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**DRAFT REGULATORY EVALUATION,
INITIAL REGULATORY FLEXIBILITY
DETERMINATION, TRADE IMPACT ASSESSMENT,
AND UNFUNDED MANDATES DETERMINATION**

JAA-02-11301-10

NOTICE OF PROPOSED RULEMAKING

**ANTIDRUG AND ALCOHOL MISUSE PREVENTION
PROGRAMS FOR PERSONNEL ENGAGED IN SPECIFIED
AVIATION ACTIVITIES
(14 CFR 121)**

**OFFICE OF AVIATION POLICY AND PLANS
OPERATIONS REGULATORY ANALYSIS BRANCH
APO-310**

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Executive Summary

The FAA is proposing to make a number of changes in its antidrug and alcohol misuse prevention programs. These proposals include modifications to testing requirements, the elimination of periodic drug testing, changes to program submission requirements, and the elimination of the program certification statements. In addition, these proposed changes would make these programs, described in Appendices I and J in part 121 more efficient. The provisions in these two programs do not always parallel each other; they include unnecessary differences, and lead to confusion among those entities that are required to test for drugs and alcohol. The FAA proposes to change the language in these Appendices to eliminate this confusion.

These proposals would result in a net cost savings of \$333,400; cost savings to the industry totals \$281,600 and to the FAA totals \$51,800. The FAA believes that these proposals would result in reduced paperwork and enhanced program management due to the elimination of unnecessary differences between the two Appendices. The FAA has determined that these proposals would not compromise safety and would lessen the burden on the regulated public. Accordingly, the FAA finds these proposals to be cost-beneficial.

The proposal would not have an impact on international trade, a significant economic impact on a substantial number of small businesses, or contain any Federal intergovernmental mandates or private sector mandates that would require additional analysis.

I. Introduction and Background

In 1988, the FAA published a final rule, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities (Anti-Drug) (53 FR 47024), which required specified aviation employers and operators to initiate antidrug programs for personnel performing safety-sensitive functions. This rule was the result of widespread public sentiment and belief that persons in safety-sensitive occupations should not be drug abusers.

This rule was modified in 1994¹ to incorporate specific requirements from the Omnibus Transportation Employee Testing Act of 1991 (the Act) (Pub. L. 102-143, Title V.). This 1994 rule also incorporated other changes to address provisions of the antidrug rule that were unclear or did not comport with Department of Transportation (DOT) drug testing procedures.

The Act also required the FAA, along with the Office of the Secretary of Transportation (OST), as well as the other DOT modal administrations to promulgate alcohol misuse prevention programs. In 1994, the FAA published a final rule, Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities (59 FR 7380), which required specific aviation employers to conduct alcohol testing.

Since the publication of the final rules, and because of FAA and industry experience with the drug and alcohol rules, the FAA has identified certain requirements that need to be amended. The FAA has also identified administrative clarifications and unnecessary differences between the drug testing program requirements and the alcohol misuse prevention program requirements in Appendices I and J of part 121, respectively. This proposal seeks to amend these appendices to effect these changes.

¹ Antidrug Program for Personnel Engaged in Specified Aviation Activities, (59 FR 42911).

II. Proposal

The FAA proposes to amend 8 sections of Appendix I and 5 sections of Appendix J of part 121. This section will briefly describe these proposed amendments, first for Appendix I and then for Appendix J. The cost implications of these proposals will be discussed in section III.

For Appendix I:

- In section I, entitled "General," the FAA proposes to make clarifying changes and add clarifying paragraphs.
- In section II, entitled "Definitions," the FAA proposes to change the definition of "employer" to eliminate the following sentence "Provided, however, that an employer may use a person who is not included under that employer's drug program to perform a safety-sensitive function, if that person is subject to the requirements of another employer's FAA mandated antidrug program." The proposed change would require employers to test all employees who perform safety-sensitive duties, including contractor employees. The current provision, which has allowed "moonlighting,"² is confusing to the industry and is a potential loophole in employee coverage. If the change is adopted, employers would no longer be permitted to rely on another company, with whom they have no agreement or contract, to cover their moonlighting employees.
- In section III, entitled "Employees Who Must Be Tested," the FAA would specify that the decision to cover an employee must be based on the duties that the individual performs rather than his/her job title.
- In section IV, entitled "Substances for Which Testing Must Be Conducted Under Appendix I," the FAA is proposing clarifying changes.
- In section V, entitled "Types of Drug Testing Required," the FAA would clarify random testing requirements, make modifications to pre-employment testing, eliminate periodic testing, and extend reasonable cause testing to cover contract employees who are working on the employer's premises.

² Although this term "moonlighting" is not in the current rule, the term is used informally by FAA and the industry to describe the use by an employer of an employee (usually part-time or intermittent) to perform safety-sensitive duties without testing that employee when that employee works for and is covered under another employer's antidrug program.

- In section IX, entitled "Implementing an Antidrug Program," certificate holders that have antidrug and alcohol misuse prevention programs would no longer have to submit their programs to the FAA for approval. The FAA would track these certificate holders using the Operations Specifications Sub-System (OPSS) and would require these certificate holders to obtain operations specifications for drug and alcohol testing. New and existing sightseeing operators, air traffic control facilities not operated by the FAA, and certain non-certificated contractors would need to register with the FAA.
- In section X, entitled "Reporting of Antidrug Results," the FAA would clarify that the reports can only be signed by the employer's antidrug program manager or a designated company employee, not the service agent.
- In section XI, entitled "Preemption," the FAA would add two paragraphs to parallel language in Appendix J; these two paragraphs would not alter the requirements.

For Appendix J:

- In section I, entitled "General," the FAA proposes to make clarifying changes.
- In section II, entitled "Covered Employees," the FAA would make changes similar to section III of Appendix I, specifying that the decision to cover an employee must be based on the duties that the individual performs rather than his/her job title.
- In section III, entitled "Tests Required," the FAA would clarify random testing requirements and make modifications to reasonable cause testing.
- In section IV, entitled "Handling of Test Results, Record Retention, and Confidentiality," the FAA would make changes similar to section X of Appendix I, making clear that the reports can only be signed by the employer's antidrug program manager or a designated company employee.
- In section VII, entitled "Implementing an Alcohol Misuse Prevention Program," the FAA would change the entire section to parallel the proposed changes in section IX of Appendix I.

III. Cost of Compliance

In this analysis, the FAA estimated future costs for a 10-year period, from 2001 through 2010. As required by the Office of Management and Budget, the present value of this stream of costs was calculated using a discount factor of 7 percent. All costs in this analysis are in 1999 dollars.

These changes would affect all companies with either antidrug or alcohol misuse prevention plans. There are currently 6,887 companies, as shown in Table A-1 in the Appendix. In addition, it would affect employees in 11 separate occupational categories:

- Part 121 Pilots, Copilots, and Instructors
- Part 135 Pilots and Instructors
- Part 135 On-Demand Pilots
- Part 121 Navigators/Engineers
- Flight Attendants
- Mechanics/Repairmen
- Aircraft Dispatchers
- Non-FAA Air Traffic Controllers
- Ground Security Coordinators (GSC)
- Aviation Security Screening Personnel
- Sightseeing Operators, and their employees, as defined in 14 CFR 135.1(c)

Table A-2 in the Appendix shows the number of employees in each category, as well as their wage and projected growth rate in the number of employees.

In addition, the FAA uses the following hourly salaries for these employees:

- Clerical - \$17.55;³
- Aviation-related company manager - \$37.40; and
- Medical Review Officer (MRO) - \$46.36^{4 5}

³ Salaries for clerical and aviation-related company manager were obtained from Bureau of Labor Statistics, Employer Costs for Employee Compensation - March 2000, June 29, 2000, page 15, Table 10, <http://stats.bls.gov/ecthome.htm>.

⁴ Source: Office of Aviation Medicine (AAM), FAA, August 2000.

⁵ Benefits for employees are calculated by multiplying the base wage by 32.45 percent to account for employee benefits. The source of the fringe benefits factor is Table 4-5, page 4-22, Economic Analysis of Investment and Regulatory Decision--A Guide, FAA-APO-98-4, January 1998.

The FAA estimates that a drug screening test would require 15 minutes of a person's time to provide information for chain-of-custody forms and to provide a urine sample for drug testing. The FAA also assumes that affected persons would provide urine samples for testing while on duty. The FAA estimates that pre-employment drug tests cost \$12, and that random, post accident, return to duty, reasonable cause, periodic, and follow-up tests cost \$14;⁶ these costs cover, among other things, collection of specimens, reporting, recordkeeping, and chain-of-custody procedure costs, as well as the cost of the technician.

As discussed in the previous section, the FAA proposes to amend 8 sections of Appendix I and 5 sections of Appendix J of part 121; not all of these proposed changes would have cost implications. Some of the proposed changes to Appendix I parallel proposed changes to Appendix J. Section A will discuss the changes with cost implications, while Section B will discuss those changes with no cost implications.

A. Proposed Changes with Cost Implications

1) Under Appendix I, section II, the FAA is proposing to require employers to test all employees who perform safety sensitive duties, including contractor employees unless the employees are in a testing program for a contractor to the employer; this proposed change would impose costs. The current provision, which has allowed "moonlighting," is confusing to the industry and has been a loophole in employee coverage. In most circumstances, the second employer does not know the employee's status with the first employer. The second employer is unlikely to know if the employee is still working for the first employer in a safety-sensitive function or if that employee either had a positive test result or refused to submit to testing.

Compliance inspections and investigations also show that employers confuse the regulatory provisions between the drug and alcohol rules. The current drug rule allows moonlighting, while the alcohol rule does not permit it. Moonlighting occurs mostly among small employers, who often do not know the other employers that the moonlighting employee is working for. Consequently, these employees can potentially escape testing. When employers fail to

⁶ Source: Office of Aviation Medicine (AAM), FAA, August 2000.

recognize the differing requirements of the drug and alcohol programs, they are in violation of the alcohol rule.

This change would affect selected occupational categories as only certain types of employees tend to moonlight. These include part 121/135 pilots, mechanics, screeners, sightseers, and part 135 on-demand pilots, primarily single owner operator pilots. The FAA does not know exactly how many of these employees moonlight, but is confident that the number is small.⁷ Accordingly, the FAA will base costs on an additional 1 percent of these employees having additional drug tests. The FAA calls for comments on whether this is a correct approximation of the number of employees who currently moonlight and requests that all comments be accompanied by clear documentation.

The FAA projects that in 2001, about 2,400 additional employees would be tested, increasing to about 2,900 in 2010. These 2,400 employees would be subject to pre-employment testing in 2001, though this number would be lower in future years.⁸ In addition, on average, 25% would be subject to random testing. Based on historical data from 1994 to 1998, 0.07% would be subject to post-accident testing, 0.03% to reasonable cause testing, 0.12% to return to duty testing, and 0.60% to follow-up testing.⁹ As shown in Table A-3 in the Appendix, in 2001, the FAA assumes an additional 3,100 drug tests, summing to 13,000 over the 10 years. The additional cost of these tests would be \$38,200 in 2001 and would sum to \$168,900 over 10 years.

As noted above, each test takes, on average, 15 minutes of an employee's time. Total salary costs, based on a weighted average of the salaries of employees likely to moonlight, average \$29.85 per hour, and this would apply to all tests except for the majority of pre-employment tests. Most pre-employment tests are given to potential employees who are not yet on the payroll. In some instances,

⁷ Source: Office of Aviation Medicine (AAM), FAA, August 2000.

⁸ The FAA assumes that there are currently about 2,400 employees who moonlight that would be required to be placed in their supplementary employer's testing program, and so they will be pre-employment tested in the first year of the program. Thereafter, only those who come in as new hires (the FAA assumes a 15% turnover plus projected increases) would have to be pre-employment tested. All other types of testing would remain the same.

⁹ Source: Office of Aviation Medicine (AAM), FAA, August 2000.

employees may be moving from non-safety sensitive functions to safety sensitive functions or are in training and their hiring is contingent upon their successful completion of training, so the company defers the test until the student passes. The FAA assumes that such employees make up a maximum of 3 percent of pre-employment tests. Costs would be \$5,300 in 2001, and would sum to \$52,600 over 10 years.¹⁰

As can be seen in Table A-3, total 10-year costs of eliminating the moonlight exception would sum to \$221,500 (present value, \$160,000).

2) The FAA is proposing to eliminate section V. B. of Appendix I, periodic testing. The current regulation requires that new employers must periodically drug test part 67 medical certificate holders during the first calendar year of its program's implementation; this program may be eliminated after the first calendar year when a random drug testing program has been put into practice.

Periodic testing was important at the beginning of the program when many people were grandfathered into newly approved antidrug programs without pre-employment testing. Initially, there was also a phase-in period for implementing random testing; it was likely that a pilot would not be tested in the first year of testing. Since all flightcrew members are currently subject to pre-employment testing and annual random testing, the FAA believes that the elimination of periodic drug testing would not compromise safety and would be a cost savings.

From 1994 to 1998, there were an average of 186 periodic tests per year,¹¹ and so the FAA will assume that this would be the number of tests no longer conducted. The average pilot salary, based on a weighted average of the salaries of the different types of pilots, yields an hourly wage of \$68.24. With the cost of a periodic test at \$14, cost savings over ten years sums to \$57,700 (present value, \$40,500).

¹⁰ The first year cost is obtained by multiplying the composite hourly rate of \$29.85 times one quarter hour, or \$7.46, and this is multiplied by the number of employees to be tested. This number of employees can be seen in Table A-3 and equals 3% of those needing pre-employment tests, or 73 tests, plus the sum of all the other tests, or 632 tests, for a total of 705 tests. Multiplying \$7.46 times 705 tests equals approximately \$5,300.

¹¹ Source: Office of Aviation Medicine (AAM), FAA, August 2000.

3) The FAA proposes several changes to section IX of Appendix I and section VII of Appendix J; two of these changes would have cost implications. Provisions that affect part 121, 135, and 145 certificate holders will be covered in section 3a) and parts 135.1(c), contract ATC's, and other contractors in section 3b).

There are currently 6,887 existing plan holders, that currently submit 490 amendments each year. The FAA does not have information about how these 490 amendments are broken down between the different plan holders. Accordingly, the FAA will assume that as 82% of the plan holders are parts 121, 135, and 145 certificate holders, they file 82% of the amendments, or 400 amendments. Those entities covered in 4b) make up 18%, so the FAA assumes that they file 90 amendments.

3a) The FAA proposes that part 121, 135, and 145 certificate holders would no longer have to submit antidrug and alcohol misuse prevention programs to the FAA for approval. The FAA instead would track these certificate holders using the OPSS.¹² Using this system would allow the FAA to quickly make changes to specific types of certificate holders' operations specifications.

Currently, each carrier has an operations specification document on file with OPSS. This proposal would mean that the system has one more section to keep track of for each air carrier; this additional section consists of 1 extra page of information and would be applicable for both Appendix I and J. New and existing part 121, 135, and 145 certificate holders would be issued an Antidrug and Alcohol Misuse Prevention Operations Specification (OpSpec) by their FAA principal operations inspectors (POI). These certificate holders must contact their FAA POI's to make any required changes to the OpSpec. The data on this page consists of the certificate holder's name, address, telephone number, and whether the number of safety-sensitive employees is less than 50 or greater than or equal to 50.

¹² The OPSS is a document management system that gives the FAA easy access to certificate holders' operations specifications, among other air carrier information. Both the Office of Aviation Flight Standards and the Office of Aviation Medicine have access to this system.

The proposed registration statement for non-certificated companies would require less information than the current antidrug and alcohol misuse prevention program plan requires. The new registration would contain the OpSpec information described above under OPSS, including a statement signed by a company representative that the company would comply with the pertinent antidrug and alcohol misuse prevention program regulations.

All current plan holders and any new entrants would be included in OPSS or would need to register with the FAA. A certificate holder would have to provide the required information to its POI who would enter the information into the OPSS. The operator would have to electronically sign the OPSS, sometimes requiring a visit to the POI's office, and in some cases, companies have the capability to sign OPSS electronically from their offices.

All companies not currently covered by the OPSS would register with the FAA's Drug Abatement Division. The registration would require the same information as the OPSS and a drug and an alcohol certification statement that would state that the company would conduct testing in accordance with Appendixes I & J. These companies would be tracked in a database and the certifications would be kept on file. Any amendments would be entered into the system and the hard copy attached to the original submission.

Companies with antidrug and alcohol misuse prevention programs would incur additional costs from these proposals. In the first year of this rule, these companies would have to file the information, consisting of the OpSpecs or a registration statement. New companies would have to do the same in their first year. When the number of employees at a company changes to greater than or equal to 50 to below 50, or vice versa, the company would have to send employment change reports.

Currently, there are 968 companies that submit new plans each year, with 82% of these, 794, being from part 121, 135, and 145 certificate holders, and the remaining 18%, 174, are from entities covered in section 3b). The FAA believes that the number of companies submitting new plans under these proposals would decrease by 50% to 484, 397 for

the part 121, 135, and 145 certificate holders and 87 for the entities covered in section 3b).¹³

The FAA anticipates that 33 companies would send employment change reports each year after the initial year. All of these reports would be from part 121, 135, and 145 certificate holders. These are included in the anticipated 400 amendments per year.

Each of the existing plan holders would have to spend time to produce information required for the OpSpec or the registration and submit it to the FAA. The FAA estimates that it would take 20 minutes at \$20 per hour.¹⁴ Total first year costs would be \$37,500.¹⁵ The FAA estimates that it would take 20 minutes to process new plans, the employment change reports (when the number of employees at a company changes to greater than or equal to 50 to below 50, or vice versa), and amendments; total annual costs for these sum to \$5,300.¹⁶ Ten year costs, at the company level, equal \$85,400 (present value, \$67,400).

At the FAA, the information being submitted to OPSS would have to be processed. An administrative assistant, an FG-7 being paid at \$19.85 per hour, would enter this information into a database. The FAA assumes that these administrative assistants will need 10 minutes to input the information. First year costs would be \$18,600,¹⁷ while each subsequent

¹³ Many of the new plans submitted each year come from companies that switch consortia. In the past, when a consortium has gone out of business, there have been a number of new plan submissions. The FAA believes that half of the companies that switch plans each year fall in that category; since this plan would eliminate the need for approved consortia, there would be no need for a company to inform the FAA when they change service providers.

¹⁴ This cost figure was calculated by the Office of Management and Budget to represent an average for all of the employees who might handle a document from clerical to administrative to managerial staff. Source: Jim Swart, OST Office of Drug and Alcohol Policy and Compliance, "Drug and Alcohol Testing Program 83-C Submission," July 26, 2000.

¹⁵ This is obtained by multiplying the number of companies, 5,630, times one third of an hour times the salary of \$20 per hour.

¹⁶ This is obtained by summing two separate activities, each taking one third of an hour at \$20 per hour:

- Annual amendments filed - 400; and
- Annual number of new companies - 397.

¹⁷ This is obtained by multiplying the number of companies, 5,630, times one sixth of an hour times the salary of \$19.85 per hour.

year cost would be about \$2,600;¹⁸ costs over ten years sum to \$42,400 (present value, \$33,500).

As part of these proposals, the FAA would replace the current system for storing and tracking this data, called CCDATA. This information would be added to the OPSS. OPSS is an existing database that is periodically modified with new or changed requirements, so any changes needed due to these proposals would be done as part of normal upkeep. Consequently, there would be no extra costs to accommodate any modifications needed to store this data. The database page containing this information would be one page out of several hundred. The FAA believes that using OPSS would save time, as it requires very little new information and can be updated more easily.

The FAA is also not ascribing any costs to the plan holders providing a signed version of the information to the FAA. A fax could be sent and returned. A POI might hand carry it to and from the company in conjunction with other work. The program manager can go to the local Flight Standards District Office, and in many cases the signature can be accomplished in conjunction with other tasks. Accordingly, there are many options that do not increase required time and resources.

All companies would also incur cost savings, for they would no longer have to file an alcohol certification statement and a drug plan. Currently, companies submit a combined drug plan and an alcohol certification statement to the FAA. This statement contains information such as the numbers and types of safety-sensitive employees, the names of the MRO, lab manager, and program manager, as well as the name and address of the primary laboratory.¹⁹

Thus, each of the existing companies would no longer have to spend time to produce these plans and certification statements to file with the FAA. The FAA estimates that it would take 2 hours at \$20 per hour to produce these plans and certification statements. Total first year cost

¹⁸ This is obtained by summing two separate activities, each taking one sixth of an hour times \$19.85 an hour:

- Annual amendments filed - 400; and
- Annual number of new companies - 397.

¹⁹ This laboratory must be Department of Health and Human Services (DHHS) certified.

savings would be \$225,200.²⁰ The FAA estimates that the 400 amendments that existing companies submit take half an hour to process. The FAA estimates that there would have been 794 new plans submitted each year; each plan taking 2 hours to process. Total annual cost savings for the amendments and new plans sum to \$34,400.²¹ Ten year cost savings, at the company level, equal \$535,000 (present value, \$420,100).

Ten year net cost savings sum to \$407,300 (present value, \$319,200).

3b) These proposals also would eliminate the antidrug program plan and alcohol misuse prevention program certification statement requirements for new and existing non-Federal air traffic control facilities and operators as defined by §135.1(c). Instead, as with the certificate holders, a single registration statement requirement would suffice for both programs. In addition, the FAA proposes requiring new and existing non-certificated contractors that elect to have an antidrug and alcohol misuse prevention program to register with the FAA.

The FAA has identified 253 part 135.1(c) operators and 1,004 contractors that would be affected by these proposals; the contractors include 19 ATC contractors, providing services for 192 ATC contract towers, and 985 other contractors.²²

Each of the existing plan holders would have to spend time to produce information required for the OpSpec or the certification, file and store it, and submit it to the FAA. As above, the FAA estimates that it would take 20 minutes at \$20 per hour. Total first year costs would be \$8,400.²³ Using the assumption that it would take 20 minutes to

²⁰ This is obtained by multiplying the number of companies, 5,630, times 2 hours times the salary of \$20 per hour.

²¹ This is obtained by summing two separate activities, each at \$20 per hour:

- Annual amendments filed - 400, taking one third of an hour; and
- Annual number of new companies - 794, taking 2 hours.

²² The FAA does not expect any employment change reports from any of these companies. In general, part 135.1(c) operators are small businesses, less than 50 employees. Meanwhile, the bigger ATC contractors tend to be fairly stable, while the smaller ones would not get enough additional towers to change their status.

²³ This is obtained by multiplying the number of companies, 1,257, times one third of an hour times the salary of \$20 per hour.

process new plans and amendments, total annual costs for the amendments and new plans sum to \$1,200.²⁴ Ten year costs, at the company level, equal \$19,000 (present value, 15,000).

To calculate costs at the FAA, using the same cost and salary assumptions as in section 5a), first year costs would be \$4,200,²⁵ while each subsequent year cost would be about \$600.²⁶ Costs over ten years sum to \$9,400 (present value, \$7,500).

As in section 3a), these companies would no longer have to file an alcohol certification statement and a drug plan, resulting in cost savings. Total first year cost savings would be \$50,300.²⁷ The FAA estimates that the 90 amendments that existing companies submit take 20 minutes of company time to process. The FAA estimates that there would have been 174 new plans submitted each year. Total annual costs for the amendments and new plans sum to \$7,600.²⁸ Ten year cost savings, at the company level, equal \$118,300 (present value, \$93,000).

Ten year net cost savings from this proposal sum to \$89,900 (present value, \$70,600).

As can be seen in Table 1, total cost savings for these proposals sum to \$333,400 (net present cost, \$270,200). Total cost savings to the industry total \$281,600 (present value, \$229,300) and to the FAA total \$51,800 (present value, \$40,900).

²⁴ This is obtained by summing two separate activities, each taking one third of an hour at \$20 per hour:

- Annual amendments filed - 90; and
- Annual number of new companies - 87.

²⁵ This is obtained by multiplying the number of companies, 1,257, times one sixth of an hour times the salary of \$19.85 per hour.

²⁶ This is obtained by summing two separate activities, each taking one sixth of an hour times \$19.85 an hour:

- Annual amendments filed - 90; and
- Annual number of new companies - 87.

²⁷ This is obtained by multiplying the number of companies, 1,257, times 2 hours times the salary of \$20 per hour.

²⁸ This is obtained by summing two separate activities, each at \$20 per hour:

- Annual amendments filed - 90, taking one third of an hour; and
- Annual number of new companies - 174, taking 2 hours.

Table 1 - Costs (1999 dollars)		
Proposed Section Changes	Costs	Discounted Costs
Appendix I, Section II	\$221,452	\$160,039
Appendix I, Section V. B.	(\$57,650)	(\$40,490)
Appendix I, Section IX and Appendix J, Section VII		
a)	(\$407,334)	(\$319,202)
b)	(\$89,887)	(\$70,551)
TOTAL	(\$333,419)	(\$270,204)

B. Proposed Changes with No Cost Implications

Under Appendix I, the proposed changes to section I would impose no costs as the changes involve definitions and are descriptive in nature.

All but one of the proposed changes to section II of Appendix I are descriptive in nature, thus imposing no costs; the item involving cost was covered above.

The proposed changes to section III of Appendix I and section II of Appendix J are intended to clarify the sections because it has been the FAA's experience that employers have often misunderstood which employees must be tested. The decision to cover an employee must be based on the employee's duties rather than his or her job title. Employees in a training status, who perform safety-sensitive functions under the direct supervision of another employee, must also be subject to an antidrug program. Employers have interpreted the rule incorrectly and have not been testing the proper employees. There would be no costs to these proposed changes, as previous FAA antidrug and alcohol misuse analyses had already identified the proper employees and calculated the costs of testing accordingly.²⁹

²⁹ Final Regulatory Impact Analysis, Regulatory Flexibility Determination, and Trade Impact Assessment, Final Rule, Anti-Drug Program for Personnel Engaged in Specified Aviation Activities (Anti-Drug evaluation), Office of Aviation Policy and Plans, FAA, November, 1988 and Final Regulatory Impact Analysis, Regulatory Flexibility Determination, and Trade Impact Assessment, Final Rule, Alcohol Misuse Program for Personnel Engaged in Specified Aviation Activities (Alcohol evaluation), Office of Aviation Policy, Plans, and Management Analysis, FAA, January 1994.

The proposed changes to section IV of Appendix I would impose no costs as these changes are administrative and are descriptive in nature.

The proposed changes to section V of Appendix I and section III of Appendix J cover proposed changes to different types of testing. Proposed changes that have cost implications were covered above in section A; all other changes to these sections would have no cost implications as will be discussed in the following 5 paragraphs.

Section V. A. of Appendix I deals with pre-employment testing. Proposed paragraph V. A. 1. would change the requirements of pre-employment testing back to the original obligations established in the 1988 requirements, which involved first testing and then obtaining a negative drug test result prior to hiring a person to perform safety-sensitive functions. One of the changes in 1994, made in order to parallel alcohol testing, required pre-employment drug testing prior to the first time an individual performed a safety-sensitive function rather than prior to being hired by an employer.

Since this change, however, it has been the FAA's experience that some aviation employers misunderstood when they were required to conduct pre-employment drug testing, thus violating the regulations. Before the 1994 change, such misunderstandings were not prevalent. The original language was a clearer standard for employers to follow. Accordingly, the FAA is proposing to change the regulation back to the original language. There would be no cost effect to these proposed changes. The costs of the tests for these employees had been calculated and included in the 1988 FAA antidrug analysis,³⁰ and the 1994 analysis did not attribute any costs to the aforementioned change.

The changes to paragraph V. A. 2. of Appendix I would require employers to perform a pre-employment drug test on those employees who are transferred to a safety-sensitive function prior to the first time they perform a safety-sensitive function. This proposed change simply makes clear to employers that they may have misinterpreted the existing rule and that pre-employment testing is required before an employee first performs a safety-sensitive job.

³⁰ Anti-Drug evaluation.

Therefore, this proposed change would not add any additional costs.

In paragraph V. A. 3. of Appendix I, the FAA would require employers to conduct another pre-employment test on an employee if more than 60 days have elapsed since the pre-employment testing of that employee and the hiring or transferring of that employee to perform a safety-sensitive function. The FAA is proposing this 60-day window to make sure that employers do not indiscriminately test people who have not applied for or are not being transferred to a job involving safety-sensitive duties. The FAA believes that in almost all cases, because there is a cost to pre-employment testing, employers would tend to use, fairly quickly, almost any employee that they have subjected to a pre-employment test. This proposal may result in additional tests in rare cases, but the FAA does not know the extent of these additional tests. Accordingly, the FAA calls for comments from employers as to how many additional tests this 60-day window would impose; the FAA requests that all comments be accompanied by clear documentation.

The proposed changes to paragraphs V. D. of Appendix I and paragraph III. D. of Appendix J would allow an employer to make a reasonable cause or reasonable suspicions determination to test contract employees who perform safety-sensitive functions on the employer's premises and under the supervision of the employer. This proposed language would allow, but not require, an employer to have its supervisors determine whether reasonable cause exists to test contract employees under the employer's antidrug program and then refer the contract employee to the contractors to perform the test.³¹ Because this proposal would not require the employer to make these types of tests, but instead, would simply allow it, there would be no cost impact.

Paragraph IX of Appendix I and section VII of Appendix J proposes eliminating the 60 days allowed for new employers and their contractors to be subject to an antidrug. The proposed rule would require such programs to be implemented by the time the contractors perform safety-sensitive functions for an employer. This 60-day period was put into

³¹ There has been confusion about whether an employer can test contract employees on its own premises; the FAA does not believe that it makes sense to wait for a contractor to send a supervisor to make a determination.

the original antidrug program to allow an employer time to ensure that its contractors obtained coverage. However, both the antidrug and alcohol misuse prevention regulations have been in place for a number of years, so that this phase-in period is no longer needed. Since contractors would have to have these programs in place with or without a 60-day window, there would be no costs to this proposed requirement.

Paragraph III. B. of Appendix J, entitled "Post-Accident," eliminates a requirement that has expired, so changing the language would have no cost impact.

The proposed changes to section XI of Appendix I would parallel the language in appendix J, Sec. I.D. As this proposed change would not alter the meaning of the existing requirement, this proposed change would impose no new costs.

The proposed changes to section I of Appendix J would impose no costs as these changes involve definitions and are descriptive in nature.

The FAA also proposes under section VII of Appendix J to eliminate the 180 days allowed for new employers to ensure that their contractors are subject to an alcohol misuse prevention program. Contractor programs must be implemented by the time a contractor performs safety-sensitive functions for an employer. Because of the safety-implications and since the regulations have been in effect since 1994, the FAA has determined that it is no longer appropriate to grant employers extra time to ensure that their contractors are subject to an antidrug and alcohol misuse prevention program. There would be no cost implications to this proposal; all this proposal does is to move up the time that companies would find out when their contractors would be subject to alcohol misuse prevention programs.

IV. Analysis of Benefits

The specific proposed changes to pre-employment testing would result in a number of benefits. The FAA believes that certain employers have misunderstood the current requirements and that the proposed requirements would be better understood. This would reduce the number of pre-

employment enforcement cases. From August 1994 through June 2000, the FAA initiated 450 legal enforcement cases dealing with pre-employment violations, or an average of 76 cases per year. The FAA believes that these proposals could reduce the number of legal enforcement cases, saving both the FAA and the industry time and resources.

Pre-employment testing acts as the "gatekeeper" to safety-sensitive work. Since this type of testing has had the largest number of positives, it is the tool that reduces the likelihood that drug users will become employed in safety sensitive positions in the aviation industry. Most of the other drug and alcohol tests are largely deterrence based. Clarifying pre-employment requirements is important, as the process would reduce the number of mistakes by employers that could lead to employees escaping the pre-employment test, the consequences including both potential safety impacts and enforcement actions for non-compliance.

Companies no longer having to file anti-drug or alcohol misuse prevention plans would bring about benefits. In addition to the costs savings discussed above, each company would benefit from a reduction in the paperwork burden; the FAA would also benefit. Industry has misunderstood the purpose and intent of these antidrug and alcohol misuse prevention plans, as there is confusion as to what is required by the regulations as opposed to what each company's plan requires them to do. Since the programs and obligations in each plan sometimes differ, eliminating the plans can lead to better enforcement of the regulations. It would also eliminate duplicative FAA databases and permit easy access to information about new certificate holders.

These proposals would increase consistency between Appendices I and J, where possible. Elimination of these unnecessary differences would reduce industry inquiries into the current conflicts between the two, saving both individual companies and the FAA time and resources, as well as increased compliance with the regulations.

The proposed changes to reasonable cause testing would also have benefits. These changes would allow an employer to have its supervisors make reasonable cause determinations on contract employees working on the employer's premises and being supervised by the employer; it would also allow these supervisors to refer the contract employees for

testing under the contractors antidrug or alcohol misuse programs. The amount of time needed for the contractor to send a supervisor to make a determination could mean the difference between the employee testing positive and testing negative, particularly for alcohol testing. Allowing more people to detect and, hence, request a timely test could increase safety.

V. Comparison of Costs and Benefits

This action would make a number of changes in order to make the antidrug and alcohol misuse prevention programs more efficient. The modifications to testing requirements, the changes to program submission requirements, and the elimination of the certification statements should make these programs more effective.

These proposals would result in a net cost savings of \$333,400 (net present value, \$270,200). In addition, the public could see reduced paperwork and enhanced program management due to the elimination of unnecessary differences between Appendices I and J. The FAA has determined that these proposals would not compromise safety and would lessen the burden on the regulated public. Accordingly, the FAA finds these proposals to be cost-beneficial.

VI. Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the

determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

For this rule, the small entity group is considered to be part 121, 125, and 135 air carriers (Standard Industrial Classification Code [SIC] 4512) and part 145 repair stations (SIC Code 4581, 7622, 7629, and 7699). The FAA has identified 98 of a total of 144 part 121 air carriers and 2,118 of a total of 3,074 part 135 air carriers that are small entities. However, the FAA is unable to determine how many of the 2,412 part 145 repair stations are considered small entities, and so calls for comments and requests that all comments be accompanied by clear documentation.³²

The annualized cost savings of these proposals to the industry are \$32,600. The FAA is unable to isolate the cost savings to each industry group because some of the proposals apply to individual companies while others apply to the employees.³³ So, the FAA looked at the average cost impact on each of the small entities and also on all of the small entity industry groups. If all the cost savings were recognized by only small part 121 air carriers, small part 135 air carriers, or all repair stations, the average cost

³² There are about 4,600 repair stations, of which about 2,700 are small entities. As noted above, 2,412 repair stations require drug and alcohol testing of their safety sensitive employees. However, repair stations also have non-safety sensitive employees, and the FAA does not have the data showing the breakdown between safety sensitive employees and all other employees at each repair station. Without this information, the FAA does not know which of the 2,412 repair stations have more than 1,500 employees and, thus, are not small entities. Only three of these 2,412 repair stations test more than 1,500 safety sensitive employees, so these repair stations clearly would not be small entities, and only 28 others test between 480 and 1,050, so they may not be small entities.

³³ For instance, one of the employee groups covered by these proposals is maintenance workers; there are maintenance employees working for part 121, part 135, part 145, part 135.1(c), and other contractors.

savings per certificate holder would be \$333, \$15, or \$14, respectively. If the cost savings were divided among all of these business entities, the average cost savings per entity would be \$7 per entity. Therefore, we certify that this action would not have a significant economic impact on a substantial number of small entities.

VII. International Trade Impact Statement

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or 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. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this proposed rule and has determined that it would have only a domestic impact and therefore no affect on any trade-sensitive activity.

VIII. Unfunded Mandates Determination

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104-4 on March 22, 1995, 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 a \$100 million or more expenditure (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 proposed rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

APPENDIX

Type of Company	Number of Companies
Part 121	144
Part 135	3,074
Part 145	2,412
Pt. 135.1(c)	253
Contract ATC's	19
Other Contractors	985
TOTAL	6,887

Occupational Category	Hourly Wage Rate (1999\$)	Number of employees in 2000	Employee Annual Growth Rate
Part 121 pilots, copilots, and instructors	\$83.89	76,339	2.8%
<i>Part 121/135 pilots³⁴</i>	\$50.04	1,944	2.7%
Part 135 pilot and instructors	\$35.25	11,705	2.6%
Part 135 on-demand pilots	\$19.25	13,359	2.0%
Part 121 navigators/engineers	\$34.29	4,529	-2.5%
Flight attendants	\$31.20	115,921	1.9%
Mechanics/repairmen	\$32.35	193,595	1.8%
Aircraft dispatchers	\$24.32	11,836	1.3%
Non-FAA air traffic controllers	\$21.25	1,180	1.8%
Ground security coordinators (GSC)	\$26.85	22,229	1.5%
Aviation security screening personnel	\$6.52	18,702	1.5%
Sightseeing operators	\$15.62	519	1.0%

Sources:

A. Wage Rates

- For pilots from the Majors, the FAA used an annual salary of \$151,000 and then divided by 1,800 hours to obtain the hourly wage. This salary was based on:
 - ◆ data from the DOT Form 41 quarterly submissions from certificate holders for 1999;
 - ◆ the compliance cost submission from the Airline Transport Association (ATA) for the docket on the following FAA analysis - Initial Regulatory Impact Analysis, Regulatory Flexibility Determination, and Trade Impact Assessment, Flight Crewmember Duty Period Limitations and Rest Requirements, Notice of Proposed

³⁴ These pilots are included under the totals for part 121 pilots. They have been broken out as the cost discussion for moonlighting deals with part 121/135 pilots rather than all part 121 pilots.

Rulemaking, Office of Aviation Policy, Plans and Management Analysis, FAA, November 1995; and

- ◆ and the implicit GDP deflators for 1999 from the most recent Economic Report to the President.
- For all other pilots, flight attendants, mechanics/repairmen, and dispatchers, this information came from Searles, Robert, "Operations Planning Guide: Salary Survey," The McGraw-Hill Companies, Inc., 1999. This survey has several categories for pilots for each table, and along with a summary table, the survey has wage rate for different types of airplanes. The FAA increased these salaries by 1.3245 to account for all fringe benefits and then divided by 1,800 hours to obtain the pilots hourly wage and by 2,080 to obtain the all other employee's hourly wage. Listed below is the pilot category and table used for each employee group:
 - ◆ Part 121/135 pilots - use of the average of chief pilot for the Turboprops and Light Jets Table;
 - ◆ Part 135 pilots and instructors - use of senior pilot for the Turboprops and Light Jets Table;
 - ◆ Part 121 navigators/engineers - use of copilot from the Summary Table;
 - ◆ Flight attendant - use of flight attendant from the Summary Table;
 - ◆ Mechanics/repairmen - use of maintenance technician from the Summary Table; and
 - ◆ Scheduler/dispatcher - use of scheduler/dispatcher from the Summary Table.
- For non-FAA air traffic controllers and sightseeing operators, this information was updated from the Alcohol evaluation by use of the Consumer Price Index (CPI).
- For screening personnel, this information was obtained from Regulatory Evaluation, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Determination, Final Rule, Certification of Screening Companies (Screening), Office of Aviation Policy and Plans, FAA, December, 2000.
- For GSC's, the source was the Office of Civil Aviation Security (ACS), FAA, October 2000.

B. Number of employees in 2000

- For all pilots, as well as flight attendants, mechanics/repairmen, aircraft dispatchers, and non-FAA air traffic controllers, this information was obtained from the Office of Aviation Medicine (AAM);

- For GSC's and aviation screening personnel, this information was obtained from Screening; and
- For sightseeing operators, this information was obtained by examining the number of flight crewmembers for each company with a drug plan.

C. Employee annual growth rate

- For part 121 pilots, flight attendants, and aircraft dispatchers, the FAA calculated the growth rate of the population from 1992, shown in the Alcohol evaluation, to the current level in 2000;
- For part 135 pilots, on-demand pilots, part 121 navigators/engineers, GSC's, aviation security screeners, and sightseers, the FAA used the same growth rate as was used in the Alcohol evaluation;³⁵
- For mechanics, the FAA used the average of the two above methods;
- For non-FAA contract towers, the FAA used the projected growth in total aircraft operations at airports with contract traffic control service;³⁶ and
- For part 121/135 pilots, the FAA used the average of the growth rates for the part 121 pilots and part 135 pilots.

³⁵ For these employees, there were major differences between the populations used in the 1992 analysis and the current populations. Hence, it did not make sense to use growth rates based on these differences.

³⁶ Source: FAA Aerospace Forecasts: Fiscal Years 1999-2010, Tables 37, FAA-APO-99-1, March 1999.

Table A-3 – Costs of Employers no Longer Relying on Another Company to Cover their “Moonlighting” Employees (1999 dollars)											
Employees	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	TOTAL
Part 121/135 pilots	20	21	21	22	22	23	23	24	25	25	226
Part 135 Pilot and Instructors	120	123	126	130	133	137	140	144	147	151	1,351
Part 135 On-Demand Pilots	136	139	142	145	148	150	153	157	160	163	1,493
Mechanics/Repairmen	1,971	2,008	2,044	2,082	2,120	2,159	2,199	2,239	2,280	2,322	21,424
Aviation Security Screening Personnel	190	193	196	199	201	205	208	211	214	217	2,034
Sightseeing Operators	5	5	5	5	5	5	6	6	6	6	54
Total Personnel	2,442	2,489	2,534	2,583	2,629	2,679	2,729	2,781	2,832	2,884	26,582
Number of tests	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	TOTAL
Pre-employment	2,442	373	380	387	394	402	409	417	425	433	6,063
Random	611	622	634	646	657	670	682	695	708	721	6,646
Post-Accident	2	2	2	2	2	2	2	2	2	2	20
Reasonable Cause	1	1	1	1	1	1	1	1	1	1	10
Return to Duty	3	3	3	3	3	3	3	3	3	3	30
Follow-up	15	15	15	15	16	16	16	17	17	17	159
Total number of tests	3,074	1,016	1,035	1,054	1,073	1,094	1,113	1,135	1,156	1,177	12,928
Cost of Testing	\$38,152	\$13,482	\$13,731	\$13,987	\$14,238	\$14,510	\$14,768	\$15,058	\$15,332	\$15,607	\$168,866
Cost of Employee's Time	\$5,263	\$4,882	\$4,973	\$5,064	\$5,155	\$5,254	\$5,345	\$5,451	\$5,550	\$5,649	\$52,586
Total Costs	\$43,415	\$18,364	\$18,704	\$19,051	\$19,393	\$19,764	\$20,113	\$20,509	\$20,882	\$21,256	\$221,452
Discount Factor	0.9346	0.8734	0.8163	0.7629	0.7130	0.6663	0.6227	0.5820	0.5439	0.5083	
Discounted Costs	\$40,575	\$16,040	\$15,268	\$14,534	\$13,827	\$13,170	\$12,525	\$11,936	\$11,358	\$10,806	\$160,039