DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2002–11301; Notice No. 04–08]

RIN 2120–AH14

Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: In Notice 02–04, published on February 28, 2002, the FAA proposed to make it clear that each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to drug and alcohol testing. The comment period closed on July 29, 2002. Several commenters stated that the change was more than clarifying and would have an economic impact. The FAA has prepared an initial regulatory evaluation on this issue. The FAA is reopening the issue for public comment before making a final determination.

DATES: Send your comments on or before August 16, 2004.

ADDRESSES: Address your comments to the Docket Management System, U.S. Department of Transportation, Room PL 401, 400 Seventh Street, NW., Washington, DC 20590–0001. You must identify the docket number FAA–2002–11301 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that FAA has received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to: *http://dms.dot.gov.* You may review the public docket containing comments to these proposed regulations in person in the Docket Office between 9 a.m. and 5 p.m., on the plaza level of the Nassif Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Diane J. Wood, Manager, AAM–800, Drug Abatement Division, Office of Aerospace Medicine, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone number (202) 267–8442.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the Web address in the **ADDRESSES** section.

Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) Web page *(http://dms.dot.gov/search).*

(2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on ''search.''

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the document number for the item you wish to view.

You can also get an electronic copy using the Internet through the Office of Rulemaking's Web page at *http://www.faa.gov/avr/armhome.htm* or the **Federal Register's** Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number, notice number or amendment number of this rulemaking.

Background

SNPRM General Information

On February 28, 2002, the FAA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM), Notice 02–04, entitled Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities (67 FR 9366). The purpose of Notice 02–04 was to clarify regulatory language, increase consistency between the antidrug and alcohol misuse prevention program regulations where possible, and revise regulatory provisions as appropriate.

In Notice 02–04, the FAA proposed to make it clear that each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to testing. Several commenters indicated that the proposed clarification would impose an economic burden on the aviation industry. Therefore, the FAA is reopening the issue for public comment. We are proposing the same language again in this Supplemental Notice of Proposed Rulemaking (SNPRM).

This SNPRM does not reopen the other proposals that were contained in Notice 02–04 or request further comments on those proposals. Those proposals, amended as appropriate in response to public comment, were published in a final rule on January 12, 2004 (69 FR 1840).

Subcontractor Issue Discussion

In Notice 02–04, the FAA proposed to amend the language in 14 CFR part 121, appendix I, section III and appendix J, section II to make it clear that any contractor's employee who performs safety-sensitive work for an employer must be drug and alcohol tested. Currently, both sections specify that employees performing a listed safety-sensitive function are required to be tested if performing the function ''directly or by contract for an employer.'' The change proposed in Notice 02–04 was to add the following parenthetical phrase after the word ''contract,'' so that it would be clear that

each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to testing. In this SNPRM, we are proposing the same language as in Notice 02–04.

While the regulations have always required that any person actually performing a safety-sensitive function be tested, the FAA provided conflicting guidance on this point in the past. As discussed in Notice 02–04 (67 FR 9369 to 9370), in the initial implementation phase of the drug testing rule in 1989, the FAA issued informal guidance stating that maintenance subcontractors would not be required to test unless they took airworthiness responsibility for the work that they were performing. This guidance was provided widely to persons and companies in 1989 through 1990, and on an ad hoc basis thereafter until the mid 1990s. This guidance constricted the potential reach of the plain language of the regulation as it applied to contractors. The FAA believes that constricting the scope of testing of contractors is in conflict with the objective of having each person who performs a safety-sensitive function actually tested.

However, the FAA acknowledges that some employers and some maintenance providers may be confused about testing employees performing work under a subcontract. Therefore, in Notice 02–04 and again in this SNPRM, the FAA has proposed to make it clear that all persons performing safety-sensitive work must be tested. The level of contractual relationship with an employer should not be read as a limitation on the requirement that all safety-sensitive work be performed by drug- and alcohol-free employees.

The FAA will rescind all conflicting informal guidance regarding subcontractors upon publication of the final rule on this issue.

Comments Received

The comment period for Notice 02–04 was scheduled to close May 29, 2002, but was extended until July 29, 2002 (67 FR 37361) as a result of public requests for extension. In Notice 02–04, the FAA proposed to make it clear that each person who performs a safety-sensitive function is subject to testing. The FAA received approximately 10 comments on the subcontractor issue. Several commenters, including the Air Transport Association of America (ATA), National Air Transportation Association (NATA), Regional Airline Association (RAA), and a joint filing by the Aeronautical Repair Station Association and 14 other entities (hereinafter referred to as ''ARSA''), indicated that the proposed clarification would impose an economic burden on the aviation industry. Therefore, the FAA is reopening the issue for public comment. The FAA is focusing its comment discussion solely on the subcontractor testing issue because all other issues were resolved in the final rule published on January 12, 2004.

ARSA, with a supporting general comment from NATA, strongly opposed the proposal to test non-certificated maintenance subcontractors, which it believed would expand the scope of drug and alcohol testing to non-aviation employees without enhancing safety. ARSA believed the proposed rule would impose significant new costs on companies that are not regulated by the FAA and on certificated entities that are in full compliance with current regulations. In addition, ARSA commented that the proposal did not adequately consider the costs and benefits as required by Executive Order 12866 or the impact on small entities under the Regulatory Flexibility Act of 1980. According to ARSA, the proposal would increase the costs of aviation maintenance at a time when the industry can least afford it and create an incentive for non-aviation companies to withdraw their support from the industry.

Several commenters, including ARSA, ATA, RAA, and United Technologies Corporation (UTC), stated that the FAA issued conflicting guidance regarding the testing of subcontractors. The commenters reiterated much of the conflicting guidance we cited in Notice 02–04. Some commenters added that confusion further ensued as a result of Advisory Circular (AC) 121–30, *Guidelines for Developing an Anti-Drug Plan for Aviation Personnel,* issued March 16, 1989. This AC was cancelled May 20, 1994.

The FAA acknowledges the concerns of commenters regarding the confusion that ensued from multiple FAA guidance documents on testing subcontractors. It is because of this conflicting guidance that we have proposed clarifying language regarding the subcontractor issue. Because the FAA merely considered this a clarification, the issue was not included in the Regulatory Evaluation for Notice 02–04. In response to the comments and concerns regarding the subcontractor issue and potential costs, the FAA has now prepared a draft Regulatory Evaluation for this SNPRM. For a discussion of the cost comments, see the draft Regulatory Evaluation that is included in the docket for this rulemaking (Docket No. FAA–2002–11301).

We are publishing this SNPRM to gather public comment on the FAA's economic analysis and proposed change, in order to fully evaluate this issue before making a final decision.

In its objections to the proposed clarification, ARSA cited the Omnibus Transportation Employees Testing Act of 1991 (Omnibus Act), 49 U.S.C. 45101, *et seq.* ARSA believes that the Omnibus Act limits the category of persons subject to testing to only air carrier employees and possibly direct contractors. ARSA states extending the coverage to subcontractors ''is far more tenuous.'' In support of its concerns, ARSA also cites Senate Report No. 102–54, 1991, which encouraged the FAA Administrator to ''be very selective in extending the coverage of this provision to other categories of air carrier employees.'' In its comments the ATA stated that ''because the regulation technically *can* reach every single person who falls within the covered function definition, does not mean that every such person *should* be included.''

In reviewing the language of the Omnibus Act, as well as the legislative history, the FAA finds much support for the coverage of individuals performing safety-sensitive functions without regard to the degree of contractual relationships. In the Omnibus Act, Congress acknowledged that the FAA already had regulations requiring the testing of air carrier employees performing directly or by contract, and the Omnibus Act ''does not prevent the Administrator from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance by airmen, crewmembers, airport screening employees, air carrier employees responsible for safety-sensitive functions (as decided by the Administrator) * * *.'' 49 U.S.C. 45106(c) Congress was referring to 14 CFR part 121, appendix I, which clearly included in the description of safety-sensitive personnel any individual who was performing directly or by contract for an air carrier. Among the air carrier employees responsible for safety-sensitive functions are those individuals who perform aircraft maintenance and preventive maintenance. In Senate Report No. 102–54, which was cited by ARSA, the Senate Committee on Commerce, Science, and Transportation, specifically indicated that the new statute would continue to require testing of mechanics.

At one time, many of the individuals who performed safety-sensitive functions were direct employees of the air carriers themselves. However, the

trend in aviation has been to contract out many functions, including the maintenance and preventive maintenance of aircraft. According to a report of the Inspector General (IG) of the United States Department of Transportation, there has been a significant increase in air carriers' use of repair stations for outsourced aircraft maintenance. The IG cautioned the FAA ''to pay close attention to the level of oversight it provides for repair stations.'' The IG further advised the FAA ''to consider this shift in maintenance practices when planning its safety surveillance work.'' (See pages 7 and 18 of The State of the Federal Aviation Administration, Statement of the Honorable Kenneth M. Mead, Inspector General, appearing before the Committee on Commerce, Science, and Transportation, United States Senate, Report No. CC–2003–068, February 11, 2003.) In addition, the IG noted on page 1 of a report entitled ''Review of Air Carriers' Use of Aircraft Repair Stations,'' (IG Report No. AV–2003–047, July 8, 2003,) that ''in 1996 major air carriers spent $1.5 billion (37 percent of their total maintenance costs) for outsourced aircraft maintenance. However, in 2002, the major carriers outsourced $2.5 billion (47 percent of their total maintenance costs) in maintenance work.'' The July 8, 2003, report indicated that between 1996 and 2002, U.S. carriers experienced accidents and incidents that have been tied to improper maintenance or maintenance mistakes.

Thus, the FAA believes that it has the statutory authority and, in the interest of aviation safety, the responsibility to require that individuals who actually perform safety-sensitive duties are subject to drug and alcohol testing. In providing FAA the authority to ''further supplement'' the regulations that existed in 1991, Congress empowered the FAA to amend and adapt the regulations as appropriate.

Several commenters, including ARSA, believe that non-certificated maintenance contractors are not authorized to have drug and alcohol testing programs of their own. This is incorrect. Since the beginning of the programs, certificated and non-certificated contractors have been allowed, but not required, to submit and implement antidrug programs under 14 CFR Part 121, appendix I, formerly sections IX.A.3–4, now sections IX, A and IX.C.2; and alcohol misuse prevention programs under 14 CFR part 121, appendix J, formerly section VII.A.2, now section VII.A and section VII.C.2. In fact, recently the FAA's drug and alcohol testing program plan database included 1,207 drug plans approved for non-certificated entities. The majority of non-certificated entities, approximately 1,188 companies, perform safety-sensitive maintenance work.

In addition, the FAA notes that the certificated and non-certificated entities that currently have FAA drug and alcohol testing programs have not identified themselves specifically as prime contractors or as subcontractors. These entities may be working as a prime contractor for one air carrier and as a subcontractor for another air carrier. Therefore, it would not be practical to limit testing to only prime contractors.

ARSA stated that the FAA's proposal, if adopted, would impose significant administrative burdens on air carriers and repair stations in at least two areas. The first is the burden of adding subcontractors to the quality auditing process. ARSA noted that in the airline industry, air carriers periodically audit their direct maintenance providers or accomplish this through the Coordinating Agency for Supplier Evaluation (CASE) to ensure that all employees who perform safety-sensitive functions are covered by drug and alcohol testing programs. According to ARSA, these audits do not extend to maintenance subcontractors with whom the air carrier has no direct relationship. The second administrative burden occurs in ''determining whether the non-certificated subcontractor would have its own drug and alcohol program, an option under the FAA's proposed registration mechanism, or whether it would be included in an existing program of its contractor.''

The FAA believes that it is an excellent business practice for an air carrier to audit its maintenance contractors. Although this is a business decision, the FAA believes that an auditing process is a good way to determine if an entity (at any tier) not only has FAA drug and alcohol testing programs, but also is implementing its programs and testing its employees. However, while an auditing process is a good tool for determining contractor compliance, there are other less costly and less ''burdensome'' tools for a company to ensure contractor compliance with the drug and alcohol testing regulations. For example, a company could use a simple questionnaire to determine if its contractors (at any tier) have a program and are testing their employees who perform safety-sensitive duties.

In response to ARSA's second concern, the FAA would like to reiterate that, since the beginning of its testing regulations, certificated and non-certificated contractors have been allowed, but not required, to submit and implement FAA testing programs. Thus, under the current regulations and under this proposal, contractors make a business decision about whether to have their own programs or obtain coverage under another company's programs.

Some commenters, including ARSA, raised concerns that subcontractors who perform repairs on equipment that is not typically considered to be aviation-related would be subject to testing under the proposed rule change. For example, the commenters suggested the following people would be covered by the proposed rule change: those who repair entertainment systems and telephones; those who repair and refurbish rugs, Formica, wood products and plumbing materials; and dry cleaners who clean aircraft seats in accordance with a component maintenance manual. The drug and alcohol regulations already require that any person who performs maintenance or preventive maintenance for an employer must be drug and alcohol tested. The purpose of this rulemaking is not to specify what constitutes maintenance or preventive maintenance, which are defined by the FAA in 14 CFR 1.1, and 14 CFR part 43. Instead the purpose of this rulemaking is to make it clear that all persons who perform safety-sensitive maintenance or preventive maintenance functions are actually tested.

Whenever maintenance is being performed, it potentially affects the safety of the aircraft. Thus, the FAA believes it is important that all people who perform any type of safety-sensitive maintenance function be subject to testing, even if the maintenance duties are not traditionally considered to be aviation-related. Some of the commenters believed that people performing maintenance not traditionally considered aviation-related would not be aware of this rulemaking. The FAA notes that many of these people are already covered by the regulations and are subject to testing. For those who are performing maintenance not traditionally considered aviation-related, the FAA expects that employers and direct contractors would know of this rulemaking and would notify their subcontractors.

ARSA requested that, in the final rule, the FAA clarify ''in a multiple tier situation which of the upstream maintenance providers would be responsible if a violation of the drug and alcohol rules was committed by a lower tier provider''

The compliance responsibility depends upon the specific facts. Normally, the FAA considers any company that holds itself out as having a registration statement or Operations Specification (OpSpec) to conduct drug and alcohol testing to be responsible for compliance with the regulations. Under the proposal, any higher tiered contractor that uses a subcontractor to perform safety-sensitive work would either include the subcontractor's safety-sensitive employees in its program or ensure that the subcontractor has a registration statement or OpSpec to conduct drug and alcohol testing. The ultimate responsibility for ensuring that the first tier contractor has a program, of course, rests with the air carrier.

Some of the commenters, including ARSA, raised fundamental issues regarding whether they and air carriers can be held responsible for the compliance with essential safety requirements being performed for them by contractors at different levels. One commenter, a repair station, stated that it ''does not have the time or resources to monitor all the contractors that might perform some of our maintenance related work. Even if we could, our end customer could not afford to pay the cost for the article's repair or overhaul. Somewhere in our customer's bill we would have to attempt to recoup the expenses generated during our monitoring of all the vendors and sub-contractors involved.'' In addition, ARSA referred to ''the fiction that an air carrier or any of its direct contractors can reasonably and practically be expected to ensure the compliance of lower tier providers with whom they have no direct relationship.''

The FAA is concerned about any suggestion that contracting or subcontracting out safety-sensitive work could relieve any entity, especially an air carrier, of its responsibilities to ensure compliance with the regulations. Contracting out work to another entity does not mean that an entity is no longer responsible for ensuring compliance with safety requirements. Air carrier safety is the core responsibility of the air carrier. The air carrier may opt to partner with its maintenance providers to ensure that all maintenance work is provided in accordance with the regulations. However, the safety of the air carrier's maintenance and operations ultimately rests with the air carrier.

UTC commented that ''the FAA needs to keep the antidrug and alcohol program responsibility with the air carriers and not extend it to maintenance providers.'' The FAA agrees with UTC that the responsibility for drug and alcohol testing of employees should remain with the air carrier and should not become a requirement of the maintenance providers. In keeping with the Omnibus Act and consistent with the history of the drug and alcohol testing regulations, this proposal does not require maintenance providers to conduct testing. However, maintenance providers may choose to obtain a testing program. Once a maintenance provider registers with the FAA or obtains an OpSpec to conduct drug and alcohol testing, the maintenance provider thereby undertakes the responsibility to properly comply with the regulations.

ARSA commented that the FAA's proposal is based on a fundamental misunderstanding of the maintenance industry's use of subcontractors. Prior to and following the issuance of the NPRM, ARSA and the Aerospace Industries Association surveyed their memberships about maintenance subcontracting practices. For a discussion of the survey results and related correspondence between the FAA and ARSA, see the draft Regulatory Evaluation for this SNPRM that is included in the docket for this rulemaking (Docket No. FAA–2002–11301).

ARSA stated that if the proposed rule language, ''including by subcontract at any tier'', is adopted, the FAA will need to determine how these additional employees will be integrated into the program. ARSA recommended that the FAA permit these employees to be added to the existing pool of covered employees for purposes of random testing without subjecting them to pre-employment testing. ARSA believes this ''grandfather provision'' would be much less disruptive and would recognize the fact that they have been previously performing these functions without being covered by the drug and alcohol rules and without any adverse effect on safety.

The FAA acknowledges ARSA's concern that there may be a disruption in the provision of some maintenance service in the industry resulting from the pre-employment testing of maintenance subcontractors who are already performing safety-sensitive functions but who are not being tested. Although ARSA suggested that a ''grandfather provision'' be added for pre-employment testing subcontractors who have not already been conducting drug and alcohol testing, the FAA is concerned about ''grandfathering'' subcontractors into the regulation because of the high drug positive rate for maintenance workers. Instead, the FAA believes that proposing an extended compliance date for conducting pre-employment testing of subcontractors who are not already being tested is reasonable. Therefore, the FAA is proposing language that would extend the requirement for pre-employment testing existing subcontractor employees to 90 days from the effective date of the final rule, if adopted. While these employees must be pre-employment drug tested and the employer must receive a negative drug test result, there is no requirement that the employee be removed from performance of safety-sensitive functions while the employer is awaiting the negative drug test result. However, if the employee refuses to submit to testing or the employer receives a positive drug test result on the employee, the employer must immediately remove the employee from the performance of safety-sensitive functions.

Both ARSA and UTC commented that the applicability of the drug and alcohol testing regulations should not be extended beyond the level where a direct contractual relationship exists. Specifically, ARSA urged the FAA to limit the drug and alcohol testing rules only to those maintenance providers that have a direct contract with a U.S. air carrier and that take airworthiness responsibility for the work they perform. As an alternative, ARSA requested that the FAA retain a past interpretation on maintenance subcontractors and add an exclusion from drug and alcohol testing for employees of non-certificated entities. ARSA provided two versions of suggested rule language to address these concerns.

The FAA has reviewed the two alternative rule language proposals that ARSA submitted in its comments. ARSA's first alternative ''Covers only those individuals who perform safety sensitive functions as (1) an employee for a Part 121 or Part 135 air carrier, or § 135.1(c) operator, or (2) under a direct contract with these entities.''

The FAA does not believe that this alternative will provide a workable solution to the issue of testing subcontractors because the proposal would change the focus of drug and alcohol testing away from ''who performs the work.'' Under ARSA's proposal it would be easy to avoid the drug and alcohol testing regulations by simply creating additional tiers in the contractual relationship.

ARSA's second alternative ''Covers the individuals specified in Alternative 1, above plus any person (including maintenance subcontractors at any tier)

that (1) takes airworthiness responsibility for the work they perform under Part 43 and/or Part 145 * * *, and (2) has actual knowledge, at the time the work is performed, that it is being accomplished for a Part 121 or Part 135 air carrier, or a § 135.1(c) operator.''

The FAA does not believe that this alternative meets the requirements of safety because it still allows certain persons who are performing safety-sensitive work not to be tested. ARSA's proposal would except from testing individuals who are doing hands-on maintenance merely because these individuals are not signing off on the airworthiness responsibility for the work they perform.

We received one comment from a non-certificated maintenance subcontractor that performs electro-plating for certificated repair stations. This commenter explained that only about 20% of its business is related to aviation, but ''because we cross-utilize our employees, all would have to be covered under Part 121, Appendix I and J because they could be called upon to work on equipment operated by a U. S. air carrier.'' This commenter stated, ''It seems incongruous to us that the FAA would allow us to perform a subcontracted maintenance function without a repair station certificate while at the same time requiring us to subject our employees to a drug and alcohol testing program.''

The commenter is correct in understanding that, under the facts it presented, drug and alcohol testing is necessary for all safety-sensitive employees who are cross-utilized to perform maintenance and preventive maintenance duties for an air carrier subject to the drug and alcohol testing regulations. This is because the regulations have always required that employees performing any safety-sensitive duties be tested. It is not incongruous for the scope of the FAA's drug and alcohol testing regulations to be different from the scope of the FAA's repair station certification regulations. The question of keeping illegal drug users and alcohol misusers out of the performance of safety-sensitive work is very different from the issue of technical qualifications. The drug and alcohol testing regulations are focused on who actually does the work, and not on the person's technical qualifications to do the work or airworthiness responsibility under the regulations. The testing regulations and the certification regulations are different because they focus on different safety concerns.

In addition, although the commenter was concerned that all of its employees would need to be tested because all of them were cross-utilized, that is not necessarily the case. For business reasons, an employer may decide not to designate all employees as eligible to be cross-utilized to perform safety-sensitive functions. Only the employees who are designated as eligible to be cross-utilized would need to be tested.

Several commenters, including ATA, RAA, ARSA, and the Aircraft Owners and Pilots Association (AOPA), stated that the FAA did not provide a safety justification for the proposed rule change. Because the FAA viewed the proposal in Notice 02–04 as a clarifying amendment, we did not discuss the history of the safety justification for testing employees who perform safety-sensitive functions.

The safety considerations that support this proposal are clearly implied from the history of the drug and alcohol testing regulations. Since the inception of the drug and alcohol testing regulations, the annual statistical data indicate that a significant number of the positive test results for both drug and alcohol occur in the maintenance field. Between 1990 and 2001, aviation employers reported 30,192 positive drug test results for all occupations, with 15,340 of those positive drug test results attributable to maintenance workers. Between 1995 and 2001, aviation employers reported 876 alcohol violations for all occupations, with 423 of those violations attributable to maintenance workers.

If we do not require the testing of all employees who perform safety-sensitive functions directly or by contract (including by subcontract at any tier) for an employer, we would omit from testing employees in the aviation industry who have demonstrated a significant history of illegal drug use and alcohol misuse. Therefore, we believe this proposal is in the interest of aviation safety.

Paperwork Reduction Act

This rule contains information collections that are subject to review by OMB under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The title, description, and respondent description of the annual burden are shown below.

Estimated Burden: The FAA expects that this proposed rule would impose additional reporting and recordkeeping requirements on non-certificated maintenance contractor companies that would need to put together antidrug and alcohol misuse prevention programs and then implement them; it would have the following impacts:

- Additional training and education program, including education programs for anti-drug and alcohol misuse prevention programs, training all employees to the requirements of these programs, and training supervisors to make reasonable cause/reasonable suspicion determinations, which, on an annual basis, sums to $44,951, taking 1,330.11 hours;
- Program development and maintenance, including developing each program and producing the registration information and submitting it to the FAA, which, on an annual basis, averages $1,670, taking 79.50 hours; and
- Annual documentation, including the documentation for the aforementioned training, reasonable suspicion cases, post-accident alcohol tests, refusal to take tests, and positive tests, which, on an annual basis, averages $2,216, taking 105.53 hours.

The total impact on these companies and on their maintenance and preventive maintenance employees averages $48,837, taking 1,515.14 hours annually.

The regulation will increase paperwork for the Federal government, as the FAA would need to process the registration information for these non-certificated maintenance contractor companies, averaging $1,897 annually, taking an average of 8.25 hours.

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number. The burden associated with this rule has been submitted to OMB for review. The FAA will publish a notice in the **Federal Register** notifying the public of the OMB approval number.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

Regulatory Evaluation Summary

Total Costs and Benefits of This Rulemaking

The estimated cost of this proposed rule is $3.57 million ($2.67 million, discounted). The estimated potential benefits are $7.53 million ($5.29 million, discounted).

Who Is Potentially Affected by This Rulemaking

Private Sector

Approximately 300 non-certificated maintenance contractors that would have to develop antidrug and alcohol misuse prevention programs, affecting about 5,500 employees in 2004, rising to approximately 6,250 employees by 2013.

Government

The FAA will need to process the submitted registration information from each of the subcontractors.

Our Cost Assumptions and Sources of Information

The FAA disagrees with the commenters' assertion that we are changing the current regulations. Instead we continue to believe that we are simply clarifying the regulations. However, if the commenters are correct, then we believe that the proposed rule language would increase the number of personnel tested by no more than 2.5%.

Although we believe that we are merely clarifying the regulations, we recognize that, due to the previous conflicting guidance, some companies with existing programs and some non-certificated contractors may have to modify their current alcohol misuse prevention and antidrug programs. In addition, some non-certificated contractors may have to join another company's program or implement their own program. The FAA does not know how many additional employees or contractor companies would be subject to alcohol misuse prevention and antidrug testing, but will base costs on the following assumptions:

- There are currently 1,188 non-certificated maintenance contractors with antidrug program plans and alcohol misuse prevention programs.
- The FAA is basing costs on an increase of 25%, for an additional 297 contractors; this is expected to rise to 315 in 2013.
- The FAA will base costs on subcontractors initiating and implementing their own programs as opposed to their being covered under another company's program.
- The FAA will base costs, in this analysis, on an additional 2.5% maintenance workers being subject to the antidrug and alcohol misuse prevention programs. Accordingly, the FAA expects an additional 5,466 employees to be subject to these proposed rules in 2004; thus each of these companies would have to test 18 employees in 2004.
- The FAA estimates that the number of employees in the maintenance sector grows at 1.5% per year. Thus, the number of additional employees to be tested is expected to rise to 6,250 in 2013.
- The FAA assumes that there would be two supervisors per contractor and the attrition rate for mechanics is approximately 10% per year.

The FAA believes that the actual number of employees, additional companies, and employees per company would be less than what is being assumed for this analysis, but the FAA is using this number so as to be conservative and not underestimate costs.

Additional Assumptions

- Discount rate—7%.
- Period of analysis—2004 through 2013.
- All monetary values are expressed in 2002 dollars.
- Price of a drug test—$45.
- Price of an alcohol test—$34.
- Time for a drug or alcohol test (hours)—0.75.
- One instructor for every 20 supervisors and/or employees to be trained.
- Value of fatality avoided—$3.0 million.
- Value of avoiding a destroyed aircraft—$241,000.
- Value of avoiding a substantially damaged aircraft—$32,535.

Alternatives We Considered

As this proposal would simply emphasize sections of existing regulations, no alternatives were considered.

Benefits of This Rulemaking

The major benefit from this rulemaking would be the prevention of potential injuries and fatalities and property losses resulting from accidents attributed to neglect or error on the part of individuals whose judgment or motor skills may be impaired by the presence of drugs and/or alcohol.

There was an average of about one part 135 accident every 2 years that resulted in at least two fatalities over the last 10 years; the historical data showed an average of five fatalities for each of these accidents. Avoiding these accidents yields benefits of $15 million in fatalities avoided; avoiding the average of one accident every 2 years halves these benefits to $7.5 million in fatalities avoided per year.

This analysis contains benefits resulting from not having to repair or replace damaged or destroyed aircraft. The most common aircraft involved was the Piper PA–31–350. There were about five times as many substantially damaged aircraft as destroyed aircraft, so the FAA will base the benefits of avoiding one such accident over the next 20 years, thus avoiding, in the next 10 years half a destroyed aircraft, valued at $33,600.

Over the last 10 years, there were 63 part 135 accidents attributable to maintenance as either a cause or a factor in the NTSB accident report, or an average of six a year. Of these 63, six of them had at least two fatalities per accident, with the average such accident averaging five fatalities per accident. While there have been no documented aviation accidents directly attributed to the misuse or abuse of drugs or alcohol, the FAA believes it is possible that such misuse or abuse may have contributed to aviation-related accidents. Accordingly, the FAA believes it is prudent to base benefits on avoiding one such part 135 accident over the next 20 years, thus avoiding in the next 10 years, an estimated total of 2½ fatalities and half a destroyed airplane. These number of accidents, fatalities, and destroyed airplanes are less than or equal to 1% of all maintenance-related accidents that had occurred over the last 10 years; the FAA considers these benefits to be both conservative and reasonable.

The total benefits of this rulemaking were calculated by assuming an equally likely chance of avoiding these accidents in each of the next 10 years. Total benefits sum to $7.53 million ($5.29 million, discounted).

Costs of This Rulemaking

Assuming, under this proposal, an additional 2.5% maintenance workers would be subject to the antidrug and alcohol misuse prevention programs, from 2004 to 2013, the total cost of the rule is estimated to be approximately $3.57 million ($2.67 million, discounted); almost all of these costs are private sector costs. The costs are in four areas:

(1) Testing costs—All the new employees would be subject to all the normal tests—pre-employment, random, post-accident, reasonable cause, return to duty, and follow-up. The cost of testing includes both the actual cost of the test as well as the cost of the employee's time. Over 10 years, additional testing costs sum to $2.76 million ($1.99 million, discounted).

(2) Training and Education Costs—For both the alcohol misuse prevention and the antidrug programs, the employer must train each supervisor who would make reasonable cause determinations. Supervisors must also receive training

on the effects and consequences of drug use. In addition, all employees need to be trained as to the requirements of the alcohol misuse prevention program and the antidrug program. All companies would be required to establish education programs for both the antidrug program and the alcohol misuse prevention program. Over 10 years, total training and education costs sum to $682,700 ($560,000, discounted).

(3) Program Development & Maintenance Costs—Each subcontractor would have to devote resources to developing an antidrug and alcohol misuse prevention testing program. In addition, each of these subcontractors would have to spend time to produce information required for their registration and submit it to the FAA. At the FAA, the submitted information would have to be processed, and also entered into the appropriate database. Over 10 years, total program development and maintenance costs sum to $111,200 ($101,800, discounted).

(4) Annual Documentation Costs—Each subcontractor needs to document certain events; over 10 years, annual documentation costs for these events sum to $21,200 ($16,600, discounted). They include:

—A company's supervisory personnel who make reasonable cause and reasonable suspicion testing determinations must receive specific training on specific indicators of probable drug and alcohol use and misuse. The regulations require each company to document the training;

—Employees also need to be trained as to the requirements of the antidrug program. The regulations require each company to document this training;

—Companies would have to document all reasonable suspicion cases;

—If a post-accident alcohol test is not administered within 2 and 8 hours following the accident, the employer has to document each, stating the reasons the test was not promptly administered;

—Each company must notify the FAA within 5 working days of any employee holding a 14 CFR part 61, 63, or 65 certificate who refused to submit to a required drug or alcohol test; and

—The Medical Review Officer (MRO) needs to send a positive drug test report to the FAA within 12 working days after verifying a positive drug or alcohol test result for any individual who holds a part 67 medical certificate.

Regulatory Flexibility Determination

For this rule, the small entity group is considered to be part 145 repair stations (SIC Code 4581, 7622, 7629, and 7699). The FAA has been unable to determine how many of the part 145 repair stations and their subcontractors are considered small entities. However, as noted in the *Assumptions and Basic Data* portion of the ''Cost of Compliance'' section, for the purposes of this analysis, the FAA assumed that the average non-certificated maintenance contractor company would have to test an average of 19 employees over the 10 years examined by this analysis. Most, if not all, of these companies would be considered small entities.

This proposed rule would cost $3.57 million over 10 years ($2.67 million, discounted). This proposed rule would affect, on average, 306 companies; hence, the cost impact on the average company would be $11,700 ($8,700, discounted). Using the capital recovery rate of 0.14238 yields an annualized cost of about $1,200. The FAA does not know the annual median revenue of these companies, but, given an average of 19 employees who would have to be tested, we believe it is well in excess of $120,000 annually. Since annualized costs would be less than 1% of annual median revenue, the FAA believes that this proposed action would not have a significant economic impact on a substantial number of small entities. The FAA solicits comments on this determination, on these assumptions, on the annualized cost per company, and on their annual revenue; the FAA requests that all comments be accompanied by full documentation.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this SNPRM and has determined that it would have only a domestic impact and therefore no affect on any trade-sensitive activity.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.''

This final rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this proposed rule does not have federalism implications.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this proposed rulemaking action qualifies for a categorical exclusion.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Alcoholism, Aviation Safety, Charter flights, Drug abuse, Drug Testing, Safety, Transportation.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend part 121 of Title 14, Code of Federal Regulations as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG AND SUPPLEMENTAL OPERATIONS

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

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 45101–45105, 46105, 46301.

2. Amend appendix I to part 121 by revising the introductory text of section III and by adding paragraph A.6. of section V.

Appendix I to Part 121—Drug Testing Program

* * * * *

III. *Employees Who Must be Tested.* Each employee, including any assistant, helper, or

individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this appendix must be subject to drug testing under an antidrug program implemented in accordance with this appendix. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

* * * * *

V. Types of Drug Testing Required. * * *

A. Pre-employment Testing.

* * * * *

6. If an individual has been performing safety-sensitive work under a subcontract prior to (effective date of this regulation), the employer must conduct a pre-employment test and receive a negative test result on that individual no later than (90 days after the effective date of this regulation.)

* * * * *

3. Amend appendix J to part 121 by revising paragraph A. introductory text of section II.

Appendix J to Part 121—Alcohol Misuse Prevention Program

* * * * *

II. Covered Employees

A. Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this appendix must be subject to alcohol testing under an alcohol misuse prevention program implemented in accordance with this appendix. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

* * * * *

Issued in Washington, DC, on May 5, 2004.

Charles J. Ruehle,

Acting Federal Air Surgeon.

[FR Doc. 04–10815 Filed 5–14–04; 8:45 am]

BILLING CODE 4910–13–P