost.

Many employers commented that they wanted performance-adjusted rates, where the random testing rate would be set according to each employer's random positive rate for the preceding year. These commenters stated that testing based on measures of results would provide an incentive for employers to try alternative deterrence methods. Labor agreed with employers on this issue. Adjusted-rate testing could be used to reward those employers who have adopted rehabilitation and treatment programs or who have low positive rates. A few preferred adjusted-rate testing by industry. Other commenters noted that providing flexibility with respect to the random testing rate would be extremely difficult to administer.

We agree that there is merit in using a random alcohol testing rate that is adjusted annually based on industry performance. To provide more incentive and flexibility, the rules allow those industries that demonstrate a very low positive alcohol random rate over two years, due to few employee alcohol misuse problems or the success of the alcohol prevention programs, to lower their random alcohol testing rate to 10 percent. Ten percent would be insufficient to protect public safety, at least as an initial testing rate. The number of tests conducted at a ten percent rate and the visibility of testing to employees, especially in medium and small companies, would be insufficient to obtain data about prevalence or deterrence of alcohol misuse. We could not reliably make decisions on data gathered with such a rate—at least not for a number of years. If those who say usage is extremely low are correct, when the data gathered at the initial 25

percent rate verifies this, the testing rate can be lowered.

The OA rules require employers to use an initial random alcohol testing rate of 25 percent. They provide that, after all employers have implemented the rules and industry-wide data for the first year is available, the OA Administrator will annually announce in the *Federal Register* the minimum required annual percentage rate for random alcohol testing applicable in that OA's covered industry during the calendar year following publication of the notice. Thereafter, each OA will determine the annual random alcohol testing rate for the industry regulated by the OA rule based on the reported violation rate (number of random alcohol tests results equal to or greater than 0.04 plus refusals-to-take random alcohol tests divided by the total random alcohol tests conducted plus refusals-to-take random alcohol tests) for the industry. The random rate adjustment indicated by industry performance will occur at the beginning of the next calendar year. (Thus, during calendar year 1997, an OA will receive results from its industry for calendar years 1995 and 1996 (the first year that industry-wide data will be available), evaluate them and publish in the *Federal Register* a determination of the need for the industry to adjust the random rate. Any such change would take effect on January 1, 1998. Please note that, once employers of all sizes are reporting data, a decrease in the rate would require two years of qualifying data and an increase in the rate would require only one year of data.) A refusal to take a random alcohol test will count as a positive for the purpose of calculating the industry random testing rate and count toward the number of random alcohol tests required to be conducted.

Determination of the violation rate is based on data obtained from employers through the annual Management Information System (MIS) reports they must submit by the following March 15th. We envision that each OA and the OST Drug Office will review the MIS data and that the OA Administrator will issue a determination within a few months. We believe that covered entities need approximately one-half year of lead time to adjust their procedures, make changes in any contracts and take other necessary action to adjust to an increase or decrease.

To make a decision, each OA will compare the violation rate to two specific criteria: 1 percent and 0.5 percent, respectively, to determine if the industry must change or maintain the random alcohol testing rate. 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 for the next calendar year. For example, an industry testing at a 50 percent random rate for alcohol can drop the rate to 10 percent if its violation rate drops below 0.5 percent for two consecutive years. Because of safety concerns, two years of data are necessary to justify lowering the rate and one year of data is sufficient to raise it. The two years cannot be averaged; a violation rate of 0.07 one year and a 0.11 violation rate the next year will not allow a drop in the random alcohol testing rate.

We selected 1.0 percent and 0.5 percent as appropriate performance standards. We would prefer zero positives but recognize this may be impossible. These levels represent a balance, permitting cost savings when usage remains very low, while ensuring that if deterrence is not maintained, the rates will increase. We selected the 1 percent violation 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 representing a fraction of 1 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. We also believe that a positive rate of 0.5 percent is achievable based on our limited data from the random roadside alcohol testing project, where rates below 0.5 percent were obtained, and our experience with DOT Federal employee drug testing where positive rates have decreased to 0.25 percent.

We recognize that because the reported violation 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 violation 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 decided to use industry violation rates (positive tests and refusals to test) as the performance benchmark rather than the employer violation rates urged by commenters. Company-by-company rates would be extremely difficult to implement and enforce, 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 alcohol testing rate. Industry-wide rates should be much easier to implement and enforce.

**Implementation Issues.** The lower random alcohol testing rates will create implementation problems, particularly for small employers and consortia (see discussion below). Small companies that do not participate in a consortium may have to test at a higher effective rate even after the industry rate has been lowered to meet other requirements. A very low number of dates on which tests are conducted will have a detrimental effect on deterrence. Therefore, to promote deterrence (and as required under the Department's drug testing rules), an employer must spread alcohol tests throughout the year. A very small company (e.g., one that has to test two covered employees) will not be permitted to only test employees once every few years. Rather, it will have to test at least once a year and establish a

program that will ensure that there is no period of time during which employees know testing "is done for the year". For example, if an employer is required to conduct only one to four tests and that number are completed by mid-summer, the employer's program must ensure that more tests could be conducted before the end of the calendar year. For example, such an employer could conduct random testing every quarter or could randomly select the month within the next 12 months for conducting the next test(s). Depending upon the month selected, the employer may in fact test more than once in a calendar year. For example, using a revolving calendar, the first selection is May 1994 for the year January 1994 to December 1994; the next selection must be for the 12 months from May 1994 to April 1995.

Another alternative is for small employers to join a consortium so that their employees are always subject to random testing. Although we have in a number of ways eased the burden on small employers, these restrictions that may raise the effective annual random rate are necessary to achieve deterrence in random testing in the context of allowing random rate adjustments. A small employer, of course, can achieve the benefits of a lower random rate without the higher costs of meeting the deterrence requirements if it joins a consortium. If the company is in a consortium, the employee is always subject to testing because he or she is part of a much larger pool and the necessary deterrence exists.

Under the Department's current drug testing rules, employers must conduct random drug tests at a 50 percent annualized rate; that is, the number of annual random tests conducted must equal half the number of the covered population. Elsewhere in today's *Federal Register*, the Department is publishing a separate NPRM that seeks comment on a proposed industry performance standard to adjust the random testing rate for the current drug testing programs. The proposal is designed to lower costs and maintain an equivalent level of deterrence of illegal drug use. The NPRM proposes to allow each OA Administrator to lower the random drug testing rate to 25 percent if its industry has a positive testing rate of less than 1.0 percent for two consecutive years (while testing at 50 percent); the rate will increase back to 50 percent, if the industry random violation rate is 1 percent or higher in any year. The Department is not proposing a system to adjust the drug random rates identical to that established for alcohol random testing for the opposite of the reasons stated



above. It is more difficult to justify a possible lowering of the testing rate to 10 percent because the symptoms of drug usage are less well known and more difficult to detect by observation than symptoms of alcohol misuse. Moreover, random drug testing is a more effective deterrent than random alcohol testing because the window of opportunity for detection is greater; drug metabolites are present in the body far longer than alcohol. However, we agree with commenters that we still should provide an incentive for each industry to achieve a low random drug positive rate and reduce testing costs.

The random alcohol rate adjustments will have an impact on other aspects of random alcohol testing. If a given covered employee is subject to random alcohol testing under the alcohol misuse rules of more than one OA for the same employer, the employee shall be subject to random alcohol testing at the percentage rate established for the calendar year by the OA regulating more than 50 percent of the employee's safety-sensitive functions (or those that take the greatest percentage of the employee's time). If the employee's time is equally divided, the employer may choose the OA rule with the lowest random testing rate. If an employer is required to conduct random alcohol testing under the alcohol misuse prevention rules of more than one OA, the employer may (1) establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at a different OA required rate; or (2) randomly select from all employees for testing at the highest percentage rate established for the calendar year by any OA to which the employer is subject. Consortia could meet different required random testing rates by setting up separate pools.

Many commenters, particularly employers, supporting random testing claimed that it would be less burdensome if they could combine their drug and alcohol random testing programs. They noted that using the same employee selection for both alcohol testing and drug testing would allow flexibility and be more cost effective, by minimizing the impact on an employer's operations. Labor supported combination testing, where an employee would not know in advance whether he or she was being tested for alcohol, drugs, or both, as the most effective type of program. The rules do not prohibit employers from combining random drug and alcohol testing. However, the possibility of different testing rates for drug and alcohol random testing may cause difficulties for employers interested in

combining their random testing programs. Differences in the testing rate for each program can be accommodated; for example, where an employer must use a 25 percent alcohol random rate and a 50 percent drug random rate, half (randomly selected) of the employees chosen for testing would be tested for both drugs and alcohol while the rest could be tested only for drugs. Other methods are possible so long as they meet the requirements of both programs. Of course, combined testing must occur around the time of performance of a safety-sensitive function to meet the requirements of the alcohol misuse prevention rules.

#### *Reasonable Suspicion Testing*

The vast majority of commenters supported the need for reasonable suspicion testing, although one commenter opposed it as unnecessary in view of existing company policies. We agree that this type of testing may be more valuable for alcohol than for illegal drugs. People are more familiar with the symptoms of alcohol intoxication than with those of illegal drug use. The presence of alcohol is easier to detect (at least at higher consumption amounts) from physical symptoms (e.g., odor of breath) or behavior (e.g., inability to walk a straight line) and more research has been done on how to train people to make these observations. Supervisor observation is not a complete solution, however; "practiced" drinkers often can mask symptoms (e.g., they use a breath spray or can walk a straight line) and avoid detection. Also, supervisors may have reasons to overlook employee alcohol use (e.g., sympathy for the employee, the desire to avoid confrontation, or the lack of a readily available replacement). The U.S. Army has found that supervisors have a tendency to underreport alcohol involvement in accidents (The Alcohol and Accidents Guide, February 1987).

The OA rules require employers to test covered employees for alcohol when the employer has reasonable suspicion to believe that the employee has violated the prohibitions in these rules or if the employee's behavior and appearance indicate alcohol misuse. The employer's determination that reasonable suspicion exists to require an alcohol test must be based on specific, contemporaneous, articulable observations by a trained supervisor concerning the appearance, behavior, speech, or body odors of the employee. Reasonable suspicion testing under these rules is authorized only if the required observations are made during, just preceding or just after the period of

the work day that the covered employee is performing a safety-sensitive function.

Several commenters wanted supervisors to be able to use long-term performance factors, such as abuse of sick leave, in making their reasonable suspicion testing decisions. In addition, they believed that requiring the observation to occur close to or during the performance of a safety-sensitive function is too restrictive. Some commenters thought that use of long-term factors would be appropriate only in conjunction with short-term indications of alcohol misuse; others opposed any use of long-term factors. The factors set out for determining when reasonable suspicion exists in the drug and alcohol rules are short-term in the sense that they focus on what a supervisor sees at the time of performance of safety-sensitive duties. The Department believes that this restriction is appropriate because it accommodates Fourth Amendment concerns by relating the determination of the need for testing to factors indicating possible alcohol involvement that may affect the employee's present ability to safely perform required safety-related tasks. For example, even if the supervisor does not smell alcohol, he or she legitimately could decide to test an employee who cannot hit the correct buttons to operate a vehicle (a required safety-related task), but should not test an employee simply because he or she comes in late that day. Constant lateness, for example, may result from an alcohol problem, but it is not a reasonable basis for suspicion of alcohol misuse; there are too many other possible explanations. The rules do not interfere with the supervisor's own authority to take appropriate action in response to longer-term factors (e.g., a long-term decline in work performance, patterns of absenteeism, lateness, or abuse of sick leave) that may violate company policies.

A covered employee is required to undergo reasonable suspicion testing for alcohol as soon as possible, because the body rapidly eliminates alcohol. Therefore, if a reasonable suspicion test is not conducted within two hours following the determination of reasonable suspicion, the employer shall prepare and maintain on file a record stating the reasons why the test was not conducted. If the test is not conducted within eight hours after the determination of reasonable suspicion, the employer shall cease attempts to conduct the test and shall state in the record the reasons for not administering the test. These records must be submitted to the appropriate



Department officials upon request. This record requirement and the reasons we are imposing it are similar to those for post-accident testing discussed above. (Please note this is a change from the NPRMs.)

A number of commenters expressed concerns that supervisors might abuse reasonable suspicion tests to harass unpopular employees and wanted strict requirements to prevent this possibility. Many wanted us to require that two supervisors make the decision to test (as in the existing drug testing rules) to limit possible harassment and to support management's case during future grievance and arbitration procedures. Others noted that a two-supervisor requirement would be impracticable because alcohol metabolizes so quickly and because in certain locations, many employees have only one supervisor available.

The alcohol final rules generally require a single supervisor trained in detecting the symptoms of alcohol misuse to make the required observations and determine the existence of reasonable suspicion. We agree with several commenters that alcohol testing is too time-sensitive to incorporate as a general rule the time it takes to consult a second supervisor before making the testing decision, which also is difficult or impossible in some transportation industry locations. In addition, symptoms of alcohol use are more widely-known and easier to detect than those of drug use so there is less need for corroboration. To protect against possible harassment of a specific employee, the supervisor who makes the determination that reasonable suspicion exists generally is prohibited from conducting the reasonable suspicion test on that employee. Comments were mixed on whether we should allow supervisors to base their decisions to conduct reasonable suspicion tests on third-party reports of alcohol misuse. We decided not to permit a supervisor to base such a decision on reports by a third person who has made the observations, because of that person's possible credibility problems or lack of appropriate training.

A few commenters suggested that supervisors document within two hours and annually report their reasons for conducting a reasonable suspicion test so that the OAs can check for harassment. We believe that the possibility that a review of company records would show whether particular individuals were harassed—i.e., tested without positive result too often—should help deter harassment. A couple of commenters envisioned holding supervisors liable for damages if the

results of the test did not confirm their suspicions. We believe it inappropriate to require action against a supervisor for ordering a test where the results are negative. Reasonable suspicion is not a guarantee of a positive result on an alcohol test. Other factors can result in behavior or appearance that can reasonably cause one to suspect alcohol misuse; that is why we require a test before requiring action for a rule violation. In addition, the supervisor may have been correct, but, by the time a test can be conducted, the alcohol may have passed through the employee's system.

#### Behavior and Appearance

Numerous commenters wanted to eliminate the proposed prohibition on employee behavior and appearance characteristic of alcohol misuse, because it is conceptually part of the reasonable suspicion prohibition and because it is so subjective. They noted that it would not be useful because managers do not always have daily contact with their employees. However, some commenters stated that they wanted the authority to remove an employee on behavior and appearance grounds when a reasonable suspicion test is not possible.

We agree that simple "behavior and appearance" of alcohol misuse involves a subjective determination and should not be considered prohibited conduct that triggers the full consequences of violating these rules without confirmation of such misuse by a positive test. As a result, the final rules have been changed from the NPRMs: under the reasonable suspicion testing provisions, an employer who observes such behavior and appearance must conduct a test; however, when it is infeasible or impossible to conduct a reasonable suspicion test in a timely manner (e.g., an EBT is unavailable or broken), the employee is not permitted to perform safety-sensitive functions for eight hours (or until obtaining a result below 0.02 on a test if an EBT subsequently becomes available within the 8-hour period).

The OA rules prohibit a covered employee from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as indicated by behavior, speech and performance indicators of alcohol misuse. They also prohibit an employer from allowing such an employee to perform or continue to perform safety-sensitive functions. However, since alcohol-related behavior tends to become apparent to persons without extensive training (such as that

provided by police) only at alcohol concentrations well above 0.04, it is unlikely that misuse would be detected in this manner at alcohol concentrations in the 0.02–0.04 range. Thus, there are important safety reasons for requiring that an employee be removed from his or her safety-sensitive function based on behavior and/or appearance alone if no testing devices are available. Another reason that we decided not to eliminate this provision entirely as requested by many commenters is because some employers do not believe that they otherwise have the authority to remove an employee who appears to be under the influence of alcohol in the absence of a test. We do not want an employer to allow a safety-sensitive employee to remain on duty for that reason.

Some commenters, particularly in the aviation industry, wanted to retain existing prohibitions on operating "under the influence" and while "impaired". To the extent some existing OA rules already permit removal of an employee based on observation alone, the employee has a right to an evidentiary hearing (e.g., as part of a certificate revocation action). The rules we have published today do not provide for a right to a hearing. For that reason, and because removal from a safety-sensitive function in the absence of a reasonable suspicion test involves a subjective determination, unverified by a test, and may provide an opportunity for the employer to harass an employee, we believe that lesser consequences should apply, i.e., removal from the safety-sensitive function until the next regularly scheduled duty period if at least 8 hours has passed. Removal for this reason does not require a SAP evaluation. Existing consequences in other OA rules that have "under the influence" or "impaired" language will continue in effect; any consequences that attach as a result of those rules could be imposed in addition to removing the employee from safety-sensitive function for eight hours. An employer's separate existing authority to remove employees is not affected by this provision.

#### Return-to-Duty Testing

The commenters split over whether return-to-duty testing should be mandated by regulation or left solely to the discretion of the employer; one commenter noted that it really is another "intelligence" test. Commenters who believed that the test should be discretionary disagreed whether the decision to test should rest with the employer (in consultation with the SAP) or the SAP alone. Some commenters stated that using a 0.02 standard is too



stringent. Others liked the provision as proposed.

The OA rules require each employer to ensure that a covered employee, who has violated any of these alcohol misuse rules, has been evaluated, treated (where indicated) and tested with a result indicating an alcohol concentration of less than 0.02 before returning to a safety-sensitive function. We disagree with those commenters who thought return-to-duty testing should be left solely to the discretion of the employer. We believe that compelling concerns about safety and possible recidivism justify imposing a return-to-duty test requirement for those employees returning to safety-sensitive functions after they already have demonstrated problems with alcohol. Similar concerns justify use of a stricter 0.02 standard for return-to-duty tests. In any event, under other provisions of the rules, employees could not perform safety-sensitive functions until they have a result lower than 0.02; since this test is specifically for return-to-duty, the application of the 0.02 standard is logical. A positive result on a return-to-duty test indicates a problem that has not been resolved; the employee cannot come back the next day to retake the test without seeing the SAP again. The decision to return the employee to safety-sensitive functions and to conduct the test ultimately belongs to the employer. The SAP's function is to advise the employer as to whether the employee has complied with any recommended program of treatment.

Given the potential for poly-drug misuse, the rules permit employers to conduct return-to-duty drug tests on an employee, when the SAP has reason to suspect drug involvement and recommends such testing. Any such testing must conform to the requirements of part 40. The opposite would be true as well. Employers would have similar authority to test for alcohol where an employee tested positive for drugs and the SAP had reason to suspect alcohol misuse. (The OA drug rules have been drafted or are being changed to permit this.)

#### *Follow-Up Testing*

Commenters disagreed as to whether follow-up testing should be required or discretionary. As with return-to-duty testing, they divided over leaving the follow-up testing decision to the employer or to the SAP. Several commenters thought that a requirement for follow-up testing would be too costly and burdensome for employers and might cause them to fire the employee instead. Others thought that the concept had merit, but that the rules should

require fewer tests over a shorter period of time, especially since the employee is also subject to random testing.

After identification of an employee's alcohol problem, there is a strong chance of recidivism and a need to ensure continued disassociation from alcohol misuse through periodic unannounced follow-up testing. We believe that a minimum number of follow-up tests is necessary to ensure public safety in view of various disincentives for imposing them, such as cost, the customary SAP preference for informal follow-up, and FRA's experience in its drug testing program (see below). In making the decision whether to return the employee to safety-sensitive duties, we assume the employer would determine whether, in its particular circumstances, the cost of hiring and training (and testing) a new employee would exceed that of testing a returned employee to ensure continued disassociation from alcohol. We agree with commenters that it is appropriate for the SAP to determine the employee's need for an individualized rehabilitation (if any) or follow-up program beyond the minimum specified here.

The OA rules require that each covered employee, who has been identified by a SAP as needing assistance in resolving problems with alcohol misuse and who has returned to duty involving the performance of a safety-sensitive function, shall be subject to a minimum of 6 unannounced, follow-up alcohol tests administered by the employer over the following 12 months. The SAP can direct additional testing during this period or for an additional period up to a maximum of 60 months from the date the employee returns to duty. The SAP can terminate the requirement for the follow-up testing in excess of the minimum at any time, if the SAP determines that the testing is no longer necessary. We believe that fewer follow-up alcohol tests over a shorter period would not provide sufficient deterrence of (or opportunity for detection of) alcohol misuse by an employee who has demonstrated a previous problem.

The FRA's experience under its drug testing rules with required follow-up testing for employees who tested positive for prohibited drugs illustrates the need for a minimum number of required follow-up tests. In 1991, FRA conducted a compliance review on a large railroad company and found that 9 of ten employees who had tested positive and were returned to service had received no follow-up tests during the next year. One employee received one follow-up test six months after

returning to work. One of the employees who had received no follow-up testing later tested positive on an FRA-required random drug test. The Department's Office of Inspector General (OIG) recently completed a review of the FRA's alcohol and drug program. The OIG reviewed follow-up testing practices on several railroads and found inconsistent procedures and a lack of follow-up tests. Its report recommends prescribing procedures for follow-up tests, including a minimum number of tests and a minimum period for follow-up testing. For the above stated reasons, we believe that we must require a minimum amount of follow-up testing.

The rules provide that the evaluation and treatment services may be furnished by the employer, by a SAP under contract with the employer or by a SAP not affiliated with the employer. In view of the "gatekeeper" function that the SAP has under the rules, we believe that the employer should designate the SAP. Experts note that, due to training and the profession's normal employee orientation, the SAP may be eager to place the employee back into the normal work environment, i.e., the safety-sensitive function, but reluctant to require testing by the employer. The SAP may prefer to conduct any necessary follow-up testing as part of an after-care or follow-up treatment program. While we recognize that placement of the employee back on the job as soon as possible without follow-up testing may help the employee, it could put public safety at risk. The SAP's customary professional loyalty to the employee "patient" would directly conflict with the safety responsibility of the employer. In order for this program to work and to ensure public safety, the SAP must recognize his or her obligations to be cognizant of the employer's responsibilities and need for a fair evaluation of the employee.

Given the potential for poly-drug misuse, the rules permit employers to conduct follow-up drug tests on an employee during the follow-up alcohol testing period, when the SAP has reason to suspect drug involvement. Any such testing must conform to the requirements of part 40. The opposite would be true as well. Employers would have similar authority to test for alcohol where an employee tested positive for drugs and the SAP had reason to suspect alcohol misuse. (The OA drug rules have been drafted or are being changed to permit this.)

The rules do not use the stricter 0.02 alcohol concentration standard imposed on return-to-duty tests for follow-up tests, even though the employee has previously demonstrated problems with



alcohol. In either case, the employee cannot perform safety-sensitive functions with an alcohol concentration of 0.02 or above. Unannounced follow-up tests of employees back on the job are similar to random tests. Because employers may find it convenient to conduct some follow-up testing at the same time as random tests, the consequences for follow-up test results must be the same as those for random tests. This will enable employers to conduct unannounced testing and combine follow-up testing with other types of testing, but avoid imposing total abstinence from alcohol on returned employees whose follow-up programs do not require it. We note that, under the Act, an aviation employee who has a second violation under the FAA alcohol misuse prevention rule will be forever barred from the employee's safety-sensitive function. Please see the preamble to the FAA rule for a more complete discussion of this consequence.

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

Some commenters disagreed that there is any need to provide for retesting. Others used this issue as an opportunity to reiterate their opposition to the lesser consequences for test results indicating alcohol concentrations between 0.02–0.039.

The rules provide that if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an OA-required alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer must first retest the employee. The employee can return to the safety-sensitive function if the retest results in an alcohol concentration of less than 0.02. However, the FHWA rule does not contain a retesting provision because of a statutory requirement that drivers found to have a measurable amount of alcohol in their systems must be removed for 24 hours. The FRA rule also does not contain this provision because it would conflict with its existing rules. Eliminating this option from the other OA rules would impose a hardship on some employers; the employer will make the decision whether retesting is necessary to accommodate its employment circumstances.

**Handling of Test Results, Record Retention and Confidentiality**

*Retention of Records*

We received very few comments directed to handling of alcohol recordkeeping requirements. Generally, those commenters wanted to shorten the record retention periods (the most popular option would reduce the proposed 5 years to 3 years and the proposed 2 years to 1 year).

To facilitate Department oversight and effective enforcement of the alcohol testing programs and to protect employee confidentiality, we are requiring each employer to maintain records of its alcohol misuse prevention program in a secure location with controlled access. One commenter wanted to know what that really means. The employer should lock the location (room, cabinet, or, if on computer, control access by password or other protections) and allow access only to persons with a legitimate need to see the records under these rules. The OA rules require employers to retain, for a minimum of five years, records of any employee alcohol test results indicating an alcohol concentration of 0.02 or greater; documentation of refusals to take required alcohol tests; equipment calibration documentation; and documentation of employee evaluations and referrals. They require employers to retain for a minimum of two years any records related to the collection process (except equipment calibration documentation) and training. Records of negative test results must be retained for a minimum of one year.

Generally, the rules require each employer to maintain the following specific records:

- (1) Records related to the collection process, including: Collection logbooks, if used; documents relating to the random selection process; EBT equipment calibration documentation; documentation of BAT training; documents generated in connection with decisions to administer reasonable suspicion and post-accident tests; and documents verifying existence of a medical explanation of an employee's inability to provide adequate breath for testing;
- (2) Records related to test results, to the refusal of any covered employee to submit to a required alcohol test and to an employee dispute over the result of an alcohol test;
- (3) Records related to other violations of these rules;
- (4) Records related to evaluations and return to duty; and
- (5) Records related to education and training.

We have decided to retain the retention periods as proposed because, considering the serious potential consequences of alcohol misuse, we believe it is important to be able to identify repeat offenders. In addition, the FAA has a need to track the number of repeated violations under its rule for mandatory permanent disqualification of an employee under the Act.

In the common preamble to the NPRMs, we asked whether we should require documentation of reasonable suspicion determinations. Very few commenters addressed this issue; some favored the requirement because such documentation might deter harassment of employees, but others opposed it as burdensome and a violation of employee privacy. The rules do not require documentation of reasons for determinations made to conduct reasonable suspicion tests, but if employers generate them, they must maintain the records. We are not requiring that employers report the specific test results of individuals—just aggregate numbers for reasonable suspicion tests conducted and resulting positives. This requirement should not burden employers and will protect employee privacy. Employers may want to monitor their reasonable suspicion testing positive rate to determine if their supervisors need additional training.

*Reporting of Results in a Management Information System*

For oversight purposes, each employer generally is required to compile for the OA that regulates it, at a minimum, an annual report summarizing the results of its alcohol misuse prevention program for each calendar year. This information will allow the Department to track progress in the programs and later make changes, if justified, that could reduce costs, ease implementation and enforcement, provide better employee protection, and/or increase benefits. Some OA rules require that all employers submit the data to the OA; others require a representative sampling of employers to submit the reports or a mix of required reports from some and a sampling of others. The OAs will rely on this data for program evaluation and enforcement purposes, as well as to adjust the random testing rates for alcohol. As noted earlier, FAA, FRA, FHWA, RSPA, and USCG separately published MIS rules on December 23, 1993, that describe the particular OA requirements for reporting information on drug testing (and alcohol testing for USCG). FTA's drug MIS requirements are in its final drug testing rule published elsewhere in today's *Federal Register*.



Generally, employers subject to more than one DOT OA alcohol rule must identify each employee covered by the regulations of more than one OA and report the total number of such employees broken down by category of covered function and by the OA. Before conducting any alcohol test on an employee regulated by more than one OA, the employer must determine which OA rule requires the test and then include the test result in the appropriate OA MIS report. Pre-employment and random testing data must be reported to the OA that covers more than 50 percent of the employee's function. Post-accident and reasonable suspicion testing results, however, must be reported to the OA that covers the function the employee was performing at the time of the accident or determination of reasonable suspicion. Finally, return-to-duty and follow-up results must be reported to the same OA that received the initial results that led to the employee's removal from the safety-sensitive function. In response to one commenter's concerns about confidentiality of employee results, we note that the employer must provide aggregated, not individual, information under the MIS.

Most of the comments addressed the drug MIS requirements; we received very few concerning the alcohol MIS proposal. Since the MIS requirements for drugs and alcohol are essentially similar, the Department's responses to specific comments on the drug MIS requirements, which are addressed in the preamble to the drug MIS rules published December 23, 1993 (FTA's MIS comments are addressed in the preamble to its final drug rule), also apply to the alcohol MIS requirements.

Commenters generally expressed concerns about ensuring unimpeded access to employee testing information kept by third-party providers, e.g., consortia. The employer is responsible for the accuracy and timeliness of each report submitted by it or a third-party service provider acting on the employer's behalf. If necessary, the employer should ensure by contract or other means access to employee testing information held by a third-party provider.

Employers required to submit the annual reports must do so no later than March 15 of each year for the preceding calendar year on the specified form. Each report will contain a number of information items relevant to program evaluation or enforcement. Eventually, we plan to merge the alcohol and drug testing reporting requirements where practical to permit one annual report and to eliminate any duplicative

information items. The Department is committed to developing the capability for processing electronic submission of these reports where such capability is not currently available.

#### *Access to Facilities and Records*

To preserve employee confidentiality, the rules generally prohibit employers from releasing information pertaining to an alcohol test of a covered employee or any violation of these rules, except as required by law. They provide, however, that the employee is entitled, upon written request, to obtain copies of any records concerning the employee's use of alcohol, including alcohol test records. The rules permit the employer to disclose information arising from the results of an alcohol test administered under these rules or from the employer's determination that the employee violated any prohibitions in these rules to the employee or in the context of a proceeding relating to: (1) An employee benefit; (2) DOT agency action against the employee (e.g., an action to revoke a certificate); or (3) an NTSB safety investigation. Employers must promptly provide any records requested by the employee, but cannot make access to an employee's records contingent upon payment for records other than those specifically requested. The bundling of requested records with unrequested material at much higher cost has been a problem under the drug rules. Employers also will have to release information as required by law, including court orders or subpoenas. Please refer to part 40 for additional discussion.

The rules generally require an employer to permit access to all facilities involved in its alcohol testing program and make available copies of all test results and any other alcohol program records, upon request, to the Secretary of Transportation or any OA with regulatory authority over the employer or any of its covered employees. In addition, upon request by the NTSB as part of an accident investigation, employers are required to disclose information related to the employer's administration of a post-accident alcohol test following the accident under investigation. FTA's rule requires the employer to disclose test results to States to be consistent with obligations placed on States under FTA's State Safety Oversight rule. See the preamble to the FTA rule for a further discussion of this. RSPA's rule requires the employer to permit access to facilities and make available test results and records to a representative of a State agency with regulatory authority over the employer.

Several commenters raised questions about the reporting of confidential information on individuals and opposed mandatory release of employee test results to subsequent employers and other parties because of unspecified liability concerns. Some commenters expressed their support for employer provision of test results in appropriate circumstances; a few others opposed allowing employers to require employees to authorize the release of previous test results as a condition of employment.

Generally, the rules require an employer to release information regarding an employee's records as directed by the specific, written consent of the employee authorizing release to an identified person. In view of the fact that these rules permit employers to rely upon negative pre-employment alcohol tests conducted by other employers within the preceding six months, we believe that it is appropriate to require a prior employer, upon written request from the employee, to make records available to a subsequent employer. This pre-employment exception, which can significantly reduce hiring costs for some employers, might not otherwise be available to them. Since the previous employer would release the records only with the written consent of the employee for a specific limited purpose, commenters' liability concerns appear to be unfounded. To preserve the employee's confidentiality, the rules prohibit the identified person or recipient employer from subsequently disclosing the records, except as expressly authorized by the terms of the employee's written request. Please refer to part 40 for additional discussion.

These rules do not prohibit employers from using their own authority to require applicants to release previous test results. We believe that employers should be able to protect themselves from alcohol misusers who move from job to job as they are detected. A prudent employer can ask an applicant to request this information from former covered employers as a condition of employment and not hire the applicant until satisfactory information has been received. If the applicant does not provide this consent, the employer simply could choose not to hire the applicant for a safety-sensitive position. Of course, an employer must conduct a pre-employment test when a previous employer does not respond (e.g., had gone out of business, could not be located, failed or refused to provide the requested information).



### Consequences for Employees Engaging in Alcohol-Related Conduct

#### Removal From Safety-Sensitive Function/Required Evaluation and Testing

In general, the OA rules prohibit a covered employee who has engaged in conduct prohibited by any of the OA rules from performing safety-sensitive functions until he or she has met the conditions for returning to such work, which include a SAP evaluation, compliance with any required treatment program, and a successful return-to-duty test with a result below 0.02. The rules require employers, if they have determined that the employee has violated these rules, to ensure that the employee does not perform or continue to perform safety-sensitive functions.

Some commenters expressed the opinion that employers should determine the appropriate consequences for a violation of these rules. We disagree; there may be situations where a conflict exists between protecting public safety and an employer's strong economic incentive to keep an employee who misuses alcohol on the job. We believe that we need to establish the appropriate consequences for violation of these rules to protect public safety and to ensure their uniform application to similarly-situated employees to the extent possible. The rules do not prohibit an employer with authority independent of these rules from taking any other action against an employee.

A few commenters stated that employers who remove an employee from a safety-sensitive function should not be obligated to place that employee in another position or compensate the employee. All these rules require is removal from safety-sensitive functions. We leave the specific conditions under which an employee is removed, such as whether or not the employee is paid or moved to another non-safety-sensitive position, to employer policies or collective bargaining.

A few commenters wanted the consequences to be the same for all of the OA rules. Some of the OA rules do impose different consequences; these result from differing statutory requirements and the need to place these programs within the frameworks of the OA's existing safety regulations. The Act mandates harsher treatment of certain aviation employees that violate these rules. FHWA had to fit its rule within a statutorily-required system of consequences for violations of its safety requirements. (See the FAA and FHWA rules for a specific discussion of these differences.)

### Other Alcohol-Related Conduct

Continuing the argument over the appropriate prohibited alcohol concentration, some commenters on this section wanted to eliminate the lesser consequences for a 0.02–0.039 alcohol concentration and impose the full consequences under these rules on any test result at 0.02 or above, while others believed that no action should be taken against an employee with a result below 0.04. We disagree with commenters who want no action taken against an employee at alcohol concentrations below 0.04. Although the Department is not making alcohol concentrations below 0.04 a violation of the rules requiring removal from safety-sensitive functions until evaluation and, if necessary, treatment, we are concerned about employees whose alcohol test indicates some alcohol in their system. As noted earlier in this preamble, an alcohol concentration of .039 may not warrant evaluation and treatment, but it may have an adverse effect on that individual's abilities to perform safety-sensitive functions. Alternatively, the individual's blood alcohol curve may be rising, (i.e., the individual may have just consumed enough to ultimately produce an alcohol concentration of 0.04 or greater, but the alcohol is just entering the bloodstream and, at the time of testing, the alcohol concentration is below 0.04 and rising). Permitting such an employee to continue performing safety-sensitive functions, when we know there is alcohol in his or her system, would violate our (and the employer's and employee's) safety responsibility.

Therefore, in addition to the 0.04 alcohol concentration prohibition, the rules require removal of covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04 from safety-sensitive functions, until the employee is retested with a result below 0.02, or until the start of the employee's next regularly scheduled duty period, if it occurs at least eight hours following administration of the test. If the retest result is above 0.04, the employee has violated the prohibition against having an alcohol concentration greater than 0.04. The employee will then be required to meet the conditions for returning to safety-sensitive functions. The rules do not prohibit the employer with authority independent of these rules from taking any other action against an employee based solely on test results showing an alcohol concentration greater than 0.02.

The OA rules and the part 40 alcohol testing procedures treat any indicated

alcohol concentration reading of less than 0.02 on an evidential breath testing device (EBT) as "negative." Given the limits of technology for measuring alcohol concentration in body fluids or breath, the rules use 0.02 as the threshold for establishing any measured alcohol concentration. Below this level, we can not be certain an individual actually has alcohol in his or her system. Readings below 0.02, therefore, have no significance for any purpose under our rules.

### Use of Back Extrapolation

Most commenters opposed allowing the use of back extrapolation because of its difficulty and uncertainty in application and because it could infringe upon an employee's legal use of alcohol. Back extrapolation is the calculation used to determine alcohol concentrations over time based on an average rate of alcohol metabolism. It is most generally used to determine whether the alcohol concentration during the performance of the safety-sensitive functions (e.g., at the time of the accident) was actually greater than a specific concentration obtained at a later time. The OA rules require action only based on actual readings on the EBTs. They do not permit back extrapolation because, given the wide individual variations in alcohol metabolism, it creates too many uncertainties in the context of these programs. This prohibition would not prevent an OA from making use of back extrapolation in certain situations. Some existing OA rules permit the use of back extrapolation through expert scientific testimony in reasonable cause and post-accident cases conducted with appropriate due process protections. The rules that we are publishing today do not provide such protections. Those situations are different from the use of back extrapolation by employers in interpreting the results of tests conducted under part 40.

The rationale for back extrapolation is based on studies that show that the average rate of elimination of alcohol from the bloodstream is approximately .015 percent per hour, though this rate may well decline at low concentrations (0.02 and below). Individuals' rates of alcohol elimination are very often not "average," however. Further, it is ordinarily not known when the individual last ingested alcohol or how much alcohol he or she consumed. All of these factors make back extrapolation subject to substantial inaccuracy. Such analysis requires a number of "assumptions." Some of the assumptions relate to the individual subject (e.g., whether there is healthy



liver function, whether food was ingested before consuming alcohol, or other metabolic differences), some to facts or claims that may be supplied by the individual (e.g., no on-duty consumption, no consumption during the pre-duty abstinence period), and others to data that can be supplied by the employer (e.g., when the event occurred that triggered the test, when the test occurred). It is not only desirable but necessary for such analysis to be conducted by an expert in forensic toxicology.

We have decided not to permit back extrapolation of alcohol test results under these rules, because it would base serious consequences on the variable and uncertain results of this type of analysis. However, the requirement that employers remove persons with indicated alcohol concentrations of 0.02 or greater and less than 0.04 from safety-sensitive functions for a period of not less than 8 hours or until they retest below 0.02 will achieve some of the goals of back extrapolation.

#### **Alcohol Misuse Information, Training, and Referral**

##### *Employer Obligation to Promulgate a Policy on Alcohol Misuse*

The rules require each employer to ensure that each employee receives educational materials that explain these alcohol misuse prevention requirements and the employer's policies and procedures with respect to meeting those requirements prior to the start of alcohol testing. Each employer is required to provide written notice to every covered employee and to representatives of employee organizations concerning the availability of this information. Under the rules, the materials must include: the identity of a contact person knowledgeable about the materials; factual information on the effects of alcohol misuse on personal life, health, and safety in the work environment; signs and symptoms of alcohol misuse (the employee's or coworker's), particularly at low concentrations; where help can be obtained; available intervention methods, including referral to an employee assistance program (EAP), other SAPs and/or management; categories of employees subject to testing; what period of the workday or what functions would be covered by the rules; a description of prohibited conduct and the circumstances that trigger testing; testing procedures and safeguards; an explanation of what constitutes a refusal to submit to testing and the attendant consequences; and the consequences of violating the rules (as

well as lesser consequences for employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.)

Many commenters believed that simply providing the above information is not sufficient to ensure that employees understand the requirements of these rules and their consequences. This and other comments on this provision related to employee training are addressed below.

##### *Self-Identification/Peer-Referral Programs*

Since our primary purpose is to deter alcohol misuse and keep employees who have alcohol in their systems from performing safety-sensitive functions, employees should be able to identify themselves as unfit to work. A few commenters wanted to be able to "mark-off". Some segments of the transportation industry already have self-identification programs that allow an employee to decline without penalty to perform or continue to perform his or her job if the employee knows that he or she is or may be impaired by alcohol. We do not require such programs, because we believe that they are a matter more appropriate for collective bargaining and employer policy. The successful implementation of such programs depends upon joint labor-management commitment to an alcohol/drug-free work environment. However, we encourage employers to establish self-identification or peer-referral programs and encourage employees to use them.

However, such programs cannot interfere with the conduct of the alcohol tests required by these rules. Employers who have set up such programs must ensure that employees are not allowed to self-identify after they know that they have been selected for testing. This would compromise safety and frustrate the goals of these programs. The rules do not interfere with an employer's discretion to impose its own sanctions against self-identifying employees, so long as the sanctions are not premised on our rules. Such a program could permit a covered employee to take a voluntary alcohol test to determine whether the employee would be in violation of these rules if the employee were to perform safety-sensitive functions (but not after the employee has been selected for DOT-required testing); there would be no Federal consequences or requirements pertaining to the test or its results, however, since that kind of test is not required by DOT rules.

In addition to program information, the materials also may describe any

peer-identification or self-identification programs or procedures that employers offer or are associated with under which a covered employee may decline to perform or continue to perform safety-sensitive functions without penalty when he or she may be in violation of these rules, including any limits on the programs. The employer also may include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol concentration, that are based on the employer's authority independent of these rules. These additional policies must be clearly communicated and identified as based on the employer's independent authority.

##### *Training for Supervisors*

Commenters who addressed the issue of supervisor training or education requirements proposed in the OA rules generally supported one or a mix of the following: the necessity for annual or other recurrent supervisory training; the necessity for 2 hours or more of supervisory training; the adequacy of one hour of supervisory training; or a mandatory requirement for supervisory training with the amount or length of training left unspecified. For example, those who preferred a particular amount of time for training split between a one-time training requirement and an annual or other recurring training requirement.

Those commenters who supported recurrent or annual supervisory training requirements expressed the belief that supervisory personnel need refresher or ongoing education to maintain and improve skills and knowledge necessary to making effective decisions regarding reasonable suspicion alcohol testing. These commenters cited experience with one-time training for supervisors that did not provide sufficient exposure to the problems associated with confronting and identifying problem employees. Other commenters cited anecdotal information that reasonable suspicion testing was more appropriately and frequently used when supervisory training was part of an annual or periodic training program.

The OA rules require employers to ensure that persons designated to determine whether reasonable suspicion exists to require an alcohol test receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse, particularly those associated with lower concentrations of alcohol. We believe that this amount of training time is adequate for this specific purpose and in view of the fact



that the symptoms of alcohol misuse are commonly known and recognized. We believe that retaining the one-hour training requirement best balances the benefits of supervisor training with its high costs to employers. Additional supervisor training beyond a mandatory one-time, one-hour minimum may be desirable, but requiring it would significantly increase the costs imposed by these rules. At this time, we lack definitive information to corroborate the cost of additional training with quantifiable benefits that would justify imposition of those additional costs on the transportation industries. Employers may, of course, provide additional information or annual (or other recurrent) training if they desire.

Several commenters requested that the rules combine drug and alcohol training for supervisors. These commenters argued that training would be more effective if viewed in the context of all substance abuse rather than divided into separate courses for drug and alcohol abuse. Employers are free to combine supervisor training for alcohol misuse detection with the comparable training for drug use detection currently required by the OA drug testing rules for a total of two hours to minimize costs and inconvenience. Please note that FRA will retain its existing combined three-hour requirement for alcohol and drug abuse training for supervisors.

A few commenters suggested that the requirements for supervisory training should be content- rather than time-specific. These commenters recommended that the rules specify core or essential components of the curriculum and employers would develop the supervisory courses accordingly. This approach reflects a preference for criterion or performance standard training requirements, rather than training based on a "classroom hours" concept. We have decided not to establish mandatory performance-based training because of the difficulty of developing meaningful specific core course components that cover various different industry situations and the administrative burden of evaluating whether or not employers have met the performance standards. We would rather allow employers the flexibility of tailoring supervisor training to their particular industry and programs. We do, however, take this approach with required BAT training, because that is much more technical and specific and must be the same for part 40 testing in all transportation industries.

#### *Employee Training*

Commenters presented many of the same arguments on the issue of mandatory employee training as they did regarding supervisory training. Various commenters suggested that mandatory recurrent or periodic employee training would be advantageous and more effective as a prevention or deterrent strategy than testing. Commenters also suggested that the rules should combine alcohol awareness education with drug abuse education to address the total substance abuse problem. Some commenters opposed mandatory employee training because of cost concerns.

Most comments on the issue of employee education criticized the lack of specific proposed requirements for mandatory employee education and training on alcohol misuse. These commenters argued that the proposals to provide employees printed literature and information were inadequate and, according to some, a waste of time and money. They expressed the belief that structured, "classroom" type training is more effective in presenting information about drug and alcohol abuse and to increase awareness and prevention of alcohol misuse. A few commenters argued that it is irresponsible and unnecessarily punitive to impose a comprehensive alcohol testing program with specific prohibitions on alcohol misuse, without requiring training for employees to be certain they understand the prohibited conduct and the consequences of misconduct.

We believe motivating employees about safety in the workplace and good health is important to making an alcohol misuse prevention program work. Because the primary objective of any effective alcohol misuse program is deterrence rather than detection, it is especially important that, before any testing is begun, employers make their employees fully aware of the dangers of alcohol misuse in their jobs, advise them where help can be obtained if they have a problem with alcohol use, and alert them to the potential consequences for people who violate these rules.

These rules require that employers give covered employees alcohol misuse information, but do not require classroom training for nonsupervisory employees. Although such training may be desirable, industry-wide mandatory employee classroom training would be prohibitively expensive. In the highway area alone, a one-time, one-hour training requirement for approximately 6.3 million employees, with a large amount of turnover, at an average hourly wage of \$14.50 plus travel time, cost of

materials, etc., would cost in excess of \$100 million. At this time, we lack definitive information to corroborate the cost of training with quantifiable benefits that would justify imposition of these costs. Because of the large number of employees covered by these rules, the widely varying relationships between employer and employee, and the difficulty in ensuring the effectiveness of such wide-spread training, we believe it appropriate to allow employers the discretion to determine the best means of educating their employees beyond the minimum requirement to distribute informational materials.

Some researchers claim that education is more effective in preventing alcohol misuse than sanctions or enforcement initiatives. For example, a Boston University researcher concluded that social pressure and publicity "may be as important as government regulations in reducing impaired driving and fatal crashes." (quoted in "USA Today," Wednesday, August 3, 1988.) In the area of impaired driving deterrence, NHTSA believes that the most effective programs are those that combine education and enforcement. Information and education programs, in the absence of enforcement activities or sanctions, have never been shown to have an impact on reducing alcohol-related fatal crashes. Conversely, scores of studies have found that programs involving enhanced enforcement, roadside sobriety checkpoints, and the use of sanctions such as license suspensions frequently have resulted in significant reductions of alcohol-related fatalities. Although there is disagreement on the effectiveness of education alone, it appears that using education as an adjunct to other deterrent measures, such as those in these rules, will make both more effective.

We recognize that it may be difficult to get the attention and support of workers by handing them literature or displaying various materials on a bulletin board. In conjunction with the implementation of the rules, the Department also plans to distribute educational materials and conduct seminars designed to help employers increase employee awareness of the risks of alcohol misuse by those who perform safety-sensitive functions. The Department took similar action in the drug area.

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

Numerous commenters expressed concern that the NPRMs did not go far enough in ensuring that employees would get access to needed assistance and treatment. They felt that even



though the proposed rules require "evaluation and assessment" by a SAP, they do not protect employees who violate the alcohol misuse provisions from termination, and, therefore, the access to treatment via the SAP evaluation is a sham; a paperwork exercise. Several commenters favored mandatory employer-provided or paid rehabilitation, citing our proposals as a cynical violation of the Congressional mandate to provide an opportunity for rehabilitation. Some commenters, particularly labor and union groups, expressed the view that the rules should specifically guarantee that employees who violate the regulations are evaluated by a SAP and provided access to treatment, regardless of personnel actions taken by the employer. Many commenters, however, opposed mandatory employer-provided or paid rehabilitation.

The Act requires that an opportunity for treatment be made available to covered employees. To implement this mandate, these rules require an employer to advise a covered employee, who engages in conduct prohibited under these rules, of the available resources for evaluation and treatment of alcohol problems, including the names, addresses, and telephone numbers of SAPs and counseling and treatment programs. They also provide for SAP evaluation to identify employees with alcohol misuse problems. The employer has no similar obligation to applicants who refuse to submit to or have a positive result on a pre-employment test; this obligation runs only to current employees. The rules do not require employers to provide or pay for rehabilitation or to hold a job open for an employee with or without salary; the costs of such requirements could be prohibitive and could jeopardize the success of this program. In the drug testing rules, the Department decided that it was inappropriate to establish a Federal role in mandating that employers provide for rehabilitation and that it should be left for management/employee negotiation. The same logic applies here and the Department has decided not to require employer-provided rehabilitation in these rules. We believe that the rules' provisions concerning evaluation adequately address the Act's requirements.

Many commenters noted that EAPs have proven successful in offering employees with alcohol problems an avenue to non-punitive resolution of their problems and in offering employers the ability to return employees to the workforce who might otherwise have been fired. Aviation

employers pointed to the FAA-supported Human Intervention and Motivational Study (HIMS) as a particularly effective program, with its combination of alcohol awareness training for supervisors and peers, rehabilitation, return to duty/medical certification process, and intensive follow-up monitoring of recovery. Overall, the success rate for alcoholic pilots identified through the HIMS or related programs has been about ninety percent. Some transportation employers have established similar programs for all of their employees. A number of these commenters also expressed their concerns that resources currently dedicated to EAPs would have to be shifted to support the new alcohol testing requirements, resulting in the reduction or elimination of existing EAP services.

We recognize that these programs will be costly and that, in specific circumstances, employers may decide that they have to divert funds from an EAP to conduct the required alcohol testing and prevention programs. The primary safety objective of these rules is to prevent, through deterrence and detection, alcohol misusers from performing safety-sensitive functions. The necessary resources must be provided to accomplish this objective. We hope that employers do not have to divert resources from EAPs to achieve this. We recognize the value of rehabilitation and encourage those employers who can afford to provide it to do so through established health insurance programs, since it helps their employees, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs. Please note that repeated provision of access to rehabilitation services after "positive" testing, followed by repeated reinstatement and repeated violations, may raise public safety and liability concerns for employers. It also could dilute the deterrent value of testing programs and encourage further misuse of alcohol.

Commenters also addressed the issue of the role of the SAP in return-to-duty determinations. Many of these commenters felt that the NPRMs were not clear in delineating how and by whom the decision of an employee's return to safety-sensitive function would be made. Some of these commenters believe that the SAP should play a crucial role in advising or recommending return-to-duty actions to employers.

The rules provide that the evaluation may be provided by a SAP employed by the employer, by a SAP under contract

with the employer, or by a SAP not affiliated with the employer. A SAP will evaluate each covered employee who violates these rules to determine whether the employee needs assistance resolving problems associated with alcohol misuse and refer the employee for any necessary treatment. Before returning to duty, each employee identified as needing assistance must (1) Be evaluated again by a SAP to determine whether the employee has successfully complied with the treatment program prescribed following the initial evaluation, (2) Undergo an alcohol test with a result of less than 0.02 alcohol concentration, and (3) Be subject to a minimum of six (6) unannounced, follow-up alcohol tests over the following twelve (12) months. Compliance with the prescribed treatment and passing the return-to-duty alcohol test do not guarantee a right of reemployment or return to safety-sensitive duties; they are preconditions the employee must meet in order to perform safety-sensitive functions. The decision on whether to return the employee to his or her job we leave to the employer. The choice of SAP and assignment of costs should be made in accordance with employer/employee agreements and/or employer policies.

In the common preamble to the NPRMs, we proposed categories of persons eligible to be SAPs and asked if other categories should be included. Numerous commenters complained that the proposed definition was too restrictive. The National Association of Alcoholism and Drug Abuse Counselors (NAADAC) organized a widespread effort for its membership to send comments supporting the position that certified addiction counselors were the most qualified professional or occupational group to serve as SAPs. These comments tended to emphasize NAADAC standards and certification requirements, especially in counseling, treatment and rehabilitation of alcoholics and addicts. Many commenters certified by other State or local boards also presented arguments for their inclusion in the definition of a SAP. A few commenters suggested that physicians, social workers, and psychologists do not generally have training or skills specific to alcohol and drug abuse diagnosis or treatment.

The final rules define the SAP, as proposed, to include a licensed physician (with a Medical Doctor or Doctor of Osteopathy degree) with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders (the degrees alone do not confer this knowledge), or a licensed or certified psychologist, social worker,



or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders. In response to comments, we also have included in the definition alcohol and drug abuse counselors certified by the NAADAC Certification Commission, a national organization that imposes qualification standards for treatment of alcohol-related disorders. The commenters provided information showing that the training and experience necessary to meet NAADAC standards are sufficient for participating as a SAP in our alcohol misuse prevention programs. We rejected commenters' suggestions that the definition include State-certified counselors, because the qualification standards vary dramatically by State; in some States, certified counselors do not have the experience or training we deem necessary to implement the objectives of our rules. State-certified addiction counselors can, of course, take the NAADAC competency examination to become a certified alcoholism and drug abuse counselor. The rules require that all persons in the categories listed in the definition must have knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders to qualify.

A few commenters expressed concern about the relationship of the SAP to the treatment or rehabilitation staff or facility. These commenters specifically addressed potential conflicts of interest, a "referral-to-self" practice, and the objectivity of return-to-duty evaluations. Many of these commenters believed that the rules should establish specific parameters that outline the SAP's duty or obligation to the employer as well as protections for employees against unscrupulous or unethical SAPs who would use the evaluation and assessment process to foster their own practice or treatment facilities.

Professional organizations, such as the Employee Assistance Professionals Association, prohibit their members from making referrals for treatment to their own practice or to agencies from which they receive financial remuneration. We want to avoid conflict-of-interest problems that could arise where the SAP is involved in both the evaluation and treatment phases of employee assistance, which could lead to recommendations for inadequate or inappropriate treatment for the employee and/or the imposition of unnecessary costs on both employers and employees. For example, a SAP might recommend a one-time misuser for a 30-day treatment program in which the SAP has a financial interest or send

an alcoholic through the SAP's own outpatient treatment program. Therefore, the rules generally require the employer to ensure that a SAP who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the SAP's private practice or to a person or organization from which the SAP receives remuneration or in which the SAP has a financial interest. However, this requirement could impose hardship and the unnecessary costs of requiring two different sources of assessment and treatment on employers in remote areas or in situations where employee assistance (including assessment and treatment) is provided by contract or through a health insurance program. Therefore, the rules do not prohibit a SAP from referring an employee for assistance provided through (1) a public agency; (2) the employer; (3) a person under contract to provide treatment for alcohol problems on behalf of the employer; (4) the sole source of therapeutically appropriate treatment under the employee's health insurance program; or (5) the sole source of therapeutically appropriate treatment reasonably accessible to the employee.

Some commenters wanted a medical review officer (MRO) to review and interpret alcohol test results. Since the determination made in alcohol tests required by these rules is whether there is a prohibited concentration of alcohol in an individual's system, regardless of the source, there is no need to require an MRO to interpret positive test results, as required by the DOT drug testing rules. There is no "alternative medical explanation" for the prohibited alcohol concentration, so there is no role for an MRO. The mental health and/or medical professionals to whom the employee is referred can evaluate the employee's problems, if any, associated with the alcohol misuse. A SAP will then determine whether the employee has complied with any recommended treatment program. In some OA rules, where the employee operates under a certificate or license, a licensed physician must certify, in conjunction with a medical examination, whether the employee can return to work.

#### Other Issues

##### *Flexible Approaches*

As in the drug testing rules, we want to provide program flexibility to allow employers to carry out their programs in a more efficient, cost-effective manner and to ease the compliance burden on small businesses. Testing, for example, can be conducted by the employer, an

outside contractor or program administrator, a consortium, a union, or any other entity. The use of consortia has worked well in the drug testing area; in fact, it is the predominant method of compliance in some industries, particularly among smaller employers. We have delayed implementation of the alcohol rules for smaller employers by an additional year to enable them to join established consortia or large employer testing programs, rather than have to establish their own programs.

The OA rules have specific provisions to make it easier for smaller employers; FRA is retaining its existing exemption from its drug and alcohol rules for railroads with 15 or fewer employees that do not engage in joint operations. (These entities are not considered sufficiently safety-sensitive to be subject to testing, since they tend to operate on private track at slow speeds.) FRA, which requires covered employers to submit plans for their alcohol misuse programs, imposes significantly reduced plan requirements on smaller employers.

Employers may find it more cost-effective and convenient to conduct alcohol testing, particularly random testing, at the same time they conduct drug testing. Because we require alcohol testing at or near the time of performance, however, all random and reasonable suspicion drug testing also would have to occur at such times. In addition, the testing would have to take into account differences in the alcohol and drug random testing rates for the employer's industry. For random testing, employers can randomly choose the employee's number and then test the employee for both drugs and alcohol the next time he or she performs safety-sensitive functions. As described earlier, we are allowing performance-based random alcohol testing rate adjustments and initiating additional rulemaking to provide for greater flexibility in testing methods.

##### *Motor Carrier Safety Assistance Program (MCSAP Option)*

In the OA NPRMs, we sought public comment on whether the post-accident and random (or other) roadside testing could be conducted by state and local law enforcement officials under the FHWA Motor Carrier Safety Assistance Program (MCSAP), which is a Federal/State cost reimbursement and matching grant-in-aid program to increase commercial motor vehicle safety, or a similar program. The FHWA NPRM specifically proposed this option. Under the MCSAP, participating States would have to submit a random (or other) alcohol testing plan as part of their



application for FHWA MCSAP funding. The random alcohol testing plan component would conform to the requirements of these rules.

Recognizing that statutory changes to implement the MCSAP option would be necessary, we sought public comment on whether involving State and local authorities in alcohol testing would work for the various types of testing in the different transportation industries. Since States already have some equipment and their law enforcement officials already are trained in using that equipment, overall costs might be less; user fees could be imposed on covered employers to cover State costs. As neutral, third-party testers, their tests might be better accepted by employees. Due to the fact that local officials may reach an accident first, they could help in determining who was involved in the accident and also conduct tests sooner.

Commenters were divided on this proposal. Most employers, particularly motor carriers, liked the option because it would impose testing costs on State and local authorities, rather than on individual motor carriers, especially independent owner-operators. They opposed the proposed imposition of user fees to support this program. One commenter suggested that the Federal government should pay local or State governments to perform alcohol testing. A few employers noted that roadside testing would be too time-consuming and would disrupt their closely-timed shipment and travel schedules; they prefer employer-based testing where they have more control over scheduling. They also noted that the proposal would reduce training costs because the law enforcement officers already are trained in conducting alcohol tests. The States and local authorities, including MCSAP agencies, opposed this option because of the costs (another unfunded mandate imposed on States by the Federal Government), diversion of law enforcement personnel from traditional functions, and lack of legal authority to conduct alcohol tests under their existing statutes without the requisite probable cause. They believed that without additional appropriations, the expenses of such a testing program would lessen the financial resources available for other congressionally-mandated MCSAP programs, i.e., roadside vehicle safety inspections.

We have decided not to adopt the MCSAP option at this time for several reasons. On October 28, 1993, President Clinton issued Executive Order 12875, "Enhancing the Intergovernmental Partnership," which prohibits executive departments from promulgating regulations that impose an unfunded

mandate on State, local and tribal governments, unless the mandate is required by statute, direct costs are funded by the Federal Government, or the executive department justifies the need for the mandate to the Office of Management and Budget (OMB) after appropriate consultation with the affected governments. The costs of State-operated random alcohol testing would exceed the total annual MCSAP funding allocation of \$65 million. With current limited budgetary resources, it is unlikely that the MCSAP program or any other Federal program will obtain additional appropriations to fund State testing. Legislation would be needed to collect user fees and use those fees to cover any additional, necessary MCSAP funding. Moreover, the MCSAP option could never completely replace employer-based programs; it could cover only three of the types of testing (random, reasonable suspicion and post-accident) and only on certain roads. Furthermore, in some States, the MCSAP program is directed through agencies other than the police, who would be the likely candidates to do the testing. Before it could be implemented, this option would require numerous changes to existing State statutes or constitutions to permit State and local officials to test without probable cause.

#### *Multi-Agency Coverage*

**Multi-Agency Coverage** In some transportation industries, a significant percentage of employees are subject to the testing rules of more than one DOT OA; some are subject to the testing rules of more than one Federal agency (e.g., employee drivers covered by the Department of Energy (DOE) may also be covered by FHWA). This is one reason we have tried to make the DOT OA rules as uniform as possible (and why we have also consulted closely with other Federal agencies). Where it does not compromise the effectiveness of the testing program or other requirements, one DOT OA will defer to another or recognize the validity of the other's requirements. For example, FHWA defers to FTA for CDL holders employed by FTA grantees, and FTA defers to FRA for grantees that are part of the general railroad system of transportation.

There are different situations in which multi-agency coverage can occur:

(1) An employee may perform different modal functions for the same employer. For example, an employee may act as both a pipeline inspector and a truck driver for a single employer, activities regulated by RSPA and FHWA, respectively. Such an employee would be designated by the employer as

either a pipeline worker or driver for purposes of random testing based on which function he or she performs the majority of the time. The employee would be subject to reasonable suspicion and post-accident testing under RSPA or FHWA rules while performing either pipeline or driving functions.

(2) An employee may have two employers. For example, an employee may fly for one employer and drive for another. That employee will be subject to two OA random testing requirements and will generally be in two different pools. As discussed above, however, the employee can be covered by one random testing pool, e.g., one run by a consortium; in both situations, the employee will be subject to random testing in either job at the appropriate industry rate.

The rules require that employees cease safety-sensitive functions in every mode of transportation, once determined to be in violation of any one of the OA rules. We note that the Act clearly prohibits the performance of safety-sensitive functions in the aviation, rail, motor carrier, or transit industries by an employee who has used alcohol in violation of any law or any Federal regulation.

We also have continued to consult with other Federal agencies that are considering developing similar programs during this rulemaking proceeding in an attempt to make Federal government rules as consistent as possible.

#### *International Issues*

The Act mandates that the requirements for pre-employment, reasonable suspicion, random and post-accident tests for alcohol (and drugs) be applied to foreign operators in the aviation, rail and motor carrier industries to the extent those requirements are consistent with our international obligations. We must also "take into consideration any applicable laws and regulations of foreign countries." Because of the many questions raised about the implementation of this statutory mandate, we issued advance notices of proposed rulemaking on these issues. Published elsewhere in today's **Federal Register** are FHWA, and FAA NPRMs that propose to cover foreign operators in the U.S., but would defer implementation until January 1, 1996. During this period, we will be working through international organizations or bilateral agreements to achieve programs comparable to DOT's for alcohol and drugs; if we are unsuccessful at making progress, the



rules will go into effect. Because in their very limited foreign operations in the U.S., foreign railroad employers already are complying with FRA's existing alcohol and drug testing requirements, the FRA has published a notice withdrawing its advance notice of proposed rulemaking elsewhere in today's *Federal Register*.

## Regulatory Analyses and Notices

### General

Each of the OA preambles separately addresses a number of administrative matters concerning compliance with administrative requirements in statutes, executive orders and Departmental policies and procedures. Readers should refer to the individual OA rules for statements specific to each rule. This common preamble and all the associated rulemakings published in today's *Federal Register* have been classified as significant under Executive Order 12866 and the Department's regulatory policies and procedures and have been reviewed by the Office of Management and Budget.

### Paperwork Reduction Act

The proposed information collection requirements contained in the notices of proposed rulemaking were reviewed by the Office of Management and Budget (OMB) under section 3504(H) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Revisions of the information collection requirements contained in the final rules have been submitted to OMB for final approval. A *Federal Register* notice will be published when that approval has been obtained.

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