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49 CFR Part 219

Control of Alcohol and Drug Use: Coverage of Maintenance of Way
Employees, Retrospective Regulatory Review-Based Amendments (RRR);
Proposed Rule

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 219**

[Docket No. FRA-2009-0039]

RIN 2130-AC10

Control of Alcohol and Drug Use: Coverage of Maintenance of Way Employees, Retrospective Regulatory Review-Based Amendments (RRR)

AGENCY: Federal Railroad Administration (FRA), Department of Transportation. (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: In response to Congress' mandate in the Rail Safety Improvement Act of 2008 (RSIA), FRA is proposing to expand the scope of its alcohol and drug regulations to cover employees who perform maintenance-of-way (MOW) activities. In addition, FRA is proposing certain substantive amendments that either respond to National Transportation Safety Board (NTSB) recommendations or update and clarify the alcohol and drug regulations based on a retrospective regulatory review (RRR) analysis.

DATES: *Comments:* Submit comments on or before September 26, 2014.

Public Hearing: FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to August 27, 2014, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to Docket No. FRA-2009-0039 may be submitted by any of the following methods:

- *Online:* Comments should be filed at the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590.
- *Hand Delivery:* Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue SE.,

Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information provided. Please see the Privacy Act heading in the "Supplementary Information" section of this document for Privacy Act information related to any submitted comments or materials.

Proposed Revised Part 219 Available in Docket No. FRA-2009-0039

A revised version of part 219 incorporating all amendments proposed by this NPRM is available for review in the public docket of this rulemaking (docket no. FRA-2009-0039). Interested persons can review this document to learn how the proposed amendments would affect part 219 as a whole.

FOR FURTHER INFORMATION CONTACT: For program and technical issues, contact Gerald Powers, Drug and Alcohol Program Manager, Office of Safety Enforcement, Mail Stop 25, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone 202-493-6313), gerald.powers@dot.gov. For legal issues, contact Elizabeth A. Gross, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE., Mail Stop 10, Washington, DC 20590 (telephone 202-493-1342), elizabeth.gross@dot.gov; or Patricia V. Sun, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE., Mail Stop 10, Washington, DC 20590 (telephone 202-493-6060), patricia.sun@dot.gov.

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I. Executive Summary

FRA has regulated the use of alcohol and drugs by certain railroad employees since 1985, when it issued a final rule establishing alcohol and drug use control regulations under 49 CFR part 219 (part 219). See 50 FR 31508, Aug. 2, 1985. The rule contained certain prohibitions on the use and possession of alcohol and drugs by covered employees, who were defined as employees who had been assigned to perform covered service subject to the Hours of Service Act (45 U.S.C. 61–64b).¹ See *id.* at 31569. The rule also contained requirements for post-accident toxicological (PAT) testing, discretionary reasonable cause and reasonable suspicion testing, co-worker and voluntary referral policies, pre-employment drug testing, and reporting. See *id.* at 31508. In 1988, FRA amended part 219 to require random drug testing of covered employees. See 53 FR 47102, Nov. 21, 1988. In 1994, FRA again amended part 219 to require random alcohol testing and reasonable suspicion testing, in conformance with the requirements of the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act) (reasonable cause testing remained discretionary). See 59 FR 7448, Feb. 15, 1994. FRA has not fundamentally revised part 219 since 1994.²

The Omnibus Act required the Department of Transportation (DOT or Department) to establish Federal workplace testing procedures for transportation employees. The Department's Procedures for Transportation Workplace Drug and Alcohol Testing Program are contained in 49 CFR part 40 (part 40), which is published by the DOT Office of the Secretary (OST). Only the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) and the DOT

Office of General Counsel (OGC) are authorized to interpret part 40 requirements. See 49 CFR 40.5.³ Part 40 testing requirements and procedures apply to any drug or alcohol test required by DOT agency regulations, except for FRA's PAT testing and certain testing conducted pursuant to DOT-mandated peer prevention programs (including FRA's peer prevention program currently required by subpart E of part 219). See § 219.701. FRA's PAT testing program pre-dates the enactment of the Omnibus Act, which specifically exempts the program from part 40. See § 40.1(c).

In response to Congress' mandate in the RSIA, FRA is proposing to expand the scope of part 219 to cover employees who perform MOW activities. As used in this NPRM, the term "employee" includes employees, volunteers, and probationary employees of railroads and contractors (defined to include subcontractors) to railroads. In addition, because MOW employees are not subject to the HOS laws, FRA is proposing a new term-of-art—"regulated service"—that would encompass both covered service and MOW activities. Performance of regulated service would make an individual a "regulated employee" subject to part 219, regardless of whether the individual is employed by a railroad or a contractor to a railroad. This proposed expansion of part 219 would both comply with the RSIA mandate and respond in part to NTSB Recommendation R–08–07 (Apr. 10, 2008), available at http://www.nts.gov/doclib/reclib/2008/R08_05_07.pdf. In Recommendation R–08–07, the NTSB advised FRA to expand its alcohol and drug regulations to all railroad employees and contractors who perform FRA safety-sensitive functions as defined by §§ 209.301 and 209.303 (the regulations setting forth the purpose, scope and coverage of FRA's procedures for disqualifying individuals from performing certain safety-sensitive functions).

³ Unless otherwise specified, all references to CFR sections and parts in this document refer to Title 49 of the CFR.

FRA is also proposing to amend part 219 in response to NTSB Recommendation R–01–17, available at http://www.nts.gov/doclib/reclib/2001/R01_17.pdf. Recommendation R–01–17 advised FRA to limit the current blanket exception for PAT testing after highway-rail grade crossing accidents to allow PAT testing when an accident was likely due to human factors or involved a regulated employee fatality.

This NPRM also proposes amendments based on a retrospective review of part 219, which FRA has been implementing for more than 25 years. These amendments, which reflect practical lessons FRA has learned, are necessary to update and simplify the regulation's requirements.

Costs and Benefits of Proposed Rule

The proposed rule would impose costs that are outweighed by the quantified safety benefits. For the 20-year period analyzed, the estimated costs that will be imposed on industry total approximately \$24 million (undiscounted), with discounted costs totaling \$14.2 million (Present Value (PV), 7 percent) and \$18.9 million (PV, 3 percent). The estimated quantified benefits for this 20-year period total approximately \$115.8 million (undiscounted), with discounted benefits totaling \$57.4 million (PV, 7 percent) and \$83.6 million (PV, 3 percent).

The costs would primarily be derived from implementation of the statutory mandate to expand the scope of part 219 to cover MOW employees. The benefits will primarily accrue from the expected injury, fatality, and property damage avoidance resulting from the expansion of part 219 to cover MOW employees, as well as the PAT testing threshold increase. The table below summarizes the quantified costs and benefits expected to accrue over a 20-year period from adoption of the proposed rule and identifies the statutory costs and benefits (those required by the RSIA mandate to expand part 219 to MOW employees) and the discretionary costs and benefits (those that are due to the non-RSIA requirements that FRA is proposing).

¹ The hours of service (HOS) laws are currently found at 49 U.S.C. ch. 211.

² In 2004, FRA expanded the scope of part 219 to cover foreign railroad foreign-based employees who perform train or dispatching service in the United States. See 69 FR 19270, Apr. 12, 2004. In 2013, FRA added routine tests for certain non-controlled substances to its PAT testing program. See 78 FR 14217, Mar. 5, 2013.

20 Year costs	Statutory	Discretionary
PAT Testing Costs—Adding MOW	\$52,000	.....
PAT Testing Costs—Impact Def + Xing		\$241,974
Reasonable Suspicion Testing Costs	842,398	.....
Pre-Emp. Testing Costs—Adding MOW	673,897	.....
Pre-Emp. Testing Costs—Sm. RR		29,904
Random Testing Costs	20,863,074	.....
Annual Report Costs	160,911	.....
Recordkeeping Requirements Costs	1,397,840	.....
Total Costs	23,990,121	271,878
	24,261,999	
20 Year Benefits	Statutory	Discretionary
Accident Reduction Benefits	115,369,281	.....
PAT Testing Threshold Reduction Benefits		388,295
Total Benefits	115,757,576	

II. Statutory Authority and Proceedings to Date

Currently, part 219 applies only to covered employees, defined in § 219.5 as individuals who perform covered service subject to the HOS laws at 49 U.S.C. 21103, 21104, or 21105. In Section 412 of the RSIA (Section 412), Congress directed the Secretary to “revise the regulations prescribed under section 20140 of title 49, United States Code, to cover all employees of railroad carriers and contractors or subcontractors to railroad carriers who perform maintenance-of-way activities.” The Secretary has delegated this responsibility to the FRA Administrator. See 49 CFR 1.89(b); see also 49 U.S.C. 103(g). The RSIA does not define MOW activities.

When the RSIA was enacted in 2008, FRA was already conducting a retrospective analysis of part 219, looking for ways to clarify the regulations and make the requirements less burdensome. This NPRM therefore proposes both amendments that would incorporate MOW employees and amendments suggested by FRA’s retrospective analysis of part 219.

As explained above, part 219 incorporates the alcohol and drug testing procedures found in part 40, which is published and administered by ODAPC. For this reason, FRA did not consult with the Railroad Safety Advisory Committee (RSAC) on this proposed rule. Instead, FRA gathered information and suggestions from railroads, labor organizations, and other stakeholders at railroad industry meetings. For example, railroad industry stakeholders provided statistics about the number of employees of railroads and contractors to railroads who perform MOW activities and

submitted suggestions on how FRA should define MOW activities.

III. Expansion of Part 219 to Employees Who Perform MOW Activities

In this NPRM, FRA is proposing to expand the scope of part 219 to include employees who perform MOW activities (MOW employees). As discussed above, the term “employee,” as used in this NPRM, includes employees, contractors, subcontractors, volunteers, and probationary employees. Accordingly, the term “MOW employee” includes any individual performing MOW activities for a railroad, whether employed directly by the railroad, employed by a contractor or subcontractor to the railroad, or a volunteer for the railroad. MOW employees are at a high safety risk because they work along railroad track and roadbed and may suffer injury or death as a result of being struck by trains or other on-track or fouling equipment. Additionally, MOW employees directly affect the safety of railroad operations because they work on or near railroad tracks, operate on-track or fouling equipment, and assist in directing trains through work areas. The purpose of expanding part 219 to include MOW employees is to improve safety by reducing the rate of alcohol and drug use among the MOW employee population.

A. Background

On January 9, 2007, a southbound Massachusetts Bay Transit Administration (MBTA) passenger train, operated by the Massachusetts Bay Commuter Railroad (MBCR), struck a track maintenance vehicle that was on the track near Woburn, Massachusetts. See NTSB, Railroad Accident Report: Collision of Massachusetts Bay

Transportation Authority Train 322 and Track Maintenance Equipment Near Woburn, Massachusetts, NTSB/RAR–08/01, PB2008–916301, Mar. 18, 2008, at 1, available at <http://www.nts.gov/doclib/reports/2008/RAR0801.pdf> (“Woburn Report”). At the time of the collision, six MBCR MOW employees were replacing crossties and were working on or near the track maintenance vehicle. The train rounded a curve at 62 mph and struck the track maintenance vehicle. The MOW workers had only about 15 seconds warning before the collision. *Id.* at 17. Two of the MBCR employees, a track foreman and a track worker/welder, were killed, and two were seriously injured. The NTSB investigated the collision and determined that one of its probable causes was the failure of the MOW crew to apply a shunting device that would have provided redundant signal protection for their track segment.⁴ An MBCR rule required the crew to have a shunting device at the end of the work area every time a track was taken out of service for maintenance. The track foreman in charge of the MOW crew, however, had not complied with this rule. *Id.* at vi and 17.

While the MOW employees involved in the MBTA accident were not covered employees, § 219.203(a)(4)(ii) requires PAT testing on the remains of any railroad employee fatally injured in a train accident or incident. The PAT testing results for the fatally injured foreman involved in the MBTA accident showed that that he had likely used marijuana within three hours of his

⁴ The NTSB also found that a probable cause of the accident was the failure of the train dispatcher to maintain blocking that provided signal protection for the track segment occupied by the MOW crew. See *id.* at vi.

death. The NTSB concluded that the foreman's performance would likely have been measurably impaired at the time of the accident by his recent use of marijuana. The NTSB also concluded that the foreman's positive drug test result was "not an isolated incident among MBCR maintenance-of-way employees." *Id.* at 19. Between December 2003 and January 2007, the MBCR had four fatalities, one critical injury, and one potentially serious incident involving MOW employees. *Id.* Seven MOW employees were tested for drugs and/or alcohol as a result of these incidents. *Id.* (Four fatally injured employees were tested under FRA authority, and three surviving employees were tested under MBCR's company authority. *Id.*) Of the seven MOW employees tested, four had positive results, and one employee submitted a specimen that was a negative dilute which may have masked a positive. *Id.* The NTSB found that this high rate of positive test results was symptomatic of a substance abuse problem among MBCR MOW employees. *Id.*

As part of its investigation of this accident, the NTSB reviewed industry-wide PAT testing data for accidents involving MOW employee fatalities. Over the 10-year period ending January 9, 2007, FRA PAT testing of 26 MOW fatalities resulted in 5 positive test results, a positive rate of 19.23%. *Id.* at 19. In contrast, the overall PAT testing positive rate for covered employees was only 6.56%. *Id.* The NTSB concluded that these results showed greater alcohol and drug use among MOW employees than among covered employees subject to part 219. *Id.* Thus, the NTSB determined that alcohol and drug use by MOW employees in the railroad industry was a safety concern. *Id.* at vi and 19.

The NTSB noted that FRA data indicate that MOW employees are about three times more likely to have positive test results than covered employees (19.23% positive for MOW employees vs. 6.56% positive for covered employees). See Woburn Report at 20. Attributing this difference "to the deterrent value of the FRA's random testing program to which covered employees are subject but maintenance-of-way employees are not," the NTSB recommended that FRA revise its definition of covered employee to include all railroad employees and contractors who perform FRA safety-sensitive functions, as defined by §§ 209.301 and 209.303. See NTSB Recommendation R-08-07.

Section 209.303 lists the safety-sensitive functions that an individual

may be disqualified from performing if he or she has been found unfit to do so after committing a FRA safety violation. See § 209.301. If FRA expanded the scope of part 219 to cover the safety-sensitive functions listed in § 209.303, it would include not only covered employees, as currently defined, but all railroad employees and contractor employees (including managers and supervisors) who: (1) inspect, install, repair, or maintain track and roadbed; (2) inspect, repair, or maintain locomotives, passenger cars, and freight cars; (3) conduct training and testing of employees when required to do so by the FRA's safety regulations; (4) perform service subject to the Transportation of Hazardous Materials Law (Hazmat Law);⁵ (5) supervise and otherwise direct the performance of the safety-sensitive functions; or (6) are in a position to direct the commission of violations of any FRA safety regulation. As discussed below, FRA does not currently believe that it is necessary to expand part 219 beyond railroad employees (including contractors, subcontractors, volunteers and probationary employees) who perform covered service and/or MOW activities for a railroad.

B. FRA's Proposed Definition of "MOW Activities"

In response to the mandate contained in Section 412 and NTSB Recommendation R-08-07, FRA is proposing to expand part 219 to include employees who perform MOW activities, as defined in proposed § 219.5. FRA's proposed definition of MOW activities includes the following: (1) The inspection, repair, or maintenance of track, roadbed, or electric traction systems; (2) the operation of on-track or fouling equipment utilized for the inspection, repair, or maintenance of track, roadbed, or electric traction systems; (3) the

⁵ The Transportation of Hazardous Materials Laws are located at 49 U.S.C. ch. 51. Under 49 U.S.C. 5103, the Secretary is directed to prescribe regulations for the "safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce." These regulations apply to a person who performs a broad range of activities, including testing a "packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce" and "certify[ing] compliance with any requirements under this chapter." Such activities generally are not related to what would be considered railroad MOW activities.

The Secretary delegated the authority to issue these regulations to the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the resulting regulations are found at 49 CFR subtitle B, ch. 1. The broad extent of these regulations go far beyond what would be an appropriate scope for FRA's alcohol and drug regulation.

performance of flagman or watchman/lookout duties; (4) the obtaining of on-track authority and/or permission for the performance of activities described by the proposed definition; or (5) the granting of on-track authority and/or permission for operation over a segment of track while workers are performing activities described by the proposed definition.

In drafting its proposed definition of "MOW activities," FRA drew from § 209.303's definition of FRA safety-sensitive functions and identified those activities that most closely fit the common understanding of MOW activities in the railroad industry. Based in part on feedback from stakeholders, FRA determined that these activities include the inspection, installation, repair, or maintenance of track and roadbed. See § 209.303(b)(1).

Individuals performing such activities work along railroad track and roadbed and may suffer serious injury or death from being struck by trains or other on-track or fouling equipment. These individuals also directly affect the safety of railroad operations because they work on or near railroad tracks, operate on-track or fouling equipment, and authorize or direct trains through working limits.

In contrast, individuals performing the other FRA safety-sensitive functions listed in § 209.303 do not typically experience the same type of safety risks because they generally do not work on or around a railroad's track or roadbed. Individuals who inspect, repair, or maintain locomotives, passenger cars, and freight cars, as described by § 209.303(b)(2), generally perform these functions in locomotive or car repair facilities subject to blue flag protection. See 49 CFR part 218, subpart B. Individuals who conduct training and testing of employees required by FRA safety regulations, as described in § 209.303(b)(3), may conduct such training without ever approaching a railroad track or roadbed. Individuals who perform service subject to the Hazmat Law may sometimes do so on or near a track or roadbed, but this is not necessarily the case. Nevertheless, any individuals performing the above activities would fall within the proposed expanded scope of part 219 if they otherwise perform covered service or MOW activities as defined in this NPRM.

Once FRA decided to begin its MOW activities definition with the language from § 209.303(b)(1), it decided to remove "install" from the definition because part 219 applies only to railroads that operate on track that is part of the general railroad system of

transportation. See § 219.3(a). By not including the word “install” in its proposed MOW activities definition, FRA would exclude the installation of track that has not yet been incorporated into the general railroad system of transportation. Rebuilding a track that is already part of the general system of transportation, however, would be covered by the definition because it would be considered repair or maintenance. Essentially, work on a track would be covered under the proposed MOW activities definition once the track became part of the general system of transportation and subject to FRA’s track safety standards in 49 CFR part 213. FRA is specifically requesting public comment, however, on whether the installation of new track should be considered a MOW activity, and whether its proposed definition would improperly exclude other installation work that should be considered a MOW activity.

FRA also decided, however, that its proposed definition of MOW activities should specifically include employees who work on electric traction systems. Electric traction is a wayside electric distribution system (such as an overhead catenary or third rail) that a railroad can utilize for locomotion in lieu of locomotive diesel engines. Electric traction systems also include various pieces of equipment that can be found along the railroad’s right-of-way, such as power stations, power substations, breaker sites, power feed lines, catenary towers, and power dispatching offices. Currently, Amtrak and other commuter railroads use electric traction systems.

FRA also concluded that the definition of MOW activities should specifically include employees who perform duties as flagmen or watchmen/lookouts. While flagmen or watchmen/lookouts may not be directly engaged in the inspection, repair, or maintenance of track, roadbed, or electric traction systems, they are generally working in the foul of track and are providing on-track safety for employees who are engaged in such activities. For example, a flagman may be responsible for keeping all trains and on-track equipment clear of the working limits within which MOW activities are being performed. See § 214.7. Watchmen/lookouts are also responsible under § 214.329 for providing train approach warnings to MOW employees who foul any track outside of working limits.⁶

⁶ While § 214.329 is phrased in terms of watchmen/lookouts providing train approach warning to roadway workers, FRA notes that the definition of “roadway worker” in § 214.7

Since flagmen and watchmen/lookouts must stay alert at all times to properly perform these safety-critical job duties, it would run counter to safety purposes to exclude their duties from FRA’s proposed definition of MOW activities. FRA is proposing to define “flagman” and “watchman/lookout” in § 219.5 as those terms are currently defined in FRA’s roadway worker regulations. See § 214.7. Because these definitions have already been established by part 214, the railroad industry is already familiar with their meaning and application.⁷

For illustration purposes, part 219’s proposed MOW activities definition would include (but not be limited to) the following activities: (1) The clearing of snow and ice from track and switches (but not from passenger station platforms, as discussed below); (2) the operation of on-track or fouling equipment used for repair/maintenance purposes such as tampers, tie-throwers, ballast machines, weed sprayers, etc. or working with such equipment; (3) the operation of on-track rail inspection vehicles; (4) the requesting or granting of authority to occupy a segment of track for the purpose of performing MOW activities; and (5) the requesting or granting of permission for a train to proceed through MOW working limits. The above list is not exhaustive, and FRA is specifically requesting public comment on whether there are other functions that should be considered MOW activities that may not be included in its proposed definition. FRA is specifically interested in whether it should consider duties already covered by the alcohol and drug testing requirements of the Federal Motor Carrier Safety Administration (FMSCA) as MOW activities, when those duties also impact the safe performance of MOW activities (e.g., the operation of tractor-trailers or other equipment for the purpose of loading or unloading MOW equipment or supplies onto or within the foul of the track).

FRA proposes, however, to exclude the following types of activities from the

(discussed further below) is not craft-specific and would likely include any MOW employee (as defined in this NPRM) fouling a track outside of working limits. Any MOW employee fouling a track outside of working limits would therefore require a train approach warning by one or more watchmen/lookouts under § 214.329.

⁷ FRA notes that the term flagman is also used by the railroad industry to describe an employee (e.g., a “conductor flagman”) who obtains on-track authority for contractors that are not contractors to a railroad and therefore not roadway workers. The general public also understands flagman to mean a person who flags highway traffic during highway construction or grade crossing projects. In this NPRM, FRA is proposing to define “flagman” solely as defined in § 214.7, rather than in the sense of “conductor-flagman” or “highway-traffic-flagman.”

definition of MOW activities: (1) The clearing of snow and ice from passenger station platforms; (2) other passenger station maintenance, such as painting, cleaning, sweeping platforms, etc.; (3) activities performed by individuals who are not engaged by or under contract to a railroad, such as workers who are installing cable for a public utility company or constructing a bridge for a government highway agency; (4) railroad bridge⁸ work that is not on the track or within four feet of the nearest rail (on a horizontal plane), such as painting the base of a bridge or diving to inspect a bridge structure; (5) engagement as a tractor-trailer operator solely for the purpose of hauling MOW equipment to and from a work site (although such persons would be included in the definition if they were engaged in loading or unloading MOW equipment or supplies onto or within the foul of the track); and (6) emergency work that is wholly the result of a natural disaster, such as a flood, tornado, or mudslide. As with the list of included activities above, this list of excluded activities is not exhaustive, and FRA is requesting public comment on what, if any, other activities should be specifically excluded from the definition of MOW activities.

FRA is also specifically requesting public comment on whether the proposed MOW activities definition should include any of the following activities: (1) Boring a pipe under a track; (2) paving a highway-rail grade crossing; (3) placing detour or other signs in conjunction with grade crossing work; (4) operating cranes for the loading and unloading of MOW equipment, regardless of whether or not that equipment is being loaded onto or within the foul of a track; (5) clearing and repairing a railroad track following an accident or incident; and (6) operating a bridge if the employee is not covered under the HOS laws.

FRA notes that the proposed definition of MOW activities in part 219 is narrower than the definition of roadway worker duties in § 214.7 of

⁸ Under § 214.7, a “railroad bridge” is a structure supporting one or more railroad tracks above land or water with a span length of 12 feet or more measured along the track centerline. This includes the entire structure between the faces of the backwalls of abutments or equivalent components, regardless of number of spans, and includes all such structures, whether constructed of timber, stone, concrete, metal, or any combination of these materials. Under § 237.5, a “railroad bridge” is any structure with a deck, regardless of length, which supports one or more railroad tracks, or any other undergrade structure with an individual span length of 10 feet or more located at such a depth that it is affected by live loads. See 49 CFR part 237, appendix A—Supplemental Statement of Agency Policy on the Safety of Railroad Bridges.

FRA's railroad workplace safety rule (part 214). Consequently, a roadway worker as defined in part 214 may perform duties that would not be considered MOW activities as defined in part 219. For example, an employee who performs passenger station maintenance is performing roadway worker duties under part 214 (since a passenger station is considered a "roadway facility" under § 214.7) but would not be performing MOW activities under part 219, so that performance of these duties would make the employee subject to part 214 but not to part 219. If FRA incorporates its proposed definition of MOW activities into part 219, railroads would be required to distinguish between roadway workers as defined in part 214 and MOW employees as defined in part 219, and to realize that individuals may require roadway worker protection even if they are not performing MOW activities. The proposed MOW activities definition differs from the definition of roadway worker duties because it focuses exclusively on the nature of the activities being performed, and does not consider an employee's proximity to the track. Unlike under the roadway worker duties definition, MOW activities do not need to be performed either "on or near track or with the potential of fouling a track." FRA is requesting public comment on how to make clear the differences between its proposed MOW employee and MOW activity definitions in part 219 and the roadway worker definition in § 214.7. FRA is also asking for input on the scope of its proposed definitions, and the safety concerns that involve individuals performing MOW activities.

C. "Regulated Employees" and "Regulated Service"

To implement the expansion of part 219 to cover MOW employees, FRA is proposing to add two new definitions to § 219.5: "Regulated employee," which would refer to an any employee who is subject to part 219 (whether a covered or MOW employee) and a corresponding term, "regulated service," which would refer to all activities subject to part 219 (again, both covered service and MOW activities). Together, these two proposed terms-of-art would encompass all individuals and duties subject to part 219, and would substitute for the awkward terms "covered employees and maintenance-of-way employees" or "covered service and MOW activities." FRA believes these proposed definitions would make its RSIA-mandated addition of MOW employees easier to understand and implement, but is requesting public comment on whether

its proposed definitions would be clearly understood to refer to both covered service and MOW employees and duties.

D. Alternatives Considered for Part 219 Expansion

Before proposing to expand the scope of this rule to cover MOW activities as defined above, FRA considered two alternative approaches for meeting the statutory mandate of Section 412. Although FRA is not proposing to adopt either alternative, FRA is requesting input on each approach's feasibility in comparison to the approach proposed in this NPRM. FRA is also requesting public comment on whether there are other approaches it should consider.

1. Alternative No. 1: Adopt the "roadway worker" definition in § 214.7.

FRA initially considered adopting § 214.7's definition of "roadway worker," since it is an established definition with which the railroad industry is familiar. As defined by § 214.7, "roadway worker" includes any employee of a railroad (or a contractor to a railroad) who inspects, constructs, maintains, or repairs railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery "on or near track or with the potential of fouling a track." This definition of roadway worker also includes flagmen and watchmen/lookouts.

Although FRA initially assumed that the roadway worker population is generally the same as that of employees who perform MOW activities, FRA ultimately concluded that this is not so since § 214.7 defines railroad employees (including employees of contractors to a railroad) as roadway workers if they perform any of the section's listed duties "on or near the track or with the potential to foul the track." This particular language applies to individuals performing duties that would not be considered MOW activities, such as maintenance of roadway facilities that could involve fouling the track. Individuals performing such duties may qualify as roadway workers, but they are not generally considered to be MOW employees if their activities do not involve work on track or roadbed.

Furthermore, as used in part 214, a roadway worker is defined as any employee who performs one or more of the duties listed that has the potential of fouling a track, and this definition determines which employees must be provided roadway worker training and on-track protection in certain situations.

In part 214, this broad language is not problematic because it is relatively easy for a railroad to provide employees with roadway worker training and on-track protection on short notice. However, FRA believes that adopting part 214's roadway worker definition would make it difficult for railroads and contractors to comply with the expanded scope of part 219, since part 219 elements often require advance planning before implementation. For example, to establish an effective random testing program that meets FRA's minimum random testing rates, a railroad would first have to identify all employees and contractors who may ever perform duties qualifying them as roadway workers.

Therefore, while FRA considered adopting the § 214.7 roadway worker definition, FRA concluded that this definition was too broad for part 219 purposes. Nonetheless, FRA is requesting public comment on this alternative.

2. Alternative No. 2: Include all employees who perform FRA safety-sensitive functions under §§ 219.301 and 209.303.

As a second alternative approach, FRA considered implementing NTSB recommendation R-08-07 in its entirety by expanding part 219 to cover all employees who perform FRA safety-sensitive functions under §§ 209.301 and 209.303. For the reasons discussed below, FRA has determined that it is currently unnecessary to expand the scope of part 219 to such an extent.

As discussed above, FRA believes that in addition to the covered employees already subject to part 219, MOW employees occupy the most at-risk safety-sensitive positions in the railroad industry. Their duties regularly require them to work on or alongside track and roadbed, putting them at risk for being struck by a train or other on-track or fouling equipment. MOW employees also greatly impact safety because their activities can directly interfere with the movement of trains or other on-track equipment. Furthermore, as discussed above, the NTSB based recommendation R-08-07 upon its findings that illegal drug use by MOW employees may have played a role in a 2007 fatal MBTA accident, and that test data from FRA's PAT testing program showed an alcohol and drug use problem in the MOW employee population. See Woburn Report at 19-20.

In contrast, as discussed earlier, individuals who perform the other FRA safety-sensitive functions listed in § 209.303 (e.g., individuals who inspect, repair, or maintain locomotives,

passenger cars, and freight cars) do not pose or have similar safety risks because these functions, unlike MOW activities, are typically performed in designated shop areas or on track designated as repair track and, as such, individuals performing these functions are not subject to the same risks as individuals working on or around railroad track over which normal railroad operations are taking place. Furthermore, employees who perform § 209.303 safety-sensitive functions but are neither covered employees nor MOW employees have a lower PAT testing positive rate than those who perform MOW activities. From January 1997 to August 2010, FRA conducted PAT tests on 14 fatally injured employees who were neither covered employees nor MOW workers. Only one of these fatalities tested positive, resulting in a PAT testing positive rate of 7.14% for fatalities who were neither covered employees nor MOW workers, which is comparable to the 6.56% PAT testing positive rate for covered employees cited by the NTSB in its report on the MBTA accident. *See* Woburn Report at 20. In comparison, the NTSB's examination of the PAT testing results from MOW fatalities found a positive rate of 19.23%, about three times as high as that for covered employees. *Id.*

FRA is therefore not proposing at this time to apply part 219 to those § 209.303 safety-sensitive employees who are neither covered employees nor MOW employees. Accordingly, as proposed, the expanded scope of part 219 would not cover all § 209.303 safety-sensitive employees, as recommended by the NTSB. FRA believes this more limited scope is not only data-driven but appropriate given the need to minimize the burden and costs of implementing the mandate of Section 412. However, as with the first alternative approach discussed above, FRA is requesting public comment on this alternative.

E. MOW Employees and the Small Railroad Exception

Since the inception of its alcohol and drug program in 1985, FRA has used the number of covered employees a railroad has (including covered service contractors and volunteers) as one factor in determining the railroad's risk of alcohol and drug-related accidents. *See* 50 FR 31529, Aug. 2, 1985. For example, FRA believes that generally small railroads, defined as those railroads that have 15 or fewer covered employees and no joint operations with other railroads, pose a lower risk of alcohol and drug-related accidents than larger railroads. Existing part 219 therefore requires larger railroads (defined as those

railroads that either have 16 or more covered employees or are engaged in joint operations) to implement all of part 219, while small railroads have to implement only certain subparts of part 219. Currently under § 219.3, small railroads do not have to comply with subpart D (reasonable suspicion and reasonable cause testing), subpart E (identification of troubled employees), subpart F (pre-employment testing) and subpart G (random alcohol and drug testing).⁹ The purpose of this small railroad exception is to limit part 219's regulatory burden on small railroads without adversely affecting safety.

FRA's use of a railroad's number of covered employees and participation in joint operations as measures of the railroad's risk of alcohol and drug-related accidents is a well-established approach with which the railroad industry is familiar. FRA is therefore proposing to continue counting only a railroad's covered employees for purposes of determining whether the railroad qualifies for the small railroad exception, particularly since FRA has found no safety rationale for doing otherwise. This would minimize implementation burdens by continuing to except a small railroad from full part 219 coverage provided that the railroad continues to meet § 219.3 criteria.

With respect to a contractor who performs MOW activities for a railroad, FRA proposes to amend § 219.3 to apply part 219 to a MOW contractor to the same extent as it applies to the railroad for which the MOW contractor performs regulated service. As proposed, a contractor's level of part 219 compliance would be determined by the size of the railroad for which it is performing regulated service, regardless of the size of the contractor itself. To achieve this, FRA is proposing to add new language to the small railroad exception. Pursuant to this new language, if a contractor performs MOW activities exclusively for small railroads that are excepted from full compliance with part 219, the contractor would also be excepted from full compliance. For example, a MOW contractor with five employees who perform regulated service for a large railroad would have to implement a full part 219 program if the railroad for which it performs regulated service is required to do so, while a MOW contractor with 20 employees would not have to implement a full part 219 program if it performs regulated service for a small

railroad that is excepted from full compliance with part 219.

FRA recognizes that a MOW contractor may perform regulated service for multiple railroads, not all of which may be required to comply fully with part 219. To simplify application, FRA is proposing to add new language to the small railroad exception requiring a MOW contractor who performs regulated service for multiple railroads to implement a full part 219 program if the contractor performs regulated service for at least one large railroad fully subject to part 219. Under this proposal, if a MOW contractor performs regulated service for at least one large railroad, it would have to incorporate all of its regulated employees into a full part 219 program, even if only some of these employees perform regulated service for a large railroad, and regardless of whether or not a particular employee was currently performing regulated service for a large or a small railroad. This approach would allow a MOW contractor the flexibility to allocate its employees effectively and efficiently by allowing it to use any of its employees to perform regulated service for a large railroad on any given day.

Although FRA considered amending the small railroad exception to allow a railroad to qualify for the small railroad exception if it did not have joint operations and the combined number of its covered employees and MOW workers was 15 or fewer, FRA ultimately decided that this approach would create several difficulties. For example, a railroad with 15 covered employees and five MOW employees that currently qualifies as a small railroad would become fully subject to part 219 if FRA counted the five MOW employees towards the 15 or fewer cutoff. FRA believes it would be unfair for a railroad's status to change simply because MOW employees were added to the count, without any actual change to the railroad's operations or the risks they would pose.

Counting MOW contractors for purposes of the small railroad exception would present even more difficult issues. While § 219.3 currently counts contractor employees who perform covered service for a railroad for purposes of the small railroad exception, this approach has not been problematic because railroads generally hire covered service contractors, such as locomotive engineers, conductors, or train dispatchers, on a long-term basis. Similarly, the demand for signal service contractors is also stable, so it is fairly easy for a railroad to count its number

⁹ As discussed later in this preamble, FRA is proposing to modify the small railroad exception of § 219.3 so that small railroads would no longer be exempt from the reasonable suspicion and pre-employment testing requirements of part 219.

of covered service employees and contractors at any given time.

In contrast, MOW work is variable, and MOW contractors frequently move from railroad to railroad. It is not unusual for a MOW contractor to perform work for a railroad only on a one-time basis. Including MOW contractors for purposes of the small railroad exception count could therefore create a situation where a railroad's status would vary from week to week. For instance, a railroad that loses its small railroad status after hiring MOW contractors to perform non-routine track maintenance could revert to small railroad status once its short-term contract with the MOW contractors expired. If a railroad no longer qualifies for small railroad status, it is no longer excepted from the requirement to implement a random testing program. Adoption of criteria that could result in short-term fluctuations in a railroad's status and requirements would be impracticable because implementation of a random testing program is generally a long-term commitment that involves contracting with collectors and other service providers.

FRA also does not want to encourage the hiring of MOW contractors in lieu of MOW employees. Accordingly, for purposes of determining whether a railroad qualifies for the small railroad exception, since FRA is proposing to exclude contractor employees who perform MOW activities, FRA similarly proposes to exclude railroad employees who perform MOW activities. Furthermore, counting a railroad's MOW employees but not its MOW contractors would inaccurately reflect the safety risk presented by the railroad's total MOW worker population.

FRA is proposing to maintain its current criteria for the small railroad exception, but is specifically requesting comment on the following questions:

- Should FRA amend the small railroad exception to consider MOW employees? If so, should FRA amend its current threshold of 15 employees to account for the increased population of individuals performing MOW activities and covered service?
- Do railroads that currently meet the small railroad exception of § 219.3 currently perform reasonable cause or random drug and alcohol testing under their own authority? If so, how does this small railroad company testing authority differ from the reasonable cause or random drug and alcohol testing conducted by larger railroads that fully complies with part 219? Should railroads that meet the existing

small railroad exception also be required to fully comply with part 219?

- In light of the changes in the railroad operating environment since the inception of the small railroad exception, are there other approaches to the small railroad exception that FRA should consider? For example, given the criticality of ensuring the safety of all rail passenger operations (whether the operations are large or small), should the small railroad exception be modified, more narrowly tailored, or removed altogether for passenger operations? Similarly, given the increase in the volume and frequency of the rail transportation of DOT-regulated hazardous materials in recent years (e.g., flammable liquids), should the small railroad exception be modified, more narrowly tailored, or removed altogether if a railroad transports hazardous materials? For example, should the small railroad exception be limited to railroads that do not transport hazardous materials or that transport only certain low hazard hazardous materials? Should the exception be limited to railroads that do not transport hazardous materials above a certain threshold quantity? FRA is requesting information on the operations of small railroads as defined under § 219.3: How many of these small railroads transport passengers and how many currently transport hazardous materials? For those small railroads that transport hazardous materials, what types of hazardous materials do they transport?

Although in this NPRM, FRA is not proposing to modify its criteria for determining when a railroad meets the small railroad exception, FRA may do so in the final rule after consideration of any comments received in response to the above questions.

F. Railroad and Contractor Responsibility for Compliance

FRA is proposing to hold both the railroad and the contractor responsible for ensuring that contractor employees performing regulated service for a railroad (contractor regulated employees) are in compliance with part 219. Since § 219.9 currently provides that every person—including railroad agents and contractors—who violates or causes a violation of a part 219 requirement may be subject to a civil penalty, both railroads and contractors performing covered service for railroads are already responsible for part 219 compliance. FRA is stressing this provision because the expansion of part 219 to cover MOW employees would also subject a large population of MOW contractors to its requirements.

While the RSIA-mandated expansion of part 219 to cover MOW employees may create complications for a railroad with a large number of MOW contractors, particularly if those contractors perform MOW activities for the railroad only on a periodic or temporary basis, there are several methods that a railroad and a regulated service contractor could use to ensure compliance with part 219. If a regulated service contractor is required to establish a random testing program because it provides regulated service for a railroad that is fully subject to part 219, the contractor could do any of the following:

- Establish its own part 219 program and provide the railroad with documentation of its compliance with part 219. The railroad should maintain this documentation for FRA audit purposes. If the contractor's documentation or program contains a deficiency or violation that the railroad could not have reasonably detected, FRA could use its enforcement discretion to take action solely against the contractor. As discussed earlier in the preamble, the extent of a regulated service contractor's responsibilities would be determined by the size of the railroad(s) with which it contracts.
- Contract with a consortium to administer its part 219 program. The consortium could either place the contractor's regulated employees in a stand-alone random testing pool or in a random testing pool with the regulated employees of other regulated service contractors. The contractor could then submit documentation of its membership in the consortium and its compliance with part 219 to the contracting railroad. As with the method described above, if the contractor's documentation or program contains a deficiency or violation that the railroad could not have reasonably detected, FRA could use its enforcement discretion to take action only against the contractor. Upon request, FRA would assist a railroad in reviewing the part 219 documentation of its regulated service contractors.
- Have a railroad incorporate contractor employees who perform regulated service for it into the railroad's own part 219 program.

To minimize the burden of these proposed requirements and to promote compliance with part 219, FRA has developed model "fill-in-the-blank" alcohol and drug policies (including testing plans) that can serve as templates for both railroads and contractors. These plans are currently available at FRA's Web site: <http://www.fra.dot.gov/Page/P0345>. FRA

developed one set of plans for entities that are subject to all of part 219 and another for entities that qualify for the small railroad exception.

FRA expects it to be common practice for a railroad to incorporate into its own part 219 program all of the contractor employees who perform regulated service for it, even if one or more of the contractors has its own part 219 program. A railroad that does so would ensure that all of its contractor regulated employees are in compliance with part 219 requirements, particularly the random testing requirements of subpart G. A railroad that chooses this approach would incorporate all contractor regulated employees into the railroad's own random testing program.

One additional option would be for a railroad to accept a contractor's plan for random testing, regardless of whether that plan was managed by the contractor or by a consortium/third party administrator (C/TPA). Although not specifically proposed in the rule text, FRA is soliciting feedback on the following approach that could create a framework for a railroad wishing to accept a contractor's random testing plan. Under this approach, if a railroad accepted a contractor's random testing plan, the contractor could be required to comply with the following requirements:

- To certify in writing to the railroad that all of the contractor's regulated employees are subject to alcohol and drug testing as required by part 219 (including, as applicable, the requirements that all regulated employees be subject to selection for random testing as required by subpart G, have a DOT pre-employment drug test resulting in a negative result under subpart F, and be subject to a previous employer background check as required by § 40.25); and

- To report, in an FRA model format, summary part 219 testing data to the railroad at least every six months.

FRA is soliciting public comment on whether the last alternative described above would make it easier for a railroad to ensure that its regulated contractor employees were complying with the requirements of part 219, without having to incorporate the contractor's regulated employees into its own part 219 program. If not, how could this approach be improved? What costs, if any, would it impose? Would contractors performing regulated service for railroads be willing to comply with the proposed requirements for written certification and reporting of summary testing data? Are there other approaches that both railroads and contractors could use to ensure that all contractor

employees performing regulated service for a railroad are in compliance with part 219?

G. MOW Employee Random Testing Rate and Minimum Random Testing Pool Size

As mentioned above, FRA is proposing to require random alcohol and drug testing for MOW employees (unless they perform regulated service solely for a railroad qualifying for the small railroad exception of § 219.3). As with covered employees, FRA would set the minimum random rates for MOW employees according to the overall reported random testing violation rate for MOW employees in the railroad industry. See §§ 219.602 and 219.608. Because MOW employees have never been subject to FRA random testing before, FRA only has data from its PAT testing of MOW fatalities (described above) on the prevalence of prohibited alcohol and drug use in the MOW employee population. FRA is therefore proposing to set the initial minimum annual percentage rates for MOW employees at 50% for drug testing and 25% for alcohol testing. Although the initial minimum random rates for MOW employees would be higher than those currently set for covered employees,¹⁰ FRA set the same initial minimum random rates for covered employees. (FRA required random drug and alcohol testing for covered employees in 1988 and 1995, respectively. See 53 FR 47123, Nov. 21, 1988 and 59 FR 7448, Feb. 15, 1994).

Railroads would initially be required to establish and maintain separate random testing selection pools for MOW employees. Maintaining distinct random testing pools for covered and MOW employees would make it easier for railroads to comply with the different minimum testing rates set for each employee population. Requiring separate random testing pools would also make it easier for railroads that are required to file an annual Management Information System (MIS) report under § 219.800 to report separate random testing results for covered and MOW employees. FRA would in turn use the data from these separate pools to set the future minimum random rates for covered and MOW employees.

Under existing § 219.3, a railroad with 15 or fewer covered employees must conduct random testing if it has joint operations with another railroad, even though the railroad's small size may diminish the deterrence effect of the

testing. The purpose of random testing is to make every regulated employee expect that he or she could be subject to a random alcohol or drug test any time he or she is on-duty and subject to performing covered service. FRA is concerned that the random testing conducted by very small railroads and contractors may have an insufficient deterrence effect. For example, a railroad with two covered employees and joint operations need only conduct one random alcohol test to meet the 10% minimum alcohol testing rate; afterwards, the railroad's random alcohol testing program would cease to have any deterrent effect because its covered employees would know that the alcohol testing required for the year had already been completed. A contractor who is required to conduct random testing because it performs regulated service for large railroads would have a similar problem if it has only a very small number of regulated employees.

As will be further discussed below in the section-by-section analysis for §§ 219.611(c) and 219.613(d), FRA is proposing the following regulatory change in response to this concern. Any individual random testing pool required under subpart G (whether maintained by a railroad, contractor to a railroad, or a consortium) must contain at least four entries and at least one entry per quarter must be selected and tested, even if doing so would require testing above FRA's minimum annual random testing rates. This new requirement would not excuse a railroad from complying with the minimum random testing percentage rates. (For example, a pool comprised of 16 MOW employees—who would be subject to random drug testing at a rate of 50%—would still be required to conduct at least eight random tests per year.) This requirement would apply both to railroads and contractors required to perform random testing.

H. MOW Employee Pre-employment Drug Testing

FRA is proposing to grandfather all current MOW employees from the pre-employment drug testing requirements of subpart F.¹¹ Under FRA's proposal, only MOW employees hired by a railroad or contractor after the effective date of the final rule would be required to have a negative DOT pre-employment drug test result before performing

¹¹ While railroads are currently authorized to conduct pre-employment alcohol testing for covered employees (so long as they treat all covered employees the same), such testing is not required under subpart F. See § 219.502. FRA is not proposing to change this approach and require pre-employment alcohol testing for regulated employees.

¹⁰ In 2014 the random testing rates for covered employees are 25% for drug testing and 10% for alcohol testing. (See 78 FR 78275, Dec. 26, 2013).

regulated service for the first time. As with the minimum random testing rates discussed above, FRA's approach to implementing pre-employment drug testing for MOW employees would be similar to its implementation of pre-employment drug testing for covered employees in 1986, when FRA grandfathered employees who had performed covered service for a railroad prior to the effective date of the final rule. *See* 50 FR 31508, Aug. 2, 1985. Although current MOW employees would not be subject to a pre-employment drug test, FRA believes its proposal to initiate random drug testing of MOW employees at a base rate of 50% would provide sufficient deterrence for this group.

FRA understands that railroads may have already given some MOW employees a Federal pre-employment drug test (resulting in a negative) under the alcohol and drug testing regulations of another DOT agency. The most common area of interagency overlap is among MOW employees who are required by their employers to hold Commercial Driver's Licenses (CDL), since these employees are subject to the regulations of both FRA and the FMCSA. To hold a CDL, an individual must have a negative FMCSA pre-employment drug test. *See* § 382.301. To ease the compliance burden for these employees and their employers, FRA would allow a negative pre-employment test conducted by an employing railroad under the rules and regulations of another DOT agency to satisfy the requirements of subpart F for employees transferring into regulated service for the first time. FRA has historically interpreted its pre-employment drug testing requirements this way, and this proposed amendment would incorporate this interpretation into the regulatory text. *See* Federal Railroad Administration, Alcohol and Drug Testing Regulations (Parts 219 and 40) Interpretive Guidance Manual ("Interpretive Guidance Manual") 32 (September 2006), available at <http://www.fra.dot.gov/eLib/Details/L02799>.

IV. Signal Contractors

Railroads and contractors should note that the RSIA made signal contractors subject to part 219. Effective July 16, 2009, section 108(a) of the RSIA amended the HOS laws by eliminating the words "employed by a railroad carrier" from the definition of "signal employee". *See* 49 U.S.C. 21101(4). As a result, contractor employees who install, repair, or maintain signal systems for a railroad are now considered covered employees under part 219, and signal contractors are

responsible for compliance with part 219 to the same extent as any other covered service contractors. This statutory change does not necessitate any amendments to part 219. Nevertheless, FRA is mentioning this change to ensure that it is understood by the railroad industry.

V. Other Proposed Substantive Amendments

This section contains a brief overview of the proposed amendments in this NPRM other than those discussed above. These proposed amendments will be discussed in greater detail in the section-by-section analysis below.

A. Small Railroads Would No Longer Be Exempted From the Requirements for Reasonable Suspicion Testing and Pre-Employment Drug Testing

Currently, the small railroad exception in § 219.3(b)(2) provides, in part, that a railroad with 15 or fewer covered employees that does not engage in joint operations with another railroad is not subject to the requirements for reasonable suspicion or reasonable cause testing (subpart D), identification of troubled employees (subpart E), pre-employment drug testing (subpart F), or random testing (subpart G).

FRA is proposing to modify the small railroad exception so that small railroads are no longer excepted from the reasonable suspicion testing requirements of subpart D. Subpart D requires railroads to conduct Federal reasonable suspicion testing on a covered employee when one or more supervisors reasonably suspects that the employee has violated an FRA prohibition against the use of alcohol or drugs. *See* § 219.300(a). Small railroads would continue to be excepted, however, from the requirements for reasonable cause testing.¹²

FRA is also proposing to amend the small railroad exception so that small railroads are no longer excepted from subpart F, which requires a railroad to conduct a pre-employment drug test (resulting in a negative) on an individual before permitting him or her to perform regulated service for the first time. *See* § 219.501(a). This proposed amendment would apply only to regulated employees hired by a small railroad after the effective date of a final rule (i.e., a negative pre-employment drug test would not be required for

regulated employees hired by a small railroad before the effective date of any final rule issued in this proceeding).

B. For Purposes of the Small Railroad Exception, a new Definition of "Joint Operations" Would Be Incorporated

The small railroad exception is currently available to railroads that have 15 or fewer covered employees and do not operate on another railroad's tracks in the United States or otherwise engage in joint operations with another railroad in the United States, except as necessary for purposes of interchange. *See* § 219.3(b)(2)(ii). While the small railroad exception uses the phrase "joint operations," this term has never been defined in part 219. As a result, the meaning of "joint operations" has been open to different interpretations. In order to support uniform application of the small railroad exception, FRA is proposing to add a definition of "joint operations" to part 219.

C. The Post-Accident Toxicological (PAT) Testing Damage Threshold for Major Train Accidents Would Be Increased

Part 219 currently requires railroads to conduct PAT testing for major train accidents,¹³ defined in part as train accidents that involve damage to railroad property of \$1,000,000 or more. *See* § 219.201(a)(1)(iii). (A train accident also qualifies as a major train accident if it meets the current reporting threshold and involves either a fatality or a hazardous materials release accompanied by an evacuation or a reportable injury resulting from the hazardous material release. *See* § 219.201(a)(1)(i)-(ii).) FRA is proposing to increase the railroad property damage threshold for major train accidents to \$1,500,000 to account for inflation. Since major train accidents require all involved crew members to be PAT tested, this proposed change would reduce the burden on railroads (e.g., employee opportunity and wage costs) by reducing the number of employees subject to PAT testing.

D. Derailment and Raking Collisions Would No Longer Be Excluded From the Definition of Impact Accidents

Part 219 also requires railroads to conduct PAT testing for impact accidents. Section 219.5 currently excludes from the definition of "impact accident" derailment accidents, where a derailment of equipment causes an impact with other rail equipment, and

¹² As discussed in Section VI below, FRA is proposing to separate the requirements for reasonable suspicion and reasonable cause testing by leaving the reasonable suspicion requirements in their current location in subpart D and moving the reasonable cause testing requirements to a new subpart E.

¹³ PAT testing is also required for events that meet FRA's criteria for impact accidents, fatal train incidents, or passenger train accidents. *See* § 219.201(a)(2)-(4).

raking collisions (i.e., collisions caused by derailment of rolling stock or operation of equipment in violation of clearance limitations). FRA is proposing to remove these existing exclusions, and require PAT testing after both derailment and raking collisions.

E. PAT Testing Would Be Required for Railroad Highway-Rail Grade Crossing Accidents/Incidents Involving Human-Factor Errors

Currently, § 219.201(b) excepts from PAT testing any event involving a “collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing.” FRA is proposing to narrow this exception to require PAT testing after any highway-rail grade crossing accident/incident in which human-factor errors may have played a role.

F. The Provisions Governing When Regulated Employees Could Be Recalled for PAT Testing Would Be Amended

Currently, a railroad may recall a covered employee for PAT testing only if three conditions are met: (1) the employee was released from duty under the normal procedures of the railroad; (2) the railroad’s preliminary investigation indicates a clear probability that the employee played a major role in the cause or severity of the accident/incident; and (3) the accident/incident occurred while the employee was on duty. See § 219.203(b)(4). To improve its investigation of human-factor related accidents, FRA is proposing, not only to lower its threshold for employee recall by removing the requirement for the accident/incident to have occurred while a regulated employee was on duty, but also to require employee recall in certain circumstances.

G. Federal Reasonable Cause Testing Would Be Authorized Only for Reportable “Train Accidents” and “Train Incidents”

FRA believes the use of “accident/incident” in the introductory text of existing § 219.301(b)(2) has led to confusion regarding whether reasonable cause testing is permitted following all part 225 reportable accidents/incidents, which would include reportable events such as occupational illnesses and railroad casualties unconnected to the operation of on-track equipment. Because FRA never intended to authorize reasonable cause testing following occupational illness cases (e.g., carpal tunnel syndrome) and casualties unconnected to the movement of on-track equipment (e.g., slips-trips-and-falls resulting from safety

concerns under the jurisdiction of the Occupational Safety and Health Administration (OSHA)), FRA is proposing to revise this existing language to specify that FRA reasonable cause testing is only authorized after “train accidents” (defined to include rail equipment accidents meeting the part 225 reporting threshold) and “train incidents” (defined to include events involving the operation of railroad on-track or fouling equipment resulting in a casualty, but in which the part 225 reporting threshold is not met). For the reasons discussed in VI.A below, FRA is proposing to include this revised language at § 219.403(b).

H. Federal Reasonable Cause Testing Would Be Authorized for Additional Operating Rule Violations or Other Errors

As mentioned above, FRA reasonable cause testing is also authorized after certain railroad operating rule violations and other errors specified in § 219.301(b)(3). Currently, these rule violations and errors listed are primarily directed at covered employees. FRA is proposing to add rule violations and errors that would specifically address employees performing MOW activities, and to add others directed at signal workers performing covered service or reflect recent amendments to 49 CFR part 218, Railroad Operating Practices.

I. Part 219 Would Be Amended To Conform Certain Provisions to the Final Conductor Certification Rule

On November 9, 2011, FRA published a final rule requiring the certification of conductors (49 CFR part 242), which was also mandated by the RSIA. (76 FR 69802, Nov. 9, 2011). This final rule became effective January 1, 2012. *Id.* FRA is therefore proposing to amend part 219 so that those sections that apply to the certification of locomotive engineers would also clearly apply to the certification of conductors. The proposed definition for a Drug and Alcohol Counselor (DAC) is one of these conforming amendments.

VI. Primary Clarifying Amendments

FRA is proposing several amendments that would both improve the organization of part 219 and make it easier to find pertinent requirements and information. Although these proposed amendments are discussed in the section-by-section analysis below, for the reader’s convenience, a brief description of the major organizational amendments is included here.

A. Reasonable Suspicion and Reasonable Cause Testing Would Be Separated Into Different Subparts, Resulting in the Re-Designation of Other Subparts

Currently, the requirements for reasonable suspicion testing and reasonable cause testing are both found in subpart D. Because of their similar names and the placement of both types of tests in subpart D, railroads often confuse one type of testing with the other, even though reasonable suspicion and reasonable cause testing have very different requirements. To clarify the substantive differences between the two, FRA is proposing to retain the requirements for reasonable suspicion testing in subpart D but move the requirements for reasonable cause testing to subpart E, which currently covers voluntary referral and co-worker report policies. The proposed separation of reasonable suspicion and reasonable cause testing into different subparts is intended to help railroads distinguish between these two types of testing. This differentiation should be particularly helpful for small railroads, since FRA is proposing to require that those railroads implement reasonable suspicion, but not reasonable cause testing. To accommodate the movement of reasonable cause testing into subpart E, FRA is proposing to move (and amend as discussed below) the sections addressing the “Identification of Troubled Employees” currently found in that subpart to new subpart K, “Peer Prevention Programs.”

B. Random Alcohol and Drug Testing Requirements Would Be Reorganized and Clarified

FRA is proposing to revise and expand subpart G, which contains FRA’s requirements for random alcohol and drug testing, to clarify these requirements and to incorporate published FRA guidance. See generally FRA, Part 219 Alcohol/Drug Program Compliance Manual, 2nd edition (2002) available at <http://www.fra.dot.gov/eLib/details/L01186> (Compliance Manual). In addition, FRA is proposing several substantive amendments which will be discussed below in the section-by-section analysis.

C. Substituting “Drug and Alcohol” for “Alcohol and Drug”

FRA has previously used both “Drug and Alcohol” and “Alcohol and Drug” as terms to describe its part 219 program and many of its components. For consistency, FRA is proposing to use only the term “Drug and Alcohol” throughout part 219 and to substitute

“Drug and Alcohol” wherever the term “Alcohol and Drug” is currently used.

VII. Section-by-Section Analysis

As discussed earlier, FRA is proposing to add definitions for “regulated employee” and “regulated service” which would serve as terms-of-art encompassing all individuals and duties subject to part 219, including both covered service and MOW activities. Throughout most of part 219, FRA would replace the terms “covered employee” and “covered service” with “regulated employee” and “regulated service.” The terms “covered employee” and “covered service,” however, would still be used where necessary, such as in proposed § 219.12, which addresses issues of overlap between part 219 and the HOS laws that apply only to covered employees.

Throughout this NPRM, FRA is also proposing small changes to conform the regulatory language, where necessary, to the proposed substantive and reorganization amendments. To streamline this NPRM, FRA is not discussing most of these minimal clarifying amendments, none of which are intended to affect the regulation’s substantive requirements.

Authority Citation

The authority citation for part 219 would be amended to add a reference to Section 412, which mandated the expansion of part 219 to cover all employees of railroads and contractors or subcontractors to railroads who perform MOW activities.

Subpart A—General

Section 219.1—Purpose and Scope

Currently, this section states that the purpose of part 219 is to “prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.” FRA is proposing to amend this section to include a reference to the proposed definition of “employee” in § 219.5, which, as used in part 219, would include any individual (including a volunteer or a probationary employee) who performs regulated activities for a railroad or a contractor to a railroad. FRA is not proposing to include a similar reference every time “employee” is used, but believes it is appropriate to do so the first time it appears in part 219.

Section 219.3—Application

FRA is proposing the following structural and substantive amendments to this section.

Paragraph (a)

FRA proposes to amend paragraph (a) to apply part 219 to all railroads, except as provided in proposed paragraphs (a)(1)–(3) and paragraphs (b), (c), and (d) of the section.

The first exception, contained in proposed paragraph (a)(1), addresses operations that occur within the confines of industrial installations commonly referred to as “plant railroads.” Plant railroads are typified by operations such as those in steel mills that do not go beyond the plant’s boundaries and that do not involve the switching of rail cars for entities other than themselves. This exception for plant railroads is currently found in paragraph (b)(1) of this section, but FRA believes it belongs more appropriately with the general applicability provisions of paragraph (a) (this will also permit proposed paragraph (b) to be dedicated solely to reporting requirements, as discussed below). FRA is also amending this language to specify that there is a definition of “plant railroads” in § 219.5.

Proposed paragraph (a)(2) addresses operations commonly described as tourist, scenic, or excursion service to the extent that they occur on tracks that are not part of the general railroad system. FRA has decided to except tourist, scenic, historic, or excursion rail operations that are not part of the general system, regardless of whether they are insular or non-insular rail operations. FRA has elected to exclude these typically small operations from the requirements of part 219 because of the limited safety risk that these operations pose to members of the public due to the fact that their operations do not take place on the general system. This is new language for this section, but reflects FRA’s tradition of exercising its jurisdiction in a way that excludes tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation from certain portions of its regulations. See *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, The Extent and Exercise of FRA’s Safety Jurisdiction*, 49 CFR part 209, Appendix A (FRA’s Policy Statement or the Policy Statement).

Proposed paragraph (a)(3) would except from part 219 rapid transit operations in an urban area that are not connected to the general system (although rapid transit type operations with links to the general system would continue to be covered by part 219). This exception is currently found in paragraph (a)(2), which excepts

railroads that “provide commuter or other short-haul rail passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102) in the United States.” The new language in proposed paragraph (a)(3) would conform part 219’s language to that used in the applicability sections of other FRA regulations without changing the scope of the exception.

Paragraph (b)

Paragraph (b) currently contains three different exceptions that are unique to part 219 and are available to both foreign and domestic railroads. To clarify these exceptions, and make them easier to find FRA is proposing to separate them into individual paragraphs as follows:

- As discussed above, the “plant railroad” exception would remain the same but would be moved from its current location in paragraph (b)(1) to proposed paragraph (a)(1). This exception is a general statement about FRA’s jurisdiction and more properly belongs with the general applicability provisions.

- The exception in current paragraph (b)(2) for railroads with 15 or fewer covered employees that do not engage in joint operations with other railroads (the “small railroad exception”) would be moved to paragraph (c) and amended to remove the exceptions related to reasonable suspicion testing and pre-employment testing.

- The exception in current paragraph (b)(3) would remain in paragraph (b), but the paragraph would be renamed “Annual report requirements.”

Paragraph (c)

As noted above, FRA is proposing to move the small railroad exception in existing paragraph (b)(2) to proposed paragraph (c) and to move the language currently in paragraph (c) relating to exceptions that apply only to foreign railroads to a new paragraph (d). In addition, because FRA is proposing to require that small railroads perform both reasonable suspicion and pre-employment drug testing (discussed below), paragraph (c)(1) would be amended to state that small railroads are excepted only from subparts E (reasonable cause testing), G (random testing), and K (peer support programs).

- **Small Railroads Would No Longer Be Excepted From Reasonable Suspicion Testing**

Section 219.11(g) currently requires all railroads to ensure that supervisors who are responsible for covered employees are trained in the signs and symptoms of alcohol and drug abuse.

(This provision also requires railroads to train covered employee supervisors on FRA PAT testing criteria.) This requirement applies to small railroads as well, even though they are currently excepted from having to conduct reasonable suspicion testing in accordance with current § 219.3(b)(2). Because small railroads must already meet the mandatory supervisory training requirements in § 219.11(g), FRA believes that removing the current exception and requiring small railroads to conduct reasonable suspicion testing would promote safety with fairly low additional costs.

The proposed expansion of part 219 to include MOW activities would require supervisors of employees who perform MOW activities to also comply with the training requirements in § 219.11(g). As with supervisors of covered employees, all railroads, regardless of size, must ensure that supervisors of employees who perform MOW activities have been trained on reasonable suspicion and post-accident testing criteria.

- **Small Railroads Would No Longer Be Excepted From Pre-employment Drug Testing**

Current paragraph (b)(2) excepts small railroads from the requirement to conduct pre-employment drug testing. FRA is proposing to remove this exception, because many small railroads already pre-employment drug test all applicants (not just those applying for covered service) under their own company authority. This has resulted in many small railroads mistakenly using DOT forms to conduct company authority pre-employment drug tests. Requiring small railroads to use only FRA authority for pre-employment drug tests of regulated employees would address this problem, and would also eliminate the ability of individuals to dodge FRA pre-employment drug tests by applying to small railroads instead of larger ones. The removal of the current small railroad exception to pre-employment drug testing would also make FRA's pre-employment testing policy consistent with that of other DOT modes, since no other DOT agency excepts small employers from conducting pre-employment drug tests. This proposed amendment would only apply to regulated employees who are hired by small railroads after the effective date of any final rule.

Furthermore, FRA believes the reasons behind its initial decision to except small railroads from pre-employment drug testing no longer apply. In 1986, when FRA's pre-employment drug testing requirements

went into effect, small railroads could not benefit from economies of scale because drug testing was new and collection and other test costs were high. *See* 49 FR 24293, June 12, 1984. This is no longer true today, as the workplace drug testing industry is well-established, and collectors, laboratories, and other service agents are widely available. Furthermore, drug use is now a significant issue in many small communities where small railroads operate.

- **Other Proposed Amendments to the Small Railroad Exception**

FRA is proposing to amend the introductory text of paragraph (c)(1) to clarify that small railroads are not authorized to perform Federal alcohol and drug testing under the subparts from which they are excepted. In other words, in addition to not requiring small railroads to conduct Federal reasonable cause or random testing, FRA is also not authorizing small railroads to conduct such testing. The proposed amendment would therefore clarify that small railroads are prohibited from conducting reasonable cause or random testing under Federal authority, and may only do so under their own authority. (FRA is also proposing to amend this paragraph to incorporate the small railroad criteria currently found in § 219.3(b)(2), no substantive change is intended.)

FRA proposes to amend the small railroad exception for proposed subpart K (Peer Support Programs) differently. Because FRA wants to limit the regulatory burden on small entities, FRA is not proposing to require small railroads to implement peer support programs. However, FRA does not want to prohibit small railroads from voluntarily implementing peer support programs such as those contemplated by new proposed subpart K. Accordingly, FRA proposes to authorize small railroads to implement peer referral and support programs because these programs encourage and facilitate the referral and rehabilitative support of regulated employees who abuse alcohol or drugs. This proposed exception from proposed subpart K would be the only exception which would neither require, nor prohibit, small railroads from implementing the requirements of part 219 under FRA authority.

As discussed in section III.F of this preamble, paragraph (c)(2) would state that a regulated employee who performs only MOW activities would not be counted when determining whether the railroad had 15 or fewer covered employees as required to meet the small railroad exception.

Also as discussed in section III.F of this preamble, paragraph (c)(3) would state that a contractor must perform MOW activities exclusively for small railroads in order to qualify for the small railroad exception.

As previously discussed in section III.G of this preamble, under proposed paragraph (c)(4), if a contractor is subject to all of part 219 (including subparts E, G, and K) because it performs regulated service for at least one railroad that is not a small railroad, only those railroads which must also comply with all of part 219 (in other words, railroads that do not qualify for the small railroad exception) would share responsibility for ensuring the contractor's full compliance with part 219. If the contractor also performs regulated service for small railroads, these small railroads would not share responsibility for the contractor's full compliance.

Public Comment Invited

Currently, a railroad's HOS contractors are counted when determining whether a railroad qualifies for the small railroad exception. Part 219 makes no distinctions, however, for those HOS contractors who work for a railroad only on a temporary basis. FRA is asking for comment on whether such a distinction should be made. For example, should a small railroad still qualify for the exception if it temporarily engages enough HOS contractors (e.g., signal contractors) to bring its number of covered employees above the 16 employee threshold? If so, how long can an HOS contractor work for the railroad and still be considered a "temporary" employee?

Paragraph (d)

FRA is proposing to move the applicability exceptions that apply only to foreign railroads to a new paragraph (d), which would be entitled "Foreign railroads." The following structural and clarification amendments are also being proposed:

- New language in paragraph (d)(1) would clarify that part 219 does not apply to the operations of a foreign railroad that occur outside the United States. For example, a major train accident on a foreign railroad that occurred outside the United States would not be subject to FRA's PAT testing requirements under subpart C. This would not be a new exception, but rather a clarification of current requirements.

- FRA would combine the exceptions currently in paragraphs (c)(1) and (c)(2) into new paragraph (d)(2), since both exceptions exclude certain foreign

railroad operations from subparts E through G. The intent of this proposed consolidation is to improve clarity and reduce redundancy, and no substantive changes are intended. FRA would also amend these exceptions to incorporate the proposed move of peer programs from subpart E to new subpart K (see discussion above).

Section 219.4—Recognition of a Foreign Railroad's Workplace Testing Program

This section contains provisions regarding the recognition of a foreign railroad's workplace testing program as a "compatible alternative" to certain requirements of part 219. FRA is proposing minimal clarifying amendments to this section, none of which are intended to affect its substantive requirements. Paragraphs (a)(1) and (b)(1) would be amended to reflect that FRA is proposing to move existing subpart E (Identification of Troubled Employees) to a new subpart K (Peer Support Programs). The final sentence of paragraph (b)(1) would be further amended to correct a mistaken reference to subpart E that should be a reference to the pre-employment testing requirements of subpart F.

Paragraph (b)(2) would be amended to clarify what type of requirements are contained in the various referenced subparts. For example, FRA is proposing to clarify that subpart C contains the requirements for PAT testing.

Section 219.5—Definitions

FRA is proposing to amend the definitions section of part 219 to add several new definitions, to revise and clarify certain current definitions, and to delete unnecessary definitions.

New Definitions

Administrator

A new definition of "Administrator" would clarify that the term means the Administrator of the FRA or the Administrator's delegate.

Associate Administrator

A new definition of "Associate Administrator" would clarify that the term means the FRA's Associate Administrator for Railroad Safety/Chief Safety Officer or the Associate Administrator's delegate.

Category of Regulated Employee

A new definition, "category of regulated employee," would mean a broad class of either covered employees or MOW employees. For the purpose of determining random testing rates under proposed § 219.625, if an individual performs both covered service and

MOW activities, he or she would be placed in the category which comprises the majority of his or her regulated service. For example, an individual who performs covered service 45 percent of the time and MOW activities 55 percent of the time should be placed in the random testing pool for MOW employees.

Contractor

A new definition of "contractor" would clarify that this term includes both a contractor and a subcontractor performing functions for a railroad.

Counselor

FRA is proposing to add this term to encompass a Drug and Alcohol Counselor (as discussed below), Employee Assistance Program Counselor, or Substance Abuse Professional, since most, but not all, of the education, counseling, and treatment requirements in new subpart K could be conducted by a person who meets the credentialing and qualification requirements for any of these professions.

DOT-Regulated Employee

A new definition of "DOT-regulated employee" would clarify that this term means any person who is subject to drug testing and/or alcohol testing under any DOT agency regulation. This term would include both individuals currently performing DOT safety-sensitive functions (as designated in other DOT agency regulations) and applicants for employment subject to DOT pre-employment drug testing.

DOT Safety-Sensitive Duty or DOT Safety-Sensitive Function

A new definition of "DOT safety-sensitive duty" or "DOT safety-sensitive function" would clarify that these terms mean a function designated by a DOT agency, the performance of which makes an individual subject to the drug testing and/or alcohol testing requirements of that DOT agency. For part 219 purposes, the performance of regulated service would be a DOT safety-sensitive duty or function.

Drug and Alcohol Counselor or DAC

FRA is proposing to adopt a definition for "Drug and Alcohol Counselor" or "DAC" from 49 CFR 242.7. As specified in § 242.111, an individual whose records show a conviction or other State action for abuse of drugs or alcohol, must be evaluated and successfully treated by a DAC as a condition of conductor certification. Although a DAC must meet the same credentialing requirements as a Substance Abuse

Professional (SAP), this evaluation and treatment may not be called a SAP evaluation because § 40.3 specifies that a SAP may provide such services only after a violation of a DOT alcohol and drug regulation, and a conviction or other State action (e.g., driving while impaired) is not a violation of part 219.

Employee

FRA is proposing to adopt a new definition of "employee" to clarify that this term includes any individual (including volunteers and probationary employees) performing activities for a railroad or a contractor to a railroad. The proposed amendment would incorporate previous FRA guidance that volunteers who perform covered service are to be considered covered employees. See Compliance Manual 2.2.

Employee Assistance Program Counselor or EAP Counselor

FRA is proposing to restore to part 219 the term "Employee assistance program counselor or EAP counselor." A previous definition of "EAP counselor" was removed when FRA amended part 219 to conform to subpart P of part 40, which requires an evaluation by a SAP when an employee has violated a DOT drug or alcohol regulation (i.e., by refusing to take or having a positive result on a DOT alcohol or drug test). See 59 FR 7457, Feb. 15, 1994. A part 219 definition of "Employee assistance program counselor or EAP counselor" is still required, however, because a SAP's role is to evaluate an employee *after* he or she has committed an DOT alcohol or drug testing violation, but § 219.403, which governs voluntary referrals, specifies that an employee may only self-refer *before* he or she has committed a violation of §§ 219.101 or 219.102. The proposed definition of "Employee assistance program counselor or EAP counselor" is adapted from the "EAP counselor" definition in § 240.7 of FRA's locomotive engineer certification regulations.

Evacuation

For clarification purposes, FRA is proposing to define the term "evacuation," which, when accompanying a release of hazardous material lading from railroad equipment, is listed in § 219.201(a)(1)(ii)(A) as one of the criteria which determines whether a train accident qualifies as a "major train accident" requiring the PAT testing of all crew members involved. This has been one of the criteria for PAT testing since the inception of the program. See 50 FR 31508, Aug. 2, 1985.

To qualify as an evacuation for purposes of PAT testing, an event must involve the relocation of at least one person who is not a railroad employee to a safe area in order to avoid exposure to a hazardous material release. This relocation would normally be ordered by local authorities and could be either mandatory or voluntary. The definition would not include the closure of public roadways for hazardous material spill containment purposes, unless that closure was accompanied by an evacuation order. FRA is specifically requesting public comment on whether the proposed definition would help railroads make PAT testing determinations and whether it properly encompasses the various events that should qualify as an evacuation.

Flagman, Fouling a Track

To clarify FRA's proposed requirements for employees who perform MOW activities, FRA would add definitions of "flagman" and "fouling a track," both of which are modeled on the definitions in § 214.7 of FRA's roadway worker regulations.

Highway-Rail Grade Crossing

FRA also proposes to incorporate the definition of "highway-rail grade crossing" found in § 225.5 of its accident and incident reporting regulations. The proposed incorporation of a part 225 definition into part 219 would lessen the burden on entities who have to comply with both regulations by maintaining consistency between the regulations and by making it unnecessary to refer to part 225 to determine what a "highway-rail grade crossing" means in part 219. By incorporating part 225's definition of a "highway-rail grade crossing" into part 219, FRA proposes to incorporate part 225's guidance on this term as well. See FRA, FRA Guide for Preparing Accident/Incident Reports (Guide), 23–24 (2011), available at <http://safetydata.fra.dot.gov/officeofsafety/ProcessFile.aspx?doc=FRAGuideforPreparingAccIncReportspubMay2011.pdf>, which states that all crossing locations within industry and rail yards, ports, and dock areas are considered to be highway-rail grade crossings.

Highway-Rail Grade Crossing Accident/Incident

A new definition of "highway-rail grade crossing accident/incident" would clarify the meaning of the phrase as used in part 219. The proposed definition is essentially identical to language describing highway-rail grade crossing impacts found in the definition

for "accident/incident" in FRA's accident and incident reporting regulations. See 49 CFR 225.5. As with the proposed definition for "highway-rail grade crossing," FRA believes maintaining consistency between part 219 and part 225 will minimize confusion for regulated entities.

Joint Operations

As discussed earlier, FRA is proposing to add a definition of "joint operations" to clarify the meaning of that term as used in the small railroad exception of § 219.3. This proposed definition, which is not intended to make any substantive changes or to create any additional burdens on small railroads, would define joint operations as "rail operations conducted by more than one railroad on the same track (except for certain minimal joint operations necessary for the purpose of interchange), regardless of whether such operations are the result of contractual arrangements between the railroads, order of a governmental agency or a court of law, or any other legally binding directive." FRA interprets the phrase "rail operations" in this definition broadly, so that it would encompass dispatching and other types of operations. For example, a railroad that has fewer than sixteen covered employees but dispatches trains for another railroad would be considered to have joint operations with that railroad.

A railroad entering another railroad's yard to perform switching operations would also constitute joint operations. For purposes of this definition, railroads that operate on the same track would not be conducting joint operations if their respective operations are absolutely separated by physical means, such as a split rail derail or the removal of a section of rail, and there is no physical possibility that the railroads' respective operations could overlap on the same track. However, this exclusion from joint operations would not apply when one railroad merely agrees, whether informally or by contract, not to engage in operations on the same track as another railroad, or when railroad operations are only temporally separated because they operate over the same track at different times of the day.

The proposed definition would also exclude certain minimal joint operations necessary for the purpose of interchange, so long as: (1) The maximum authorized speed for operations on the shared track does not exceed 20 mph; (2) operations are conducted under restricted speed (operating rules that require every locomotive and train to proceed at a speed that permits stopping within one

half the range of vision of the locomotive engineer); (3) the maximum distance for operations on the shared track does not exceed three miles; and (4) any operations extending into one of the railroad's yards are for the sole purpose of setting out or picking up cars on a designated interchange track. By excluding the above operations from its proposed "joint operations" definition, FRA would focus scarce agency resources on the operations with the greatest safety risk.

Maintenance-of-Way Activities or MOW Activities, Maintenance-of-Way Employee or MOW Employee

As discussed earlier, FRA would add definitions of "maintenance-of-way activities or MOW activities" and "maintenance-of-way employee or MOW employee" as part of its proposed expansion of part 219 to cover employees who perform MOW activities.

FRA's proposed definition of MOW employee would cover any employee (as defined in proposed § 219.5, this would include volunteers and probationary employees) who performs MOW activities for a railroad or a contractor to a railroad. As discussed above, MOW activities would be defined to include (in part) activities such as the inspection, repair, or maintenance of track, roadbed, or electric traction systems and the operation of on-track or fouling equipment utilized for the inspection, repair, or maintenance of track, roadbed, or electric traction systems.

On-Track or Fouling Equipment

FRA would add a new definition of "on-track or fouling equipment" that would include any railroad equipment positioned on or over the rails or fouling a track. In this proposed definition, FRA provides examples of what would be considered on-track or fouling equipment, including trains, locomotives, cuts of cars, single cars, motorcars, yard switching trains, work trains, inspection trains, track motorcars, highway-rail vehicles, push cars, or other roadway maintenance machines (such as ballast tamping machines), if this equipment is positioned on or over rails or is fouling a track.

Other Impact Accident

FRA would add a definition of "other impact accident" to clarify the meaning of the phrase as it is used in FRA's proposed amendment to the definition of "impact accident." As defined, an "other impact accident" would include any accident/incident involving contact

between on-track or fouling equipment that is not otherwise classified as another type of collision (e.g., a head-on collision, rear-end collision, side collision, raking collision, or derailment collision). This definition would also include impacts in which single cars or cuts of cars are damaged during operations involving switching, train makeup, setting out, etc.

Person

A new definition of “person” would clarify that this term means an entity of any type covered under 1 U.S.C. 1, including, but not limited to, the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad, such as a service agent performing functions under part 40 of this title; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor. While similar to the definition currently found in § 219.9, under this proposed definition a “person” would specifically include an independent contractor who provides goods or services to a railroad, such as a service agent (e.g., a collection site, laboratory, Substance Abuse Professional (SAP), or other entity) that provides alcohol and drug testing services to a railroad subject to part 219 and part 40. *See* 49 CFR part 40, subpart Q—Roles and Responsibilities of Service Agents. This definition would be added for clarification purposes only, since railroad service agents are already required to comply with both part 219 and part 40.

Plant Railroad

A new definition of plant railroad would clarify the meaning of that term as used in § 219.3. This proposed definition reflects FRA’s longstanding approach, consistent with its published policy statement referenced below, of excluding certain plant operations from the exercise of its jurisdiction.

In § 219.3, FRA would continue to except plant railroads, as defined in proposed § 219.5, from the requirements of this part. Although FRA’s *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, The Extent and Exercise of FRA’s Safety Jurisdiction*, 49 CFR part 209, appendix A (FRA’s Policy Statement or the Policy Statement) already explains in detail when an entity’s operations qualify for plant railroad status, FRA proposes to incorporate this language into a new

definition of “plant railroad” to make these qualifications easier to find. To enable better understanding of this term, the proposed definition would also incorporate language clarifying when an entity’s operations do *not* qualify for plant railroad status. The proposed definition of the term “plant railroad” is consistent with FRA’s Policy Statement that provides that the agency will exercise its safety jurisdiction over a rail operation that moves rail cars for entities other than itself because those movements bring the track over which the entity is operating into the general system. FRA’s Policy Statement specifically provides that “operations by the plant railroad indicating it [i]s moving cars on . . . trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire)” brings plant track into the general system and thereby subjects it to FRA’s safety jurisdiction. This interpretation of the term “plant railroad” has been upheld in litigation before the U.S. Court of Appeals for the Fifth Circuit. *See Port of Shreveport-Bossier v. Federal Railroad Administration*, No. 10–60324 (5th Cir. 2011) (unpublished per curiam opinion).

Raking Collision

A new definition for “raking collision” would clarify that a raking collision occurs when there is a collision between parts, with the lading of a train on an adjacent track, or with a structure such as a bridge. Collisions that occur at a turnout are not considered raking collisions. The proposed definition is identical to the definition of raking collision contained in FRA’s guidance regarding accident/incident reporting. *See* FRA Guide for Preparing Accident/Incident Reports at 20 (Accident Reporting Guide).

Regulated Employee and Regulated Service

As discussed in section III.B of this preamble, FRA is proposing a new term “regulated employee.” As proposed, “regulated employee” would refer to all employees who are subject to part 219, including covered employees and MOW employees, and employees of a railroad or a contractor to a railroad who perform covered service or MOW activities. Another new proposed definition of “regulated service” would mean the duties which regulated employees perform that make them subject to part 219.

Responsible Railroad Supervisor

FRA would incorporate the description of “responsible railroad

supervisor” currently in § 219.302(d) into a new definition of this term.

Side Collision

As with “raking collision,” FRA proposes to add a definition of “side collision” taken from the Accident Reporting Guide. A side collision occurs when one consist strikes the side of another consist at a turnout, and includes collisions at switches or at railroad crossings at grade. *See* Accident Reporting Guide at 20.

Tourist, Scenic, Historic, or Excursion Operations That Are Not Part of the General Railroad System of Transportation

A new definition of “tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation” would clarify the meaning of that term as used in the proposed application provisions of § 219.3. The proposed definition clarifies that the phrase means a tourist, scenic, historic, or excursion rail operation that is conducted only on track used exclusively for that purpose (i.e., there are no freight, intercity passenger, or commuter passenger railroad operations on the track). If there are any freight, intercity passenger, or commuter passenger railroad operations on the track, the track is considered part of the general system, and the rail operation would not meet the definition of term as used in § 219.3. This proposed definition is consistent with FRA’s longstanding policy that excludes insular operations entirely from FRA’s safety jurisdiction and excludes non-insular operations from all but a limited number of Federal safety laws, regulations and orders. *See* 49 CFR part 209, Appendix A (defining the terms *insular* and *non-insular*).

Watchman/Lookout

FRA would add a definition of “watchman/lookout” identical to that in § 214.7 of its roadway worker regulations.

Revised Definitions

Covered Employee

The current definition of “covered employee” includes, in part, “a person who has been assigned to perform service in the United States subject to the hours of service laws (49 U.S.C. ch. 211) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.” FRA proposes to amend this definition to clarify that “person” includes employees, volunteers, and probationary employees, and by

updating its reference to the hours of service laws so that a “covered employee” would be defined as one “who is performing covered service under the hours of service laws at 49 U.S.C. 21101, 21104, or 21105 or who is subject to performing such covered service, regardless of whether the person has performed or is currently performing covered service.” FRA believes this proposed language is clearer than that in the current definition, and it also makes the reference to the hours of service laws consistent with that contained elsewhere in part 219. No substantive change to this definition is intended.

Covered Service

FRA would amend the definition of “covered service” to provide examples of the types of activities generally considered covered service and to refer to Appendix A of 49 CFR part 228, Requirements of the Hours of Service Act: Statement of Agency Policy and Interpretation. The proposed amendments are for clarification purposes only; no substantive change is intended.

FRA Representative

The definition of “FRA representative” would be amended to clarify that the term includes the oversight contractor for FRA’s Drug and Alcohol Program and the staff of FRA’s Associate Administrator for Railroad Safety.

Impact Accident

As discussed in section V.D of this preamble, the definition of “impact accident” would be amended to remove the exceptions for derailment collisions¹⁴ and raking collisions. FRA originally excepted derailment collisions and raking collisions from the definition of “impact accident” because it believed that these types of collisions were not normally caused by human-factors. See 50 FR 31539 and 31542, Aug. 2, 1985 and 54 FR 39647, Sep. 27, 1989.

FRA has since found that both derailment collisions and raking collisions can be caused by human-factors, such as alcohol and/or drug impairment. For example, a derailment collision could occur when a dispatcher fails to properly notify trains of a derailment, or when a crew does not operate its train at the proper speed after

such a notification. Similarly, a raking collision could occur when a train crew does not comply with the special handling instruction for a high-wide load or when cars are left standing on a track without sufficient clearance.

Additionally, FRA has found evidence that railroads sometimes improperly apply the exception for derailment collisions and raking collisions in situations involving true impact accidents. For example, railroads have sometimes claimed that PAT testing was not required because equipment from a train derailed just prior to what otherwise would be considered a head-on, rear-end, or side collision with other on-track equipment. FRA did not intend the exception for a derailment collision to apply when on-track equipment derailed immediately prior to striking other on-track equipment. FRA believes that these sorts of events should be classified as impact accidents. FRA has also found that the difference between side collisions and raking collisions is not understood by some railroads, who have erroneously claimed that accidents occurring at a turnout (switch) were raking collisions. For example, some railroads have claimed that a raking collision has occurred when a switch crew strikes cars they had previously left fouling a track or when a train operates out of a siding and strikes another train. These types of accidents, however, are actually side collisions or other impacts and should therefore be considered impact accidents.¹⁵ (FRA notes that currently under § 219.201(a)(1), a derailment collision would qualify as a Major Train Accident if it resulted in damage to railroad property of \$1 million or more.)

FRA does not anticipate that its proposal to remove the exceptions for derailment collisions and raking collisions would significantly increase PAT testing costs. FRA believes that the regulated employees involved in these collisions will often be excluded from PAT testing when a “railroad representative can immediately determine, on the basis of specific information, that the employee(s) had no role in the cause(s) or severity of the accident/incident.” See § 219.203(a)(3).

In order to improve clarity, FRA also proposes to restructure this definition by listing each type of impact accident separately. FRA would also incorporate its previous guidance that an impact

with a derail does not qualify as an “impact with a deliberately-placed obstruction, such as a bumping post,” since bumping posts are mostly permanent objects found at the end of a line, while derails are mobile and can easily be moved from place to place. See FRA, Alcohol and Drug Testing Regulations (Parts 219 and 40) Interpretive Guidance Manual (“Interpretive Guidance Manual”) 18 (September 2006), available at <http://www.fra.dot.gov/eLib/Details/L02799>.

FRA would also clarify that the definition of “impact accident” excludes the impact of rail equipment with “naturally-occurring obstructions such as fallen trees, rock or snow slides, livestock, etc.”

Medical Facility

FRA would add language to the definition of “medical facility” to reflect the main purpose for including this definition in this part; that is, that a medical facility is a hospital, clinic, physician’s office, or laboratory which can collect PAT testing specimens and address an individual’s post-accident medical needs. In order to improve consistency, FRA would also substitute “medical facility” wherever “treating facility” currently appears throughout part 219.

Railroad Property Damage or Damage to Railroad Property

The definition of “railroad property damage or damage to railroad property” would be clarified to mean damage to railroad property as calculated according to the FRA Guide for Preparing Accident/Incident Reports. Additional language from the Guide would clarify what costs must be included (damage to on-track equipment, signals, track, track structure, or roadbed; and labor costs including hourly wages, transportation costs, and hotel expenses) and excluded (damage to lading and the cost of clearing a wreck, although the cost of contractor services and of renting and operating machinery is included, as is the cost of any additional damage caused while clearing the wreck) when calculating railroad property damage to determine whether PAT testing is required under FRA’s regulations. These clarifications would be incorporated to enable easier compliance with this part, and no substantive changes are intended.

Train Accident

The definition of “train accident” would be amended to clarify that it refers to rail equipment accidents under § 225.19(c) and to specify that rail

¹⁴ Derailment collisions fall within the definition of “obstruction accidents” in FRA’s Accident Report Guide. See Accident Reporting Guide at 24. But for the purposes of part 219, this type of collision is referred to only as a derailment collision.

¹⁵ As discussed below, FRA is also proposing to clarify the part 219 definition of side collision, to specifically include accidents/incidents that occur at a switch or turnout. This is the same definition for a side collision as used in the Accident Reporting Guide.

equipment accidents include, but are not limited to, collisions, derailments, and other events involving the operation of on-track or fouling equipment.

Train Incident

The definition of “train incident” would be amended to clarify that it includes events involving the operation of on-track or fouling equipment that results in a casualty, but in which damage to railroad property does not exceed the applicable reporting threshold.

Deleted Definitions

DOT Agency

The definition of “DOT agency” would be removed because it is being replaced by the proposed definition of “DOT, The Department, or DOT agency.”

General Railroad System of Transportation

The definition of “general railroad system of transportation” would be removed because FRA’s proposed amendments to the application section of this part (§ 219.3) would make this definition redundant.

Train

The definition of “train” would be removed because part 219 already contains definitions for “train accident” and “train incident” that specifically include on-track equipment (which includes trains).

Section 219.9—Responsibility for Compliance

Currently, this section contains provisions relating to compliance with part 219 and penalties for violations of part 219. FRA is proposing to amend this section by removing the language addressing penalty amounts in paragraph (a) and placing it in a new § 219.10, entitled “Penalties.” This organization would be similar to the approach taken in other FRA regulations (*see* 49 CFR parts 232, 238, and 239), and would make it easier for railroads to find specific provisions relating to either compliance or penalties.

Proposed paragraph (a) would clarify that while part 219 requirements are stated in terms of a railroad’s duty, the duty to meet part 219 requirements applies to any person performing a function required by part 219. This language would apply equally to the requirements of part 40, since § 219.701 requires all testing conducted under part 219 testing (except for PAT testing in subpart C) to comply with part 40. Also, existing paragraph (a) contains language defining the term “person” as

used in part 219. As discussed in the section-by-section analysis for § 219.5, FRA is proposing to move this definition of “person” to § 219.5 and amend it to clarify that it includes any entity who acts as a service agent for a railroad under part 40.

FRA is also proposing several minimal changes to the language contained in paragraphs (b)(1), (b)(2), and (c). These amendments are intended to increase the clarity of this section and not to make any substantive changes. For example, paragraph (b)(2) currently states that when an employee engaged in joint operations is required to participate in Federal PAT, reasonable suspicion, or reasonable cause testing and is then subject to adverse action allegedly arising from that testing (or an alleged refusal to participate in such testing), the other railroad (i.e., the railroad by which the employee is not directly employed) must provide to the employee any necessary witnesses and documents on a reasonable basis. FRA is proposing to amend this requirement to clarify that the other railroad must also provide such witnesses and documents to the regulated employee’s employing railroad.

Section 219.10—Penalties

As discussed immediately above, FRA is proposing to transfer the penalty provisions currently found in § 219.9 to a new § 219.10, entitled “Penalties.” This amendment is not intended to make any substantive changes to the penalty provisions, but is intended to increase the clarity and organization of part 219.

Section 219.11—General Conditions for Chemical Tests

This section contains various general provisions regarding FRA alcohol and drug testing requirements. FRA is proposing amendments to this section as described below.

Paragraph (a)

FRA would re-designate current paragraph (a) as paragraph (a)(1), and add new paragraph (a)(2). Paragraph (a) currently states that “[a]ny employee who performs covered service for a railroad is deemed to have consented to testing as required in subparts B, C, D, and G of this part; and consent is implied by performance of such service.” Proposed paragraph (a)(1) would amend this language to clarify that “[a]ny regulated employee who is subject to performing regulated service” is deemed to have consented to testing. This amendment is necessary because under proposed § 219.615(c)(1), a regulated employee can be required to

participate in random testing whenever the employee is on-duty and subject to performing regulated service, even if the employee is not performing regulated service at the time. FRA would also remove the language “and consent is implied by performance of such service,” as it believes this language is unnecessary and redundant. FRA would also amend this paragraph to clarify that performance of regulated service means consent to testing mandated by the peer prevention requirements of proposed subpart K.

New paragraph (a)(2) would clarify that regulated employees required to participate in Federal testing under part 219 must be on-duty and subject to performing regulated service at the time of a breath alcohol test or urine specimen collection. This requirement would not apply to the pre-employment drug testing of applicants for regulated service positions.

Paragraph (b)

Paragraph (b)(1) would be amended to clarify that regulated employees must participate in Federal testing as required by part 219 and as implemented by a representative of the railroad or an employing contractor.

Paragraph (b)(2) currently provides that “[i]n any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s).” This provision would be amended to replace “has sustained a personal injury” with “is suffering a substantiated medical emergency,” as certain medical emergencies that do not involve a personal injury (e.g. a stroke) may necessitate prioritizing medical treatment over testing. New language would further clarify that a medical emergency is an acute medical condition requiring immediate medical care, and a railroad may require an employee to substantiate a medical emergency by providing verifiable documentation from a credible outside professional substantiating the emergency situation within a reasonable period of time.

Paragraph (c)

FRA is proposing minor amendments throughout existing paragraph (c) to reflect the updated terminology proposed in this NPRM (e.g., regulated employee, medical facility) and to account for FRA’s proposal to separate reasonable cause and reasonable suspicion testing into two separate subparts.

Paragraph (d)

This paragraph, which currently requires an employee who is tested under either subpart C (PAT testing) or subpart H (which applies part 40 procedures to part 219 testing except for PAT tests) to execute a consent form upon request, conflicts directly with the Department's specific prohibition on the use of consent forms in § 40.27. To resolve this conflict, FRA proposes to remove the reference to subpart H in this paragraph, thus making execution of a consent form an available option only for PAT testing under subpart C.

Paragraph (e)

Paragraph (e) currently provides that nothing in part 219 may be construed to "authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing." FRA is proposing to amend this paragraph by re-designating this language as paragraph (e)(3), and by adding new paragraphs (e)(1) and (e)(2).

Proposed paragraph (e)(1) would clarify that a regulated employee notified of his or her selection for Federal testing under part 219 must cease to perform his or her assigned duties and proceed to the testing site as soon as possible *without adversely affecting safety*. For example, a train crew selected for random testing would not be required to proceed immediately to the testing site if the crew had received special instructions to remain on the train and protect it until a relief crew arrived. In such a situation, FRA would not expect the train crew to violate their specific instructions, and random testing would occur only after the crew was relieved. This language is currently contained in § 219.701(c), but FRA believes it belongs more appropriately in § 219.11 as it is a general condition regarding Federal tests. Similarly, paragraph (e)(2) would further specify that a railroad must ensure that the absence of a regulated employee from his or her assigned duties for testing does not adversely affect safety.

Paragraph (f)

Under current paragraph (f), any railroad employee (as discussed earlier, the term "employee" would include volunteers and probationary employees of a railroad or a contractor to a railroad) who performs service for a railroad who dies within 12 hours of an accident or incident is deemed to have consented to the removal of specimens for the purpose of PAT testing under part 219. FRA is proposing to amend this paragraph by replacing the word

"service" with the word "duties." This change is intended to make it clear that any individual who performs duties for a railroad, regardless of whether or not those duties are regulated service (covered service or MOW activities), is deemed to have consented to the removal of specimens for PAT testing. FRA is also proposing other clarifying amendments to this paragraph (i.e., that consent is implied by the performance of duties for the railroad since no consent form is required). No substantive changes are intended.

Paragraph (g)

Paragraph (g) currently requires at least three hours of supervisor training regarding the signs and symptoms of alcohol and drug use and the qualifying criteria for PAT testing under subpart C. This training must include (at a minimum) "information concerning the acute behavioral and apparent physiological effects of alcohol and the major drug groups on the controlled substances list." FRA is proposing to amend this existing training requirement to incorporate supervisory training on the signs and symptoms of "other impairing drugs," since drugs that are not controlled substances can also have "acute behavioral and apparent physiological" effects.

FRA is also proposing to amend this paragraph by removing the three hour duration requirement (a design standard) and replacing it with a requirement that supervisors demonstrate their understanding of the training at its conclusion (a performance standard). Supervisors could do so through either a written or oral examination, which must contain questions related to both the PAT testing regulations of subpart C and the signs and symptoms of alcohol and drug influence, intoxication, and misuse. FRA believes the proposed amendment would improve the required supervisor training by making it based on a performance standard rather than a design standard. *See* Office of Management and Budget, Circular A-4, 8 (Sep. 17, 2003) (discussing performance standards as opposed to design standards). Currently, the three hour duration requirement does not actually ensure that a supervisor has understood the contents of the training. Under the proposed amendment, railroads would have the flexibility to make the training as long—or short—as necessary to produce supervisors who could demonstrate their understanding of the requirements. Overall, FRA believes that the effectiveness of the training is better measured by the

outcomes it produces, as opposed to the amount of time it lasts.

Paragraph (h)

FRA is proposing only a minor editorial revision to paragraph (h) to delete an unnecessary paragraph reference.

Section 219.12—Hours of Service Laws Implications

FRA is proposing a new section § 219.12 to clarify the relationship between the alcohol and drug testing requirements of part 219 and the HOS requirements of 49 U.S.C. ch. 211.

Paragraph (a)

Proposed paragraph (a) clarifies that HOS limitations do not excuse a railroad from conducting PAT or reasonable suspicion testing. These types of tests must be performed regardless of HOS requirements because they are triggered by specific unpredictable events that indicate the possible existence of a safety issue related to alcohol or drug use. When an event occurs that mandates PAT or reasonable suspicion testing, determining the cause of the event is of greater safety concern than compliance with the HOS requirements. Thus, this proposed paragraph provides that if a railroad establishes that excess service under the HOS laws is caused solely by the railroad's need to complete required PAT or reasonable suspicion testing, that the railroad used reasonable due diligence in completing the required PAT or reasonable suspicion testing, and that the railroad completed the collection within the time limits of § 219.203(d) (for PAT testing) or § 219.305 (for reasonable suspicion testing), FRA will not take enforcement action for the excess service. The railroad would, however, still be required to file an excess service report

While technically a new part 219 requirement, this language would incorporate past FRA guidance on the impact of PAT testing and reasonable suspicion testing on HOS limitations. *See* Compliance Manual 2.3.

Paragraph (b)

As with PAT and reasonable suspicion testing, reasonable cause testing is triggered by the occurrence of a specific unpredictable event (a train accident, train incident, or rule violation), the cause or severity of which may be linked to a safety issue involving alcohol or drug use by a regulated employee. FRA would therefore not pursue an HOS violation if the excess service was caused solely by a railroad's decision to conduct

reasonable cause testing, so long as the railroad used reasonable due diligence to complete the test and did so within the time limitations of proposed § 219.407 (i.e., within eight hours of the observation, event or supervisory notification that was the basis for the test). The crucial difference between incurring excess service to conduct PAT or reasonable suspicion testing as compared to reasonable cause testing, is that reasonable cause testing, unlike both PAT and reasonable suspicion testing, is authorized, but not required by part 219. For this reason, proposed paragraph (b) clarifies that a railroad would be allowed to, but is not required to, exceed HOS limitations to perform reasonable cause testing. The railroad would, however, still be required to file an excess service report.

Paragraph (c)

Proposed paragraph (c) clarifies that random tests must be handled differently from the other types of tests discussed above, since random tests are timed and planned in advance. When conducting random alcohol and drug tests, compliance with HOS requirements must take precedence since the timing of a random test is predictable and is not triggered by a potential safety concern. With one exception, railroads must schedule random tests with sufficient time for completion within an employee's HOS limitations. The only exception to this general rule is if an employee's random drug test requires additional time to complete because of the need to conduct a directly observed collection (see § 40.67). In such direct observation situations, FRA would allow completion of the test to exceed the employee's HOS limitations not because the random test was unplanned, but because the occurrence of the direct observation was unpredictable and indicative of the fact that the employee may be trying to cheat the test. As with the other types of tests described above, to not have an HOS penalty assessed, a railroad must show that any excess service was caused solely by the need to respond to a direct observation, must complete the random test as soon as practicable, and must report any excess service to FRA. FRA would also amend this paragraph to prohibit a railroad from placing a regulated employee on duty solely for the purpose of conducting a Federal random test.

Paragraph (d)

Similar to proposed paragraph (c)'s requirements related to random tests, proposed paragraph (d) would clarify that railroads must schedule follow-up

tests, which are also planned events, with sufficient time to allow testing to be completed within a covered employee's HOS limitations. A railroad may place an employee on-duty solely for the purpose of a follow-up test if the employee is subject to being called for duty, with the caveat that an employee may be placed on duty for a follow-up alcohol test *only* if the employee's return-to-duty agreement requires total abstention from alcohol use. This exception is necessary because absent such an agreement, an employee may legitimately use alcohol when not prohibited by § 219.101 (that is, when not on-duty, not within four hours of reporting for duty, and not after receiving notice to report). In such a case, a follow-up test for alcohol could result in an employee being penalized for legitimate alcohol use. FRA anticipates few instances where an employee will be placed on-duty solely for the purpose of follow-up testing, but a railroad that chooses to do so must document why the action was necessary and provide the documentation to FRA upon request.

Section 219.23—Railroad Policies

This section establishes the requirements for a railroad's Federal alcohol and drug testing policy. FRA is proposing to clarify the language in this section governing the following requirements: (1) the providing of written notice to a regulated employee whenever a Federal alcohol or drug test is required under part 219; (2) the use of DOT forms for FRA-mandated alcohol and drug tests; and (3) the educational materials employers must provide to employees. FRA would also conform the section's structure to reflect amendments proposed in this section and elsewhere in part 219.

Paragraph (a)

Paragraph (a) currently requires a railroad to provide "clear and unequivocal written notice" to an employee when an alcohol or drug test is being required under FRA regulations. While the use of DOT testing forms satisfies this notice requirement, FRA is proposing several clarifications. First, FRA is proposing to amend this paragraph to clarify that the written notice must be provided by either a railroad employee or a designated service agent (e.g., by a collector providing a DOT form to an employee for an FRA random test) and must include the basis for the test (this requirement is currently contained in paragraph (b) of this section). Second, FRA would replace the phrase "violation of a specified operating/

safety rule enumerated in subpart D of this part" with the simpler phrase "reasonable cause." Finally, FRA would clarify that the notice requirements for PAT tests must be handled differently since notice of PAT tests may be provided only through use of a FRA-specific PAT testing form.

Paragraph (b)

The last sentence of current paragraph (b) provides that use of a DOT form is prohibited for a non-Federal test. This provision, amended to clarify that use of the DOT form is also prohibited for PAT testing, remains in revised paragraph (b). FRA also proposes to amend this paragraph to specify that the FRA PAT testing form may not be used for any other type of test. This is not a new requirement, but is currently found in the final sentence of paragraph (c) of this section.

Paragraph (c)

Proposed paragraph (c) discusses various requirements related to part 219 educational materials that must be provided to regulated employees. These requirements are found in existing paragraph (d) of this section. FRA is proposing minor amendments to clarify the language in this section and to provide railroads greater flexibility in making the required educational materials available to employees. As proposed, a railroad could post these materials continuously in an easily visible location at a designated reporting place for regulated employees, provided the railroad also supplies copies to any labor organizations representing a class or craft of regulated employees (if applicable). Alternatively, a railroad could provide these materials in some other manner that ensures that regulated employees can find and access them, such as posting them on a Web site accessible to all regulated employees. Through longstanding informal guidance, FRA has allowed railroads to post educational materials in easily visible locations. Thus, this proposed amendment would incorporate this guidance into the rule text. Because MOW employees are going to be newly subject to part 219 requirements and may be unfamiliar with the regulation, for three years after the effective date of the final rule, FRA is proposing to require a hard copy of the educational materials to be provided to each MOW employee. FRA is also proposing new language in this paragraph specifying that the requirement to provide educational materials to regulated employees would not apply to applicants for a regulated service position who either refuse to participate

in pre-employment testing or who have a pre-employment test result indicating a part 219 violation. This requirement is currently in § 219.104(a)(ii), but FRA believes it belongs more appropriately in this section, as it discusses the applicability of § 219.23.

Paragraph (d)

Currently, paragraph (e) of this section contains requirements governing the content of the educational materials that a railroad must provide to its covered employees. FRA is proposing to move these requirements to proposed paragraph (d). New language in the introductory text of paragraph (d) would clarify that the educational materials that must be made available to employees are the materials that are specified in proposed paragraph (c) of this section.

While paragraph (e)(1) currently requires training materials to include the “identity” of the person designated to answer employee questions about the materials, proposed paragraph (d)(1) would include this requirement but replace the word “identity” with “position title, name, and means of contacting” that individual. Similarly, language currently in paragraph (e)(2) would be moved to proposed paragraph (d)(2) and amended to require educational materials to identify each class or craft subject to part 219 (e.g., engineers, conductors, MOW employees, signal maintainers, train dispatchers) instead of using less specific terms such as “regulated employees” or “covered employees.”

Language currently found in paragraph (e)(3) would be amended in proposed paragraph (d)(3) to replace “safety-sensitive” with “regulated service” and to require the educational materials provided to regulated employees to distinguish between FRA’s prohibitions on alcohol use and on drug use. FRA proposes to distinguish between the two prohibitions by explicitly stating that a railroad must provide sufficient information about regulated service that regulated employees perform so that a regulated employee knows when he or she must be in compliance with part 219’s prohibition regarding alcohol use. This amendment is necessary because unlike part 219’s prohibition on *alcohol* use, which applies when an employee is on duty and required to perform or is available to perform regulated service, FRA’s prohibitions on *drug* use apply at all times, not just when a regulated employee is on duty and performing (or subject to performing) regulated service.

Existing paragraph (e)(5) would be further amended in proposed paragraph

(d)(5) to simplify the reference to reasonable cause testing authority provided by subpart E.

FRA would also move the language in paragraph (e)(12) to proposed paragraph (d)(12) and amend it to require railroads to provide educational materials on both alcohol and drug misuse.

Section 219.25—Previous Employer Drug and Alcohol Checks

This new section would direct railroads and contractors to § 40.25, which requires employers to request and review the drug and alcohol testing record of any individual they intend to use to perform DOT safety-sensitive functions. This requirement applies only to a railroad or contractor’s direct employees. For example, a railroad would not be required to check the alcohol and drug testing record of the direct employees of a contractor, since this responsibility would belong to the contractor. While § 219.701 requires all testing under part 219 (except for PAT testing under subpart C) to be completed in accordance with the requirements of part 40, FRA’s experience has been that railroads sometimes overlook the drug and alcohol background check required by § 40.25. The proposed amendment would address this concern by specifically reminding railroads and contractors of the § 40.25 requirement.

This section would also remind railroads that they must comply with the prior alcohol and drug conduct requirements of § 240.119(c) for certified locomotive engineers and § 242.115(e) for certified conductors. Under these sections, a railroad determining whether a person may be or may remain certified as a locomotive engineer or conductor must consider certain part 219 violations and refusals that occurred within a period of sixty consecutive months (five years) prior to the review of the individual’s records. As with the reference to § 40.25, these references to parts 240 and 242 are intended only to remind railroads of their existing responsibilities, not to make any substantive changes.

Subpart B—Prohibitions

Section 219.101—Alcohol and Drug Use Prohibited

Paragraph (a)(1)

Section 219.101 contains FRA’s general prohibitions on the use and possession of alcohol and drugs by railroad employees. Currently, paragraph (a)(1) prohibits the use and possession of both alcohol and controlled substances while a covered employee is assigned to perform covered service. Existing § 219.103

provides an exception to the prohibition on the use and possession of controlled substances, so long as certain conditions are met regarding the controlled substance’s prescription or authorization by a medical practitioner.

While not specifically proposed in this NPRM, FRA is soliciting public feedback on whether it should consider removing part 219’s longstanding prohibitions against the on-duty possession of alcohol and controlled substances. These prohibitions were originally intended to make FRA’s alcohol and drug requirements similar to those in Rule G, a longstanding railroad operating rule which prohibited the on-duty use and possession of alcohol, and was later amended to address the use and possession of controlled substances. *See* 49 FR 24266, June 12, 1984. As currently written, however, the FRA’s prohibition against the possession of controlled substances applies not only to the possession of illicit drugs (e.g., PCP, cocaine), but also to many prescription drugs which have legitimate medical uses (e.g., muscle relaxants, pain relievers), but have been classified by the Drug Enforcement Administration (DEA) as controlled substances because of their potential for abuse. Therefore, strictly read, FRA’s prohibition against the on-duty possession of all controlled substances would prohibit the on-duty possession of many common prescription drugs, unless that possession was incident to proper use of the prescribed drug as provided for by § 219.103.

Similarly, because of its roots in Rule G, part 219 currently prohibits the on-duty possession of alcohol. Strictly read, this prohibition would ban the on-duty possession of many commonly sold over-the-counter cough and cold remedies that contain alcohol. FRA solicits comment on whether part 219 should continue to prohibit the on-duty possession of all controlled substances and alcohol, noting that no other DOT agency prohibits the on-duty possession of both controlled substances and alcohol.

While FRA does not want to prohibit the use of legal prescription drugs or over-the-counter drugs by regulated employees, provided that such use complies with the requirements of § 219.103 (discussed below), FRA is specifically seeking public comment on whether removing the prohibitions on possession of controlled substances and/or alcohol would have an adverse effect on railroad safety. Removing the prohibition on possessing controlled substances or alcohol would not affect a railroad’s ability to take action under its own authority if a railroad employee

was found in possession of alcohol or a controlled substance in violation of a railroad operating rule, such as Rule G. *See id.*

FRA would also amend paragraph (a)(1) to prohibit the use or possession of alcohol or any controlled substance by regulated employees while they are “on-duty and subject to performing regulated service for a railroad.” This proposed language is intended to clarify that this prohibition applies whenever a regulated employee is subject to performing regulated service for a railroad, not only when the employee is actually performing regulated service.

Paragraph (a)(4)

Paragraph (a)(4) applies to regulated employees who have a breath or blood alcohol concentration of 0.02 or greater but less than 0.04 on a Federal test. Specifically, current paragraph (a)(4) prohibits an employee whose Federal test indicates an alcohol concentration of 0.02 or greater, but less than 0.04, from performing covered service until the start of his or her next regularly scheduled duty period, but not less than eight hours from the administration of the test. Since an alcohol concentration of 0.02 or greater but less than 0.04 is not a violation of § 219.101, an alcohol test result in this range may not be used for locomotive engineer or conductor certification purposes under part 240 or part 242. FRA is proposing to redesignate the current text of paragraph (a)(4) as paragraph (a)(4)(i), and add a new paragraph (a)(4)(ii) to clarify that a railroad is not prohibited from taking further action under its own authority against an employee whose Federal test result indicates an alcohol concentration of 0.02 or greater but less than 0.04, since a result in this range indicates the presence of alcohol in the employee’s system. This new language is taken from FRA guidance and is intended for clarification purposes only, not to make any substantive change to the regulatory requirement. *See* Compliance Manual 3.5.2.

Paragraph (a)(5)

Currently, paragraph (a)(5) states that a test result with an alcohol concentration below 0.02 must be considered negative and is not evidence of alcohol misuse. It also provides that a railroad may not use a Federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority, and that a railroad may compel cooperation in additional breath or body fluid testing only if it has an independent basis for doing so.

FRA is proposing to add new language to this paragraph clarifying that an independent basis for subsequent company authority alcohol testing would exist only when, after a negative FRA reasonable suspicion alcohol test result, an employee exhibits additional or continuing signs and symptoms of alcohol use. (A railroad may *not*, however, conduct an additional FRA test in such situations.) If an independent basis for testing exists and a subsequent company authority alcohol test indicates a violation of a railroad alcohol operating rule, the company test result is independent of the Federal test result and must stand on its own merits. FRA is proposing this amendment, which is taken from FRA guidance, to allow railroads to perform company authority alcohol tests in the infrequent and limited circumstances where an employee continues to exhibit signs and symptoms of alcohol use even after the employee’s FRA test result indicates an alcohol concentration below 0.02.

Section 219.102—Prohibition on Abuse of Controlled Substances

Currently, this section prohibits employees performing covered service from using a controlled substance at any time, except as permitted by § 219.103. FRA’s only proposed amendment to this section would substitute the term “regulated employee” for “employee” to reflect the expansion of this part to cover employees who perform MOW activities.

Section 219.103—Use of Prescription and Over-the-Counter Drugs

Despite its title, “Prescribed and over-the-counter drugs,” § 219.103 currently covers only a small portion of prescription drugs and no over-the-counter (OTC) drugs, since most prescription and OTC drugs are not Schedule II–V controlled substances. FRA is not proposing any changes to this section, which has not been changed since its implementation in 1985. Instead, FRA is asking for information in response to several questions. How do railroads administer § 219.103’s requirements? Does this section effectively address the safety concerns raised by the use of prescription and OTC drugs by individuals subject to part 219? What, if any, amendments should FRA make to address the increase in prescription and OTC drug use over the last 25 years? Are any amendments necessary to address FRA’s proposed addition of employees who perform MOW activities?

Section 219.104—Responsive Action

FRA is proposing both clarifying and structural changes to this section, which addresses what responsive action a railroad must take when it determines that an employee subject to part 219 has either violated certain provisions part 219 (or the alcohol or drug misuse rule of another DOT agency) or refused to provide breath or body fluid specimens under a mandatory provision of the regulation. Specifically, FRA proposes to clarify that: (1) The responsive action requirements of this section (except for the right to a hearing under proposed paragraph (c) *do* apply to a regulated service applicant who has refused to take a pre-employment test, as determined by the provisions of part 40; (2) the notice a railroad must provide to a regulated employee before removing him or her from regulated service must be in writing; and (3) that regulated employees have the right to request a hearing under this section following an alleged violation of § 219.101 or § 219.102.

Paragraph (a)

FRA proposes to add a new sentence to paragraph (a)(2) specifying that the procedures and rights in this section apply to reasonable cause tests conducted under FRA authority, but not to reasonable cause tests conducted under a company’s own authority. This would not be a substantive change, only a reminder to railroads of one important distinction between a reasonable cause test conducted under FRA authority and one conducted under company authority. FRA also proposes to remove the word “mandatory” as used in paragraph (a)(2) to describe the provisions under which a railroad may require an employee to participate in alcohol or drug testing, since neither reasonable cause or pre-employment alcohol testing are mandatory under part 219. If, however, a regulated employee (or applicant for regulated service) refuses a reasonable cause or pre-employment alcohol test that has been *conducted under FRA authority*, the employee would be subject to the consequences for unlawful refusals found in this section.

Currently, paragraph (a)(3) explains that the procedures and rights in § 219.104 and the informational requirements in § 219.23 do not apply: (1) When a test is conducted under other than part 219 authority (e.g., a test under a company medical policy); and (2) when an applicant refuses to participate in a pre-employment test or otherwise has a positive pre-employment test indicating the misuse

of alcohol or controlled substances. FRA is proposing to move the language addressing § 219.23 into § 219.23 itself, and to move the remainder of this paragraph to a new paragraph (e), which would contain provisions specifically discussing the applicability of this section.

Paragraph (b)

Currently, paragraph (b) requires a railroad, prior to “withdrawing” an employee from covered service, to provide notice to the employee of the reason for his or her withdrawal. FRA would clarify that this notice must be in writing. A railroad may initially give an employee verbal notice, provided the railroad follows up as soon as practicable with an official written notice. For consistency of language throughout this section, FRA is also proposing to replace “withdrawing” in this paragraph with the term “removing.” FRA would also require the notice to inform the employee that he or she is prohibited from performing any DOT safety-sensitive functions until he or she successfully completes the evaluation, referral, and treatment processes required for return-to-duty under part 40. FRA believes this information would discourage employees from job hopping to try to avoid their return-to-duty requirements. A railroad may also use this notice to comply with § 40.287, which requires an employer to provide to each employee who violates a DOT drug and alcohol regulation a listing of SAPs readily available to the employee and acceptable to the employer, with names, addresses, and telephone numbers.

Paragraph (c)

Paragraph (c)(1) currently specifies that employees can request a hearing if they “[deny] that the test result is valid evidence of alcohol or drug use prohibited by this subpart.” FRA is proposing to remove this phrase in to make clear that the removal from duty and hearing procedures in this section also apply to violations of §§ 219.101 or 219.102 that have *not* been detected through testing (e.g., a refusal or a violation of the prohibition against possessing alcohol). This proposed amendment would clarify that an employee may demand a hearing for any violation of §§ 219.101 or 219.102, regardless of whether the alleged violation was based on a test result.

Similarly, FRA would amend paragraph (c)(4) to clarify that the statement that part 219 does not limit the procedural rights or remedies available (e.g., at common law or through an applicable bargaining

agreement) to an employee, applies to all violations of part 219, not just those based on test results.

Paragraph (d)

Currently, paragraph (d) provides that a railroad must comply with “the return-to-service and follow-up testing requirements, and the Substance Abuse Professional [SAP] conflict-of-interest prohibitions, contained in §§ 40.305, 40.207, and 40.209 of this title.” FRA would simplify this language by deleting these section citations and referring generally to the requirements in part 40 for SAP evaluations, the return-to-duty process, and follow-up testing.

Paragraph (e)

FRA is proposing to add a new paragraph (e), which would clarify when the requirements of this section do not apply.

Paragraph (e)(1) would contain the language currently in paragraph (a)(3)(i) stating that the requirements of this section do not apply to actions based on alcohol or drug testing that is not conducted under part 219.

Paragraph (e)(2) would clarify that the requirements in this section do *not* apply to Federal alcohol tests with a result less than 0.04. As discussed above in the analysis of § 219.101(a)(4), because a Federal alcohol test with a result below 0.04 is not a violation of § 219.101, a railroad is not required to take responsive action under this section. Under § 219.101(a)(4), the only consequence for a Federal test result between 0.02–0.039 is removal of the employee from regulated service for a minimum of eight hours. (This is because a test result in this range is evidence of alcohol use but not of impairment.) A railroad must therefore use its own authority for any other actions (e.g., any return-to-duty or follow-up tests for an alcohol test result below .04 must be administered under company authority).

Paragraph (e)(3) would contain new language clarifying that this section also does not apply to a locomotive engineer or conductor who has had an off-duty conviction for, or a completed state action to cancel, revoke, suspend, or deny a motor vehicle-driver’s license for operating while under the influence of or impaired by alcohol or a controlled substance. While parts 240 and 242 require an individual with such an off-duty conviction to undergo a substance abuse evaluation, an off-duty conviction is not a violation of § 219.101 or § 219.102.

Paragraph (e)(4) would contain new language clarifying that this section

does not apply to applicants who decline to participate in pre-employment testing and withdraw the application for employment prior to the commencement of the test (the determination of when a test commences is made according to the provisions of part 40).

Paragraph (e)(5) would clarify that the hearing procedures in paragraph (c) of this section do not apply to an applicant who tests positive or refuses a DOT pre-employment test.

Paragraph (e)(6) would clarify that an applicant who tests positive or refuses any DOT pre-employment test must complete the return-to-duty requirements in paragraph (d) before performing DOT safety-sensitive functions subject to the alcohol and drug regulations of any DOT agency. Under § 40.25(j), an employee who tested positive or refused to test cannot perform any DOT safety-sensitive functions until and unless the employee documents successful completion of the part 40 return-to-duty process.

Section 219.105—Railroad’s Duty To Prevent Violations

Paragraph (a)

Currently, paragraph (a) of this section provides that a railroad may not with “actual knowledge” permit an employee to remain or go on duty in covered service in violation of either § 219.101 or § 219.102. FRA is proposing to clarify when a railroad is deemed to have “actual knowledge” of such a violation. As proposed, actual knowledge would be limited to the knowledge of a railroad manager or supervisor in the employee’s chain of command. A manager or supervisor would be considered to have actual knowledge of a violation when he or she: (1) Personally observes an employee violating part 219 by either using or possessing alcohol, or by using drugs (observing potential signs and symptoms of alcohol/drug use would not by itself constitute actual knowledge); (2) receives information regarding a violation from a previous employer as part of a § 40.25 background check; or (3) receives an employee’s admission of prohibited alcohol possession or use or drug use.

Paragraph (b)

Although FRA is not proposing to amend paragraph (b) of this section, FRA is taking this opportunity to clarify what “due diligence” means in this paragraph’s requirement for a railroad to “exercise due diligence to assure compliance with §§ 219.101 and 219.102.” When FRA proposed to add

new paragraph (b), FRA stated its purpose as follows:

to describe the limitations on railroad liability with respect to the prevention of the violations of the Subpart B prohibitions. . . . In summary, the provisions require the railroad to exercise a high degree of care to prevent violations, but do not impose liability where, despite such efforts, an individual employee uses alcohol or drugs in a manner that is prohibited (and the railroad is not aware of the conduct).

54 FR 39649, Sep. 27, 1989. Paragraph (b) therefore places an affirmative duty on a railroad to use due diligence to prevent violations of § 219.101 or § 219.102, and a railroad that can show it has done so will have only limited liability under part 219 for the violations of its individual employees. Conversely, a railroad could be found to have violated § 219.105(b) if it did nothing after becoming aware that a regulated employee had an active substance abuse disorder that could manifest itself in actual violations of § 219.101 or § 219.102. The due diligence a railroad must exercise to prevent violations will vary on a case-by-case basis and railroads uncertain how this provision may apply in certain situations are encouraged to contact FRA for guidance.

Paragraph (c)

FRA is proposing to add new a paragraph (c) to this section, which would clarify that a railroad's alcohol and/or drug use education, prevention, identification, intervention, or rehabilitation programs or policies must be designed and implemented in such a way that they do not circumvent or otherwise undermine the requirements of part 219. It would also clarify that a railroad must make all documents, data, or other records related to such programs or policies available to FRA upon request. This paragraph would not establish a new power for FRA, but would merely clarify and explain FRA's authority to conduct inspections and investigations under 5 U.S.C. 20107.

Rule G Observations and Public Comment Requested

Currently, FRA guidance directs a railroad to require its supervisors to make and record a specified number of observations of covered employees for compliance with its operating rule on alcohol and/or drug prohibitions (e.g., Rule G), as part of its part 217 operational tests and inspections program. *See generally* § 217.9. These observations are often referred to as "Rule G observations." At a minimum, FRA guidance states that each quarter a railroad should conduct a number of

part 217 observations that equals the number of its covered employees. For example, if a railroad has 100 covered employees, it should conduct at least 100 observations per quarter. *See* Compliance Manual 11.3.3.2.

FRA requests public comment on whether § 219.105 should be amended to incorporate this guidance regarding Rule G observations. FRA is particularly interested in comment regarding both the safety benefits of requiring a specific number of Rule G observations and the costs and burdens of such a requirement. Also, to what extent are these observations already being performed throughout the railroad industry? FRA may ultimately decide to include a Rule G observation requirement in a final rule.

Section 219.107—Consequences of Unlawful Refusal

Currently, this section provides that an employee who refuses to provide breath or body fluid specimens when required by a mandatory provision of part 219 must be disqualified from performing covered service for nine months. FRA is proposing several clarifying amendments to this section.

Paragraph (a)

In paragraph (a), FRA would replace the term "disqualified" with "withdrawn" to distinguish between the withdrawal requirement of this section and the disqualification requirements for certified engineers in part 240 and certified conductors in part 242. (Similar amendments would also be made to paragraphs (c)–(e) of this section.) FRA would also clarify that provision of an adulterated or substituted specimen, as defined in part 40, is a refusal under part 219 and subject to the withdrawal requirements of this section. FRA would also remove the word "mandatory" which may be misleading because neither reasonable cause nor pre-employment alcohol testing are mandatory for railroads in part 219. However, a regulated employee (or applicant for regulated service) who refuses a reasonable cause test or a pre-employment alcohol test conducted under FRA authority has always been subject to the consequences for unlawful refusals found in this section.

Paragraph (b)

Currently, paragraph (b) requires a railroad, prior to withdrawing an employee from covered service, to provide notice to that employee both of the reason for his or her withdrawal and of the procedures available to the employee under § 219.104(c) to request

a hearing. FRA proposes to amend this paragraph to clarify that this notice must be in writing. A railroad may provide an employee with an initial verbal notice, but must follow this up as soon as practicable with an official written notice.

Paragraph (c)

Currently, paragraph (c) generally provides that a railroad with notice of an employee's withdrawal from covered service may not authorize or permit the employee to perform such service on its behalf. FRA would revise this paragraph to clarify that this withdrawal provision applies "only" to an employee's performance of regulated service, and not to the employee's performance of non-regulated service. FRA would also add an additional sentence clarifying that during the period of withdrawal, a railroad with notice of the withdrawal may not authorize or permit the employee to perform any regulated service on its behalf.

Paragraph (e)

Currently, paragraph (e) states that upon expiration of a mandatory nine month withdrawal period, an employee may return to covered service only under the conditions specified in § 219.104(d) and must be subject to follow-up testing as provided by that section. Because § 219.104(d) also requires return-to-duty testing, FRA proposes to amend paragraph (e) to clarify that the employee must also be subject return-to-duty testing. This proposed amendment is not intended to substantively change the existing requirement, only to clarify that § 219.104(d) requires both return-to-duty and follow-up testing.

Subpart C—Post-Accident Toxicological Testing

Section 219.201—Events for Which Testing is Required.

Paragraph (a)

Currently, this section defines the types of accidents or incidents for which PAT testing is required and states that a railroad must make a good faith determination as to whether an event meets the criteria for PAT testing. Specifically, existing paragraph (a) requires a railroad to conduct PAT testing after the following qualifying events: (1) major train accidents; (2) impact accidents; (3) fatal train incidents; and (4) passenger train accidents. FRA is proposing both to amend the criteria defining some of these qualifying events and to create a new qualifying event requiring PAT

testing, “Human-Factor Highway-rail Grade Crossing Accident/Incident.”

- Major Train Accidents

Paragraph (a)(1) defines a “major train accident” as any train accident meeting the part 225 reporting threshold that involves either: (1) a fatality; (2) a hazardous material release accompanied by either an evacuation or a reportable injury caused by the release; or (3) damage to railroad property of \$1,000,000 or more. (As discussed in the section-by-section analysis for § 219.5, FRA is proposing a new part 219 definition for “evacuation,” to clarify the meaning of that term as used in the definition of “major train accident.”) FRA is proposing two substantive amendments to the criteria for a major train accident.

First, FRA would clarify that the fatality in a major train accident can be “to any person,” regardless of whether the person is an employee of the railroad. For example, a train accident meeting the reporting threshold would qualify as a major train accident requiring PAT testing if it resulted in a fatality to an uninvolved bystander near the track.

Second, and as discussed in Section V.D of this preamble, FRA would increase the property damage threshold for major train accidents from \$1,000,000 to \$1,500,000. On November 19, 2008, the Association of American Railroads (AAR) petitioned FRA to increase the damage threshold for major train accidents to \$1,500,000 and the damage threshold for impact accidents to \$250,000.¹⁶ FRA last increased the property damage thresholds for major train accidents and impact accidents in January 1, 1995, when FRA increased the threshold for major train accidents from \$500,000 to \$1,000,000, and the threshold for impact accidents from \$50,000 to \$150,000. *See* 59 FR 7452, Feb. 15, 1994). In its petition, the AAR asserted that these thresholds needed to be raised again to account for inflation since 1994. In calculating its proposed thresholds, the AAR measured inflation both by the rail cost recovery index and the Gross Domestic Product, assuming an annual 4 percent increase.

FRA agrees with AAR that the property damage threshold for major train accidents should be increased to \$1,500,000 to account for inflation, and is proposing to increase that threshold accordingly. FRA utilized publically available price indices from the Bureau of Labor Statistics for comparison and

consistency: the Producer Price Index—All Commodities¹⁷ and the Consumer Price Index—All Urban Consumers Inflation Calculator,¹⁸ and also extrapolated an index for comparison from part 225, Appendix B—Procedure for Determining Reporting Threshold. FRA found that all three indices supported raising the major accident threshold from \$1,000,000 to \$1,500,000.

- Impact accidents

As discussed above, AAR also asked FRA to increase its railroad property damage threshold for impact accidents from \$150,000 to \$250,000. After consideration, FRA has decided to maintain its current impact accident threshold of \$150,000. Doing so will allow inflation to increase the number of events that qualify for PAT testing as impact accidents, which involve human error more than other types of PAT testing events. (For instance, impact accidents such as collisions between trains are usually due to human error. In contrast, major train accidents such as derailments are often due to track defects.) Conducting PAT testing for more impact accidents will allow FRA to identify a greater number of events involving human factor errors caused or contributed to by the misuse of alcohol or drugs.

While FRA is proposing to amend the § 219.5 definition of “impact accident” to remove the exceptions for raking collisions and derailment collisions, as discussed above, FRA is not proposing any amendments to the “impact accident” testing criteria found in this section.

- Fatal Train Incident

Currently, paragraph (a)(3) defines a “fatal train incident” as any train incident that results in a fatality to an on-duty railroad employee and that involves the operation of on-track equipment. FRA proposes to clarify that to qualify as a fatal train incident, the fatality must have occurred within 12 hours of the train incident, although the deceased employee need not have been performing regulated service at the time of the train incident. For example, the criteria for a fatal train incident would be met if the operation of on-track equipment involved a fatality to a mechanical employee, regardless of whether the employee was performing regulated service at the time of the train incident, so long as the fatality occurred

within 12 hours of the train incident’s occurrence.

- Passenger Train Accident

FRA is proposing to amend the definition of “passenger train accident” in this paragraph to be more consistent with the rest of this section. No substantive effects are intended.

- Human-Factor Highway-Rail Grade Crossing Accident/Incident

Currently, § 219.201(b) prohibits PAT testing after a “collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing,” even if the collision would otherwise qualify as a PAT testing event. As mentioned in section V.E of this preamble, FRA would narrow this exception by creating a new qualifying event, “Human-factor highway-rail grade crossing accident/incident” in paragraph (a)(5), which would specify *when* PAT testing would be required after a qualifying human-factor highway-rail grade crossing accident/incident. (In § 219.203 below, FRA discusses *who* would be subject to PAT testing after a qualifying human-factor highway-rail grade crossing accident/incident.)

This proposal is based in part on NTSB Recommendation R-01-17, in which the NTSB recommended that FRA narrow its exception for highway-rail grade crossing accidents to require PAT testing of any railroad signal, maintenance, or other employee whose actions at or near a grade crossing may have contributed to the cause or severity of a highway-rail grade crossing accident. The NTSB based this recommendation on its investigation of a 1999 highway-rail grade crossing accident at McLean, Illinois, in which an Amtrak train collided with an automobile, killing both the automobile driver and a passenger. The NTSB found that the automobile driver had no warning that a train was approaching, since the flashing lights and gates at the crossing had failed to activate. The NTSB concluded that the probable cause of this activation failure was a signal maintainer who, after taking the crossing equipment out of service for maintenance, had made repairs and then left without restoring the equipment back to operating status. Although the maintainer was directly responsible for the signal and gate failure, he was not subject to PAT testing because of the grade crossing control exception. *See* NTSB, Railroad Accident Report: Collision of Amtrak Train 304-26 with a Highway Vehicle at a Highway-Rail Grade Crossing McLean, Illinois September 26, 1999, NTSB/

¹⁶ A copy of AAR’s petition is available for review in the public docket of this rulemaking (docket no. FRA-2009-0039).

¹⁷ Bureau of Labor Statistics, Producer Price Index-Commodities, available at <http://data.bls.gov/cgi-bin/survey/most>.

¹⁸ Bureau of Labor Statistics, Consumer Price Index, available at <http://www.bls.gov/CPI/>.

RAR-01/03, PB2001-916303, Sep. 18, 2001, at v, available at <http://www.ntsb.gov/doclib/reports/2001/RAR0103.pdf>. Since the 1999 McLean collision, FRA has investigated other highway-rail grade crossing accidents in which the actions of railroad employees and contractors may have played a role. See FRA, Accident Investigation Report, HQ-2005-106, at 4 (available at http://www.fra.dot.gov/eLib/Find#p1_z5_IAC_kHQ-2005-106) and Accident Investigation Report, HQ-2006-12, at 4 (available at http://www.fra.dot.gov/eLib/Find#p1_z5_IAC_kHQ-2006-12).

FRA's proposed new qualifying event termed "human-factor highway-rail grade crossing accident/incident" would be in new paragraph (a)(5). Under proposed paragraph (a)(5)(i), PAT testing would be required after a highway-rail grade crossing accident/incident whenever a regulated employee interfered with the normal functioning of a grade crossing signal system, in testing or otherwise, without first providing for the safety of highway traffic that depends on the normal functioning of such a system. Because this language is adapted from the prohibition against such interference contained in FRA's grade crossing regulation (see 49 CFR 234.209), a grade crossing accident/incident involving a § 234.209 violation would qualify as a human-factor highway-rail grade crossing accident/incident for PAT testing.¹⁹ See FRA's Signal & Train Control Compliance Manual for additional guidance on the meaning of interference.²⁰

Under proposed paragraphs (a)(5)(ii) and (a)(5)(iii), PAT testing after a highway-rail grade crossing accident/incident would be required if the event

¹⁹ Section 234.209(b) states that "interference" includes (but is not limited to): (1) trains, locomotives or other railroad equipment standing within the system's approach circuit, other than normal train movements or switching operations, where the warning system is not designed to accommodate those activities; and (2) not providing alternative methods of maintaining safety for the highway user while testing or performing work on the warning systems or on track and other railroad systems or structures which may affect the integrity of the warning system.

²⁰ According to the Signal & Train Control Compliance Manual, "Interference is any condition that circumvents, hinders, impedes, or diminishes whatsoever the intended warning of a system, and may be accomplished by installing, repairing, replacing, operating, or manipulating a warning system component used in detecting the presence of or of displaying warning of a train, or indicating the operation of the warning system. There is no difference between accidental or intentional interference with respect to the enforcement of this [rule]." FRA, Signal & Train Control Compliance Manual: Part 234—Grade Crossing Signal System Safety, at 234-24, available at http://www.fra.dot.gov/eLib/Find#p1_z10_ICM_kSignal%20and%20Train%20Control.

involved violations of the flagging duties found in FRA's grade crossing regulations. See 49 CFR 234.105(c)(3)-(c)(2), 234.106, and 234.107(c)(1)(i). The sections referenced in these paragraphs permit trains to operate through malfunctioning grade crossings if an appropriately equipped flagger, law enforcement officer, or crewmember provides warning for each direction of highway traffic. For example, when a false activation occurs, § 234.107(c)(1)(i) requires flagging by an appropriately equipped flagger if one is available. Under proposed paragraphs (a)(5)(ii) and (a)(5)(iii), an employee who failed to comply with this flagging requirement would be subject to PAT testing if a highway-rail grade crossing accident/incident then occurred. Under paragraph (a)(5)(iv), FRA would further narrow its exclusion for highway-rail grade crossing accident/incidents by requiring PAT testing if a fatality of a regulated employee performing duties for the railroad was involved. As with fatal train incidents, a deceased regulated employee would be subject to PAT regardless of whether the employee was at fault. For example, a regulated employee would be subject to PAT testing if the employee died while operating an on-rail truck that collided with a motor vehicle at a highway-rail grade crossing, regardless of who was at fault for the collision.

Similarly, paragraph (a)(5)(v) would require PAT testing if a highway-rail grade crossing accident/incident involved a regulated employee whose violation of an FRA regulation or railroad operating rule may have played a role in the cause or severity of the accident/incident. While proposed paragraphs (a)(5)(i)-(iv) of this section would specify the circumstances under which PAT testing would be required for highway-rail grade crossing accidents/incidents involving human-factor errors, paragraph (a)(5)(v) would serve as a catch-all provision to require PAT testing for highway-rail grade crossing accidents/incidents that involve human-factor errors other than those specified in paragraphs (a)(5)(i)-(iv).

Paragraph (b)

Currently, paragraph (b) provides that no PAT testing "may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing." FRA would make conforming changes to this paragraph to allow PAT testing for human-factor highway-rail grade crossing accident/incidents.

Section 219.203—Responsibilities of Railroads and Employees

Currently, this section sets forth general requirements for both railroads and employees regarding PAT testing, by specifying which employees must be tested, when employees must be excluded from PAT testing, and the time and place of specimen collections. As discussed further below, FRA is proposing substantive amendments to this section to specify which employees must be tested in human-factor highway-rail grade crossing accidents/incidents. Structural revisions are also being proposed to increase the clarity and organization of this section.

Paragraph (a)—Employees Tested

Currently, paragraph (a) contains requirements regarding which employees must be tested after the various qualifying events. FRA is proposing to: (1) Reorganize and clarify this paragraph; and (2) add new language specifying which employees must be tested after a human-factor highway-rail grade crossing accident/incident.

Paragraph (a), Introductory Text

FRA would add introductory text in paragraph (a) stating that regulated employees must cooperate with the collection of PAT testing specimens. This existing requirement is currently found in the final sentence of paragraph (a)(1)(i).

Paragraph (a)(1)

Proposed paragraph (a)(1) would state that a regulated employee whose actions may have played a role in the cause or severity of a PAT testing qualifying event (e.g., an operator, dispatcher, or signal maintainer) must provide blood and urine samples for PAT testing, regardless of whether the employee was present or on-duty at the time or location of the qualifying event. This language is generally consistent with the existing language of this section except that as proposed, regulated employees who may not have been on-duty or present at the time of a qualifying event are subject to PAT testing. This difference reflects the proposed change to FRA's PAT testing recall provisions, discussed in the section-by-section analysis below for paragraph (e) of this section.

Paragraph (a)(2)

Proposed paragraph (a)(2) would specify that testing of the remains of an on-duty employee fatally injured in a qualifying event is required if the employee dies within 12 hours of the qualifying event as a result of such

qualifying event, regardless of whether the employee was performing regulated service, was at fault, or was a direct employee of a railroad, or a volunteer or contractor to a railroad. Part 219 already requires such fatality testing. *See* §§ 219.11(f) and 219.203(a)(4)(ii).

Paragraph (a)(3)

Proposed paragraph (a)(3) would contain requirements specifying which regulated employees must be tested for major train accidents. Paragraph (a)(3)(i) would clarify that all crew members of on-track equipment involved in a major train accident must be PAT tested, regardless of fault. This requirement already applies to all crew members of trains involved in a major train accident. *See* § 219.203(a)(3). Paragraph (a)(3)(ii) would require a regulated employee who is not an assigned crew member of an involved train or other on-track equipment to be PAT tested, if it can be immediately determined that the regulated employee may have played a role in the cause or severity of the major train accident.

Paragraph (a)(4)

Proposed paragraph (a)(4), which applies specifically to fatal train incidents, would state that the remains of an on-duty employee performing duties for a railroad who is fatally injured during the event must be tested, regardless of whether he or she was performing regulated service, was at fault, or was an employee or volunteer for a railroad or contractor to a railroad.

Paragraph (a)(5)

Proposed new paragraph (a)(5) would contain new language specifying which regulated employees must be PAT tested following human-factor highway-rail grade crossing accidents/incidents. Proposed paragraph (a)(5)(i) would clarify that under proposed § 219.201(a)(5)(i), only regulated employees who interfered with the normal functioning of a grade crossing signal system and whose actions may have contributed to the cause or severity of the event must be PAT tested. Proposed paragraphs (a)(5)(ii) and (a)(5)(iii) would clarify the testing requirements for human-factor highway-rail grade crossing accidents/incidents under proposed § 219.201(a)(5)(ii) and (iii). These paragraphs specify that in the event of a grade crossing activation failure, PAT testing would be required if a regulated employee responsible for flagging (either flagging highway traffic or acting as an appropriately equipped flagger as defined in § 234.5), or an on-site regulated employee directly responsible for ensuring flagging, either

fails to do so, or contributes to the cause or severity of the accident/incident.

Proposed paragraph (a)(5)(iv) would clarify that, for human-factor highway-rail grade crossing accidents/incidents under § 219.201(a)(5)(iv), the remains of the fatally-injured regulated employee(s) (as defined in § 219.5) must be tested.

Proposed paragraph (a)(5)(v) would clarify that, for human-factor highway-rail grade crossing accidents/incidents under § 219.201(a)(5)(v), only a regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have contributed to the cause or severity of the event must be tested.

Paragraph (a)(6)

Proposed paragraph (a)(6) would reword the requirement currently in § 219.203(a)(3), which states that a railroad must exclude from PAT testing an employee involved in an impact accident or passenger train accident with injury, or a surviving employee involved in a fatal train incident, if the railroad immediately determines that the employee had no role in the cause or severity of the event. In making this determination, a railroad must consider the same immediately available information it considers in determining whether an event qualifies for PAT testing under § 219.201. Proposed paragraph (a)(6) would similarly exclude an employee who survives a human-factor highway-rail grade crossing accident/incident. In contrast, proposed paragraphs (a)(6)(i) and (a)(6)(ii) would clarify that a regulated employee who has been involved in a major train accident or any employee who has been fatally injured in a qualifying event while on-duty must be subject to PAT testing.

Paragraph (b)—Railroad Responsibility

Proposed paragraph (b)(1) would incorporate an amended version of language currently contained in paragraph (a)(1)(i), under which a railroad must take all practicable steps to ensure that each regulated employee who is subject to PAT testing provides specimens as required, including a regulated employee who may not have been present or on-duty at the time of the PAT testing event, but who may have played a role in its cause or severity. Including such regulated employees who may not have been present or on-duty at the time of the qualifying event reflects a proposed change to FRA's PAT testing recall provisions, as discussed below in paragraph (e) of this section.

Paragraph (b)(3) would state that FRA PAT testing takes precedence over any

toxicological testing conducted by state or local law enforcement officials. This would not be a new requirement, since it incorporates FRA guidance that testing performed by local law enforcement must not interfere with FRA PAT testing. *See* Interpretive Guidance Manual at 20.

Paragraph (c)—Alcohol Testing

Paragraph (c) would contain language currently found in paragraph (a)(1)(ii), which allows a railroad to require a regulated employee who is subject to PAT testing to also be subject to additional PAT breath alcohol testing. A railroad may not, however, conduct breath alcohol testing on an employee who has been recalled for PAT testing unless the employee is still on and has never left railroad property. If an employee has been recalled after having left railroad property, the employee's breath test result would have no probative value, since a "positive" breath alcohol test result could be due to legitimate alcohol use that occurred after the employee went off-duty and left railroad property. Paragraph (e)(4) below also addresses employee recall.

Paragraph (d)—Timely Specimen Collection

A new paragraph (d)(1) would combine two requirements currently found elsewhere in this subpart: (1) The requirement in existing paragraph (b)(1) of this section that railroads make "every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident," and (2) the requirement in current § 219.209(c) stating that if specimens are not collected within 4 hours of the qualifying event, the railroad must prepare and maintain a record stating the reasons the test was not promptly administered. (Specimens not collected within 4 hours should still be collected as soon thereafter as possible, in accordance with § 219.203(b)(1).)

FRA is also proposing to require a railroad to notify FRA's Drug and Alcohol Program Manager immediately by phone whenever a specimen collection takes longer than four hours. In addition, § 219.209(c) currently requires a railroad to prepare a written explanation of any delay in specimen collection beyond four hours, but does not require the railroad to submit that report unless requested to do so by FRA. FRA is proposing to amend this provision to require railroads to submit these written reports within 30 days after expiration of the month during which the qualifying event occurred. FRA is also proposing to move the language currently in paragraphs (b)(2),

(b)(3), and (b)(4) (pertaining to written delay reports) to proposed paragraphs (d)(2), (d)(3), and (d)(4), respectively. Proposed paragraph (d)(4), however, would no longer contain any requirements concerning the recall of employees for testing because FRA is proposing to move these employee recall requirements to proposed paragraph (e), as discussed immediately below.

Paragraph (e)—Employee Recall

Currently, paragraph (b)(4) of this section addresses employee recall for the purpose of PAT testing. Generally, that paragraph provides that a railroad must retain in duty status any covered employees who may be subject to PAT testing until a railroad representative determines whether an event qualifies for PAT testing and, if it does qualify, who must be PAT tested (see § 219.201). Furthermore, that paragraph also currently provides that an employee may not be recalled for PAT testing if the employee has been released from duty under normal procedures, except for in very narrow circumstances (i.e., a railroad *may* recall an employee for testing after he or she has been released from duty only if: (1) The employee went off duty under the normal procedures of the railroad prior to being instructed by a railroad supervisor to remain on duty pending completion of the required determinations; (2) the railroad's preliminary investigation indicates a clear probability that the employee played a major role in the cause and/or severity of the qualifying event; and (3) the qualifying event actually occurred during the employee's tour of duty. Currently, however, a railroad is not required to recall a covered employee for PAT testing, even if these conditions have been met. Existing paragraph (b)(4) also provides that an employee who has been transported to receive medical care is not off-duty for purposes of PAT testing.

In addition to moving these recall provisions into new paragraph (e), as discussed earlier, FRA is proposing to require employees to be recalled for PAT testing in certain situations. Employee recall would be required in these situations even if the qualifying event did not occur during the employee's duty tour. To further consolidate these provisions, FRA would move to paragraph (e)(1) language currently in paragraph (b)(4)(iii), which states that an employee who has been transported to receive medical care has not been released from duty for purposes of PAT testing and that a railroad is not prohibited from testing an employee who has failed to

remain available for PAT testing as required. Proposed paragraph (e)(1) would also generally prohibit a railroad from recalling an employee for PAT testing if the employee has already been released from duty under the normal procedures of the railroad, unless the conditions in proposed paragraph (e)(2) have been met.

Proposed paragraph (e)(2) would mandate employee recall for PAT testing if two of the three requirements in existing paragraph (b)(4) are met. As proposed, an employee would have to be immediately recalled and placed on duty for PAT testing if: (1) The railroad could not retain the employee in duty status because he or she went off duty under normal carrier procedures before being instructed to remain on duty pending the testing determination; and (2) the railroad's preliminary investigation indicated a clear probability that the employee played a role in the cause or severity of the accident/incident. As proposed, the current requirement for the qualifying event to have occurred during the employee's duty tour would be removed.

Proposed paragraph (e)(3) would require an employee to be recalled regardless of whether the qualifying event occurred while the employee was on duty, except that an employee could not be recalled if more than 24 hours has passed since the event. This paragraph would also clarify that an employee who has been recalled for PAT testing must be placed on duty before he or she is PAT tested.

Proposed paragraph (e)(4) would specify that both urine and blood specimens must be collected from an employee who is recalled for PAT testing. For the reasons discussed earlier in paragraph (c) of this section, if an employee left railroad property before being recalled, the employee's specimens could be tested for drugs only. A recalled employee may be tested for alcohol, however, if he or she stayed on railroad property and the railroad's company policy completely prohibits the use of alcohol on railroad property.

Proposed paragraph (e)(5) would require a railroad to document its attempts to contact an employee who must be recalled for PAT testing. As proposed, the railroad must also notify FRA and provide documentation in accordance with the requirements of paragraph (d)(1) if it is unable to contact and obtain a specimen from an employee subject to the mandatory recall requirement within 24 hours of a qualifying event. In the narrative report that the railroad submits to FRA, the railroad must show that it made a good

faith effort to contact the employee, recall the employee, place the employee on duty, and obtain specimens from the employee.

For illustrative purposes, under these proposed recall provisions, a railroad would be required to recall a dispatcher whose actions had played a role in the cause of a qualifying event, even if the dispatcher went off duty before the event occurred. While the dispatcher would have to be recalled as soon as the determination to test is made (and no later than within 24 hours of the qualifying event), the dispatcher could not be alcohol tested unless he or she had remained on railroad property and the railroad's company policy completely prohibits the use of alcohol on railroad property. As another example, if a switch crew had left a switch improperly lined or a yard crew had failed to apply sufficient hand brakes to a cut of cars that rolled away, the crew would have to be recalled for PAT testing even if they had gone off-duty, so long as the additional requirements of proposed paragraph (e)(2) had been met.

Paragraph (f)—Place of Specimen Collection

As part of the proposed reorganization of this section, FRA is proposing to move the provisions contained in current paragraph (c) regarding the place of specimen collection to new paragraph (f). Currently, paragraph (c) requires an employee who is subject to PAT testing to be transported to a pre-designated independent medical facility for collection of PAT testing specimen(s). In proposed paragraph (f), FRA would clarify that this requirement applies only to the collection of urine and blood specimens, since optional PAT breath alcohol tests do not have to be conducted at an independent medical facility. (Proposed § 219.203(c) authorizes a railroad to conduct Federal breath alcohol testing in accordance with part 40 following a qualifying event, so long as the testing does not interfere with the timely collection of required specimens in compliance with part 219.)

Although FRA believes that as a best practice railroads should pre-designate medical facilities for PAT testing as much as practicable, FRA is proposing to remove this requirement because of several impractical burdens it poses. For example, an emergency responder may take an injured employee to a non-designated medical facility, and the prompt treatment of injured employees must take precedence over any railroad pre-designation. Furthermore, even if a railroad pre-designates a medical

facility, the medical facility and its employees may not be aware of or honor this designation.

FRA is also proposing to clarify in paragraph (f)(1) that a phlebotomist (a certified technician trained and qualified to draw blood in accordance with state requirements) is a “qualified medical professional” who may draw blood specimens for PAT testing. (For PAT testing purposes, a qualified medical professional does not need to be qualified under the requirements of part 40, since part 40 does not apply to FRA PAT testing.) FRA would also clarify that a qualified railroad or hospital contracted collector may collect or assist in the collection of specimens, so long as the medical facility has no objections.

Proposed paragraph (f)(2) would clarify that employees who are subject to performing regulated service are deemed to have consented to PAT testing under § 219.11(a), as employees who perform covered service already are. FRA would also allow urine to be collected from an injured regulated employee who has already been catheterized for medical purposes, regardless of whether the employee is conscious, although a regulated employee could not be catheterized solely for the purpose of collecting a PAT urine specimen. Although this language was previously contained in part 219, it was removed when part 40 addressed the issue (under part 40, urine may be collected from a person catheterized for medical purposes only if that person is conscious). This proposal would allow urine to be collected from an unconscious catheterized employee *only* for PAT testing, since FRA PAT testing is not subject to part 40’s prohibition against collecting urine from an unconscious person. This proposed change would not, however, apply to other FRA tests that are subject to the requirements of part 40, such as reasonable cause or random testing.

Paragraph (g)—Obtaining Cooperation of Facility

FRA proposes to move the provisions regarding the obtaining of a medical facility’s cooperation for PAT testing, currently contained in paragraph (d), to a new paragraph (g). Proposed paragraph (g)(1) would require railroads to refer to the instructions and information in FRA’s PAT testing shipping kit and the requirements of subpart C when seeking the cooperation of a medical facility. FRA is also proposing to amend this paragraph by removing one of the two phone numbers given for the National Response Center

(NRC), 1–800–424–8801, as this phone number no longer belongs to the NRC.

Paragraph (h)—Discretion of Physician

As part of its reorganization of this section, FRA would move the statement that nothing in this subpart limits a medical professional’s discretion to determine whether drawing a blood specimen is consistent with the health of an employee subject to PAT testing from its current location in paragraph (e) to new paragraph (h). FRA is proposing no substantive amendments to this language.

Section 219.205—Specimen Collection and Handling

This section contains requirements regarding the collection and handling of specimens collected for PAT testing. Generally, specimens must be collected using an FRA PAT testing shipping kit and Form FRA 6180.73 and must be shipped to FRA’s designated laboratory within certain time limitations.

Paragraph (a)

Currently, paragraph (a) provides that PAT testing specimens must be “obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart, and the technical specifications set forth in Appendix C to this part.” FRA is proposing to amend this language to add that specimens must also be collected according to the instructions in the PAT shipping kit.

Paragraph (b)

FRA would remove language in paragraph (b) stating that Forms 6180.73 and 6180.74 may be “ordered from the laboratory specified in Appendix B [to part 219].” This language is no longer necessary because FRA now includes Forms 6180.73 and 6180.74 in its standard PAT shipping kits, and Form 6180.75 in its fatality kits.

Paragraph (c)

In paragraph (c)(1), FRA proposes to delete the phrase “whenever possible” to emphasize that railroads are always required to follow the instructions in the shipping kit and Appendix C when placing PAT testing specimens in the shipping kit and preparing them for shipment.

Currently, paragraph (c)(2) states that shipping kits may be ordered directly from the FRA-designated laboratory. FRA is proposing to amend this language to require that a railroad request an order form from FRA’s Drug and Alcohol Program Manager before ordering a PAT shipping kit from its designated PAT laboratory. In addition,

FRA would clarify that fatality shipping kits are being made available only to Class I, Class II, and commuter railroads to conserve resources. In the rare instance where a small railroad has a PAT testing event involving a fatality to an on-duty employee, the small railroad should contact the National Railroad Response Center. FRA will then provide a fatality kit to a medical examiner or assist the small railroad in obtaining one from a larger railroad.

FRA is also proposing to remove paragraph (c)(3), which states that a limited number of shipping kits are available at FRA’s field offices, since FRA field offices no longer have these kits.

Paragraph (d)

Currently, paragraph (d) requires specimens to be shipped as soon as possible by pre-paid “air express or air freight (or other means adequate to ensure delivery within twenty-four (24) hours from time of shipment).” FRA proposes to remove the language regarding “air freight” shipments so that specimens must be shipped by air express or other adequate means. FRA also proposes to allow railroads greater flexibility by allowing them to hold specimens in a secure refrigerator if delivery cannot be ensured within 24 hours due to a suspension in delivery services. As proposed, a secure refrigerator could be used to hold specimens for a maximum of 72 hours, since FRA believes this is ample time for a railroad to ensure shipment of specimens through alternative means.

Paragraph (e)

To ensure greater specimen security, FRA proposes to add new paragraph (e) to this section, which would prohibit a specimen kit or a transportation box from being opened after it has been sealed, even if a railroad or medical facility discovers that an error had been made either with the specimens or the chain of custody form. If such an error is discovered, the railroad or medical facility must make a contemporaneous written record of it and send that record to the laboratory, preferably with the transportation box.

Section 219.207—Fatality

FRA is proposing several minor clarifying amendments to this section, which contains requirements specifically addressing fatality PAT testing. None of these amendments are intended to have a substantive effect on the requirements of this section.

For fatalities, existing paragraph (a) requires railroads to obtain “body fluid and/or tissue specimens.” FRA is

proposing to amend this language to replace “and/or” with “and,” as FRA has always expected railroads to collect both body fluid and tissue specimens. (FRA is proposing a similar clarification to paragraph (c)). In addition, FRA would clarify that the shipping kit referenced in this paragraph is the “post-mortem shipping kit.”

In paragraph (b), FRA is proposing to remove one of the two phone numbers given for the National Response Center (NRC), 1–800–424–8801, since this phone number is no longer correct.

Paragraph (d) currently states that “Appendix C to this part specifies body fluid and tissue specimens for toxicological analysis in the case of a fatality.” FRA is proposing to clarify that this information can also be found in the “instructions included inside the shipping kits.”

Section 219.209—Reports of Tests and Refusals

Currently, paragraph (a)(2)(v) of this section requires railroads reporting tests and refusals to include the number, names, and occupations of tested employees. To protect privacy interests and reduce reporting burdens, FRA is proposing to require railroads to report only the number of employees tested.

Existing paragraph (b) requires a railroad to provide FRA a “concise narrative report” if, as a result of non-cooperation of an employee or any other reason, it is unable to obtain PAT testing specimens from an employee subject to PAT testing. As proposed, FRA would require the railroad to immediately notify FRA’s Drug and Alcohol Program Manager by phone of the failure, in addition to the current requirement for a written, narrative report. If a railroad representative is not able to speak directly to the FRA Drug and Alcohol Program Manager, the railroad must leave a detailed voicemail explaining the circumstances and reasons for the failure. This telephonic report would assist both railroads and FRA in determining whether an employee has refused to be tested.

Currently, paragraph (c) requires railroads to maintain records explaining why PAT testing was not performed within four hours of a qualifying event. FRA is proposing to delete this requirement from § 219.209 because it is already addressed in proposed § 219.203(d)(1), as discussed above in the section-by-section analysis for that section.

Section 219.211—Analysis and Follow-Up

Since part 40 does not apply to FRA PAT testing, FRA is proposing to amend

paragraph (b) of this section to incorporate part 40’s prohibition on standing down (temporarily removing from service) an employee solely based upon a laboratory report indicating a non-negative test result, before the MRO has completed verification of this test result. *See* § 40.21(a). As proposed, an employee could be removed from regulated service only after an MRO has verified that the employee has had a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test.

Paragraph (c) would be amended to provide the address of the FRA Associate Administrator for Railroad Safety.

Paragraph (e) would be amended to replace “Alcohol/Drug Program Manager” with “Drug and Alcohol Program Manager” for consistency throughout part 219. FRA would also amend this paragraph to permit employees to respond to test results more easily through email.

Currently, paragraph (g)(3) provides that FRA’s PAT testing program does not authorize railroads to hold an employee out of service pending the receipt of the test results, “nor does it restrict a railroad from taking such action in an appropriate case.” FRA would clarify that a railroad must have additional information regarding an employee’s actions or inaction, independent of the mere fact that he or she was involved in a qualifying event, to justify holding him or her out of service under its own authority. As with the proposed stand-down provision in paragraph (b) regarding laboratory reports, FRA seeks to clarify that an employee’s involvement in a PAT testing event is not in itself a basis for holding the employee out of regulated service.

Section 219.213—Unlawful Refusals; Consequences

Currently, paragraph (b) requires a railroad to provide notice to an employee who is being withdrawn from service under part 219 for refusing to provide a specimen for PAT testing. FRA is proposing to amend this paragraph to clarify that this notice must be in writing.

Subpart D—Reasonable Suspicion Testing

Currently, the requirements for both reasonable suspicion testing and reasonable cause testing are contained in Subpart D—Testing for Cause. Because these types of tests are similarly named, reasonable suspicion testing is frequently confused with reasonable cause testing even though their criteria

are completely different, and reasonable suspicion testing is mandatory while reasonable cause testing is discretionary. To highlight the distinctions between these two types of tests, FRA is proposing to separate its reasonable suspicion and reasonable cause testing requirements into two subparts. While subpart D would continue to contain FRA’s requirements for reasonable suspicion testing, FRA’s reasonable cause testing requirements would be moved to proposed subpart E. (The Identification of Troubled Employees requirements currently in subpart E would be moved to new subpart K, which would address Peer Prevention Programs.)

Section 219.301—Mandatory Reasonable Suspicion Testing

This section would contain general provisions requiring railroads to conduct reasonable suspicion testing. The language in paragraph (a), which addresses reasonable suspicion alcohol tests, and paragraph (b), which addresses reasonable suspicion drug tests, would be generally consistent with the existing requirements in § 219.300, but FRA is proposing new language in paragraph (a) to clarify that a reasonable suspicion alcohol test is not required to confirm an on-duty employee’s possession of alcohol.

Paragraph (c) would require all reasonable suspicion tests to comply with the requirements of proposed § 219.303 (which is generally consistent with existing requirements found in § 219.300(b) and is discussed in more detail below).

Paragraph (d) would reference the provision in proposed § 219.11(b)(2) stating that in a case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under part 219, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimens. This replaces similar language currently found in § 219.300(c), which states that reasonable suspicion testing is not required when a regulated employee is in need of immediate medical attention. However, FRA proposes to add new language in proposed § 219.305 clarifying that reasonable suspicion testing is still required if the employee’s condition stabilizes within eight hours.

Section 219.303—Reasonable Suspicion Observations

This section would contain the requirements for reasonable suspicion observations currently in § 219.300(b).

Paragraph (a)

The language in paragraph (a), which addresses the observations required for alcohol tests, and paragraph (b), which addresses the observations required for drug tests, would be generally consistent with the existing reasonable suspicion observation requirements in § 219.300(b), although additional language would be added to both paragraphs to clarify that these observations must be made by a “responsible railroad supervisor.”

Paragraph (b)

Additional language in paragraph (b) would clarify that although two supervisors are required to make the required observations for reasonable suspicion drug testing, only one of these supervisors must be on-site and trained in accordance with § 219.11(g). This incorporates long-standing FRA guidance, since two on-site trained supervisors are rarely available. See Compliance Manual 11.3.3.3. The supervisor who is trained and on-site is required to describe the signs and symptoms that he or she observed to the off-site supervisor so that the off-site supervisor can confirm that reasonable suspicion of drug abuse exists. Because of privacy concerns, this communication between supervisors may be made by telephone, but not by radio or email.

Paragraph (c)

FRA is proposing new language in paragraph (c). Under this new language, a regulated employee who has had an FRA reasonable suspicion test may not be held out of service pending receipt of the employee's test result, although a railroad may hold the employee out of service under its own authority if the railroad has an independent basis for doing so. For example, a railroad may remove a regulated employee from service if the employee is exhibiting signs of drunken behavior, regardless of whether Federal reasonable suspicion testing was performed.

Paragraph (d)

Paragraph (d) would contain new language requiring railroads to document and maintain the basis for each determination to conduct a reasonable suspicion test (e.g., the determining supervisor(s)'s observations of the employee's signs and symptoms). The trained supervisor who made the determination should complete this documentation as soon as practicable. This proposal would incorporate FRA's long-standing guidance and interpretation regarding this requirement. See *id.*

Section 219.305—Prompt Specimen Collection; Time Limits

This section would contain provisions regarding the prompt collection of specimens for reasonable suspicion testing. These requirements are currently found in § 219.300(d)(1) and § 219.302(a), (c), and (e).

Paragraph (a)

Proposed paragraph (a) would contain language currently in § 219.302(a), which specifies that, consistent with the need to protect life and property, testing must be promptly conducted following the observations upon which the reasonable suspicion testing determination is based.

Paragraph (b)

Paragraph (b) would state that whenever a railroad cannot collect reasonable suspicion testing specimens within two hours of the determination to test, the railroad must prepare and maintain a record explaining the reasons for the delay. If, however, a railroad has not collected reasonable suspicion testing specimens within eight hours of its determination to test, the railroad must discontinue its collection attempts and record why the test could not be conducted. Currently, this requirement is found only in § 219.300(d)(1) and applies only to reasonable suspicion alcohol tests, but FRA is proposing to specifically apply this requirement to reasonable suspicion drug tests as well. The proposed requirement for a railroad to cease its attempts to conduct a reasonable suspicion drug test if it has not done so within eight hours of the railroad's determination to test would supersede the current language in § 219.302(b)(1) (which currently addresses both reasonable suspicion and reasonable cause testing). Consistent with existing language in § 219.302(e), paragraph (b) would specify that the eight-hour deadline has been met if the railroad has delivered the employee to the collection site (where the collector is present) and made a request to commence specimen collection.

Proposed paragraph (b) would also contain language similar to that currently in § 219.300(d)(1), under which reasonable suspicion testing records required by that section must be submitted upon request of the FRA Administrator. The amended requirement in paragraph (b) would instead require these records to be submitted upon request of the FRA Drug and Alcohol Program Manager.

Paragraph (c)

Paragraph (c) would incorporate, without change, language currently found in § 219.302(c), which addresses the reasonable suspicion testing of employees who have been released from duty, who have been transported to receive medical care, or who have failed to remain available for testing.

Subpart E—Reasonable Cause Testing

As discussed above, FRA is proposing to move its reasonable cause testing requirements from subpart D to subpart E to separate reasonable suspicion and reasonable cause testing into distinct subparts. As discussed further below, FRA is proposing the following substantive amendments to its reasonable cause testing requirements: (1) Requiring a railroad to select and perform all reasonable cause testing under either FRA or company authority; (2) specifying that reasonable cause testing is only authorized after “train accidents” and “train incidents,” as defined in § 219.5; and (3) adding new rule violations or other errors related to railroad operating practices as a basis for Federal reasonable cause testing.

Section 219.401—Authorization for Reasonable Cause Testing

This section would contain an amended version of the conditions for FRA reasonable cause testing currently in § 219.301. Under § 219.301, a railroad currently has three options if the conditions for a reasonable cause test outlined in the section have been met: (1) Conducting a reasonable cause test under FRA authority; (2) conducting a reasonable cause test under its own authority; or (3) choosing not to conduct a reasonable cause test. A railroad does not have to announce in advance or be consistent as to which option it chooses; thus, a railroad may decide to conduct an FRA reasonable cause test for one event, and a company reasonable cause test for the next, without any explanation. This flexibility has, unfortunately, had the unintended effect of creating confusion within the railroad industry. In some instances, FRA believes it has led to arbitrary decision making by railroads. For example, Federal reasonable cause testing is sometimes performed in situations that don't meet one of the conditions specified in current § 219.301, but which would nevertheless qualify for company reasonable cause testing.

In new paragraph (a), FRA is proposing to address these issues by requiring each railroad to decide and announce (in the educational materials the railroad would be required to

provide to its regulated employees under § 219.23(e)(5)) whether it will be exclusively using FRA or its own authority for reasonable cause testing after § 219.403 testing events. For example, under this proposal, a railroad that announces it will be using FRA authority for reasonable cause tests would then be prohibited from conducting reasonable cause tests under its own authority. However, this restriction would apply only to reasonable cause tests conducted after an event listed in § 219.403. A railroad may always use its own authority to test for events that are outside of FRA's criteria for reasonable cause testing.

Consistent with existing § 219.301(a), proposed paragraph (b) of this section would authorize railroads to conduct reasonable cause testing under certain conditions. FRA is not proposing any substantive changes to this general authorizing language, except to clarify that it would apply *only* when a railroad conducts reasonable cause testing under FRA authority.

Section 219.403—Requirements for Reasonable Cause Testing

This section would describe when FRA reasonable cause testing is authorized. As briefly discussed earlier in Section V.H of this preamble, FRA is proposing to specify that reasonable cause testing is authorized only after “train accidents” and “train incidents,” as defined in § 219.5, and not after all part 225 reportable “accidents/incidents.” In addition, as briefly discussed earlier in Section V.I of this preamble, FRA is proposing to authorize Federal reasonable cause testing for additional rule violations or other errors that reflect the expansion of part 219 to MOW workers, relate to signal systems and highway-rail grade crossing warning systems, and reflect recent amendments to 49 CFR part 218, Railroad Operating Practices.

Introductory Text

If a potential reasonable cause testing event occurs, FRA would require a railroad to determine whether it has the authority to conduct an FRA reasonable cause test before it can begin reasonable cause testing process. As proposed, a railroad would have to make a threshold determination about its authority before it can conduct a reasonable cause test.

Paragraph (a)

Existing § 219.301(b)(2) is currently titled “Accident/incident” and authorizes reasonable cause testing following “an accident or incident reportable under part 225” when “a supervisory employee of the railroad

has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident.” FRA is proposing to make this language paragraph (a) of this section and amend it to clarify that reasonable cause testing is only authorized following train accidents and train incidents, as defined in § 219.5.

FRA believes the phrases “accident/incident” and “accident or incident reportable under part 225” in existing § 219.301(b)(2) could imply that FRA reasonable cause testing is authorized after all part 225 reportable accidents/incidents. This implication is problematic because the term accident/incident, as defined in § 225.5, includes many events that should not justify FRA reasonable cause testing. Specifically, the term “accident/incident” includes many employee injuries and illnesses that are designed to conform with OSHA's recordkeeping/reporting requirements, but that do not necessarily fall otherwise within FRA's railroad safety jurisdiction.²¹ See Accident Reporting Guide at 1–2 (stating that “FRA's accident/incident reporting regulations that concern railroad occupational casualties should be maintained, to the extent practicable, in general conformity with OSHA's recordkeeping and reporting regulations”).

FRA audits have found some instances in which this confusing language has led a railroad to conduct FRA reasonable cause testing after all reportable injuries, regardless of whether or not a reportable injury was connected with the movement of on-track equipment. For example, FRA has encountered situations where railroads were conducting FRA reasonable cause testing after slips, trips, and falls resulting in a reportable injury, even if the railroad had insufficient reason to believe that the employee's act or omission contributed to the injury (which is also a violation of existing § 219.301(b)(2)).

Furthermore, confusion about whether FRA reasonable cause testing is authorized following all part 225 reportable accidents/incidents could potentially create a situation where a railroad utilizes FRA reasonable cause testing in a clearly inappropriate situation. For example, the § 225.5

definition of “accident/incident” includes occupational illnesses, such as carpal tunnel syndrome, carbon monoxide poisoning, noise-induced hearing loss, and various dust diseases of the lungs. See Accident Reporting Guide at Appendix E–2 through E–5. FRA also requires railroads to record and report certain suicide data, including a suicide attempt made by an employee on duty. See *id.* at 33. These are just a few examples of the events that could qualify as part 225 reportable accident/incidents that FRA believes should clearly not serve as a basis for FRA reasonable cause testing.²²

FRA is proposing to correct this confusion by specifying in proposed § 219.403(a) that FRA reasonable cause testing is authorized following “train accidents” and “train incidents,” as defined by § 219.5, when a responsible railroad supervisor has a reasonable belief, based on specific, articulable facts, that the individual employee's acts or omissions contributed to the occurrence or severity of the train accident or train incident. By using the terms train accident and train incident, FRA is attempting to remove any implication that reasonable cause testing could be authorized following any part 225 reportable accident/incident. (A railroad would still remain free, however, to perform company authority reasonable cause testing for an accident/incident that otherwise did not qualify as a train accident or train incident.) FRA specifically requests public comment on the clarity of the proposed language.

As an editorial change, FRA is also proposing to replace the term “supervisory employee” with “responsible railroad supervisor” for consistency with the remainder of the subpart.

Paragraph (b)

Paragraph (b) would contain a list of rule violations and other errors that would be grounds for FRA reasonable cause testing when a regulated employee is directly involved. The rule violations and other errors currently in § 219.301(b)(3) would be moved to proposed paragraphs (b)(1)–(b)(4), (b)(6)–(b)(8), and (b)(10) of this section, without any substantive amendments. Proposed paragraphs (b)(5), (b)(9), (b)(11)–(b)(12), and (b)(13)–(b)(18) would contain additional rule violations and other errors that would be new

²¹ Because FRA's employee injury and illness recordkeeping/reporting requirements employ equivalent standards to those promulgated by OSHA, OSHA permits railroads to record and report employee injuries and illnesses only to FRA. *Id.* FRA then shares this employee injury and illness data with OSHA. *Id.* at 2.

²² Although § 219.5 does currently define “accident or incident reportable under part 225” to exclude “covered data” cases under part 225, “covered data” cases are only a small subset of part 225 reportable accidents/incidents that should not authorize FRA reasonable cause testing.

grounds for FRA reasonable cause testing, as discussed below.²³

- **Additional Rule Violations or Other Errors Related to Railroad Operating Practices**

In proposed paragraphs (b)(5) and (b)(9), FRA would add two new categories to the rule violations or other errors that are grounds for reasonable cause testing. These additional categories reflect recent amendments to 49 CFR part 218—Railroad Operating Practices.

In 2008, FRA amended part 218 to require railroads to adopt and comply with operating rules regarding shoving and pushing movements and the operation of switches. *See* 73 FR 8475–8482, Feb. 13, 2008. Specifically, §§ 218.103–218.107 require railroads to adopt and comply with operating rules regarding switches. FRA believes that many of these operating rule requirements for switches are already reflected by the current reasonable cause testing provisions, which authorize testing for “[a]lignment of a switch in violation of a railroad rule, failure to align a switch as required for movement, operation of a switch under a train, or unauthorized running through a switch” and “[e]ntering a crossover before both switches are lined for movement or restoring either switch to normal position before the crossover movement is completed.” § 219.301(b)(3)(iv) and (vii). Nevertheless, paragraph (b)(5) would authorize FRA reasonable cause testing if a regulated employee fails to restore and secure a main track switch when required.

Similarly, § 218.99 establishes certain requirements for railroad operating rules regarding shoving and pushing movements. FRA is proposing to authorize reasonable cause testing only for certain § 218.99 operating rule violations. For instance, FRA would not authorize such testing when the violation of an operating rule does not pose a sufficient safety concern (e.g., a failure to conduct a required job briefing). FRA would, however, authorize reasonable cause testing if a regulated employee violates a valid

§ 218.99(b)(3) railroad operating rule addressing point protection.

- **Additional Rule Violations or Other Errors Related to MOW Employees**

To reflect the proposed expansion of part 219 to cover MOW employees, paragraphs (b)(13)–(b)(17) would authorize FRA reasonable cause testing for certain rules violations and errors related to the performance of MOW activities. Under paragraph (b)(13), testing would be authorized for the failure of a machine operator that results in a collision between a roadway maintenance machine and/or other on-track equipment or a regulated employee. Under paragraph (b)(14), testing would be authorized for the failure of a roadway worker-in-charge to notify all affected employees when releasing working limits. Under paragraph (b)(15), testing would be authorized for the failure of a flagman or watchman/lookout to notify employees of an approaching train or other on-track equipment. Under paragraph (b)(16), testing would be authorized for the failure to ascertain on-track safety before fouling a track. Under paragraph (b)(17), testing would be authorized for the improper use of individual train detection (ITD) in a manual interlocking or control point.

FRA is requesting public comment on whether these proposed paragraphs sufficiently address those MOW operating rule violations and errors that justify reasonable testing by posing a safety concern. Are there other operating rule violations and errors that should be included?

- **Additional Rule Violations or Other Errors Related to Covered Service**

FRA is also proposing new rule violations and other errors that would be grounds for FRA reasonable cause testing primarily for covered employees. The first two additional rule violations or other errors related to signal systems and highway-rail grade crossing warning systems. Interference with the normal functioning of a signal system or a grade-crossing signal device is a serious safety concern, as is the failure to properly perform any required stop-and-flag duties. Such failures could result in a collision between trains or a highway-rail grade crossing accident.

First, under paragraph (b)(11), FRA would authorize reasonable cause testing if a regulated employee has interfered with the normal functioning of any grade crossing signal system or any signal or train control device without first taking measures to provide for the safety of highway traffic or train operations which depend on the normal

functioning of such a device. Such interference includes, but would not be limited to, failure to provide alternative methods of maintaining safety for highway traffic or train operations while testing or performing work on the devices or on track and other railroad systems or structures which may affect the integrity of the system. This proposed provision adopts language from the unlawful interference provisions of § 234.209 (grade crossing systems) and § 236.4 (signals) and is intended to encompass the same types of interference that are covered by those sections. The types of devices referred to by this provision would include (but are not limited to) a wayside or cab signal system, component, or warning device, as well as the flashing lights or gates at a highway-rail grade crossing. For example, FRA reasonable cause testing would be authorized whenever the actions of a regulated employee result in a false proceed signal or a highway-rail grade crossing activation failure.

Second, under paragraph (b)(12), FRA reasonable cause testing would also be authorized if a regulated employee failed to perform required stop-and-flag duties as required after of a malfunction of a grade crossing signal system. FRA is proposing this revision because a regulated employee who fails to perform stop-and-flag duties as required after a malfunction of a grade crossing signal system may not be the same regulated employee who originally interfered with the normal functioning of the system.

Finally, in paragraph (b)(18), FRA reasonable cause testing would be authorized if a failure to apply three point protection (by fully applying the locomotive and train brakes, centering the reverser, and placing the generator field switch in the off position) results in a reportable injury to a regulated employee.

Public Comment Requested

As with its proposed MOW operating rule violations and errors, FRA is requesting public comment on whether additional rule violations or errors should be added. FRA is also interested in feedback recommending changes to the wording “proposed rule violations or other errors” as used in this section. Because FRA reasonable cause testing would remain optional, a contracting company that performs regulated service for a railroad would not be required to conduct FRA reasonable cause tests on its regulated employees. However, a railroad could conduct FRA reasonable cause testing of contractors when they are performing regulated service on the railroad’s behalf.

²³ Railroads should note that FRA reasonable cause drug testing authority does not apply if a rule violation or error results in an event that qualifies for mandatory PAT testing under § 219.201. *See* § 219.301(e). Reasonable cause alcohol testing authority may, however, currently be exercised in PAT testing situations when “breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of specimens under subpart C.” *Id.* Similar provisions (amended as discussed below) are found in § 219.409 of the proposed rule.

Section 219.405—Documentation Requirements

FRA is proposing to require a railroad to create and maintain written documentation describing the basis for each reasonable cause test it conducts under FRA authority. The railroad supervisor who determines that reasonable cause exists for FRA testing would have to document the observations or facts that he or she relied upon in making the determination. To ensure that a supervisor's recollection of the incident is as fresh as possible, FRA would require the supervisor to document the basis for each reasonable cause test promptly, although the supervisor would not be expected to complete this documentation before the test has been performed. The minimum supervisory documentation requirements would vary according to the basis for a reasonable cause test. If the basis for a reasonable cause test is the occurrence of a train accident or train incident, a supervisor must document, at a minimum, the following: (1) The amount of railroad property damage; and (2) the basis for the supervisor's belief that an employee's acts or omissions contributed to the occurrence or severity of the train accident or train incident. If the basis for a reasonable cause test is a rule violation or other error, a supervisor would have to document, at a minimum, the following: (1) The type of violation involved; and (2) the extent of each tested employee's involvement in the violation. FRA believes that this proposed documentation requirement would decrease the number of improperly performed Federal reasonable cause tests.

Section 219.407—Prompt Specimen Collection; Time Limitations

This section would contain language similar to that in proposed § 219.305 (which addresses specimen collection and time limitation requirements for reasonable suspicion testing), but would also clarify that the eight-hour time period for conducting reasonable cause testing runs from the time a railroad supervisor is notified of the occurrence of a train accident, train incident, or rule violation, rather than from the time of the train accident, train incident, or rule violation's occurrence.

Section 219.409—Limitations on Authority

Paragraph (a)

This paragraph would contain language currently in § 219.301(e), with three proposed clarifications. First, FRA

would clarify that if an event qualifies for mandatory PAT testing, a railroad is prohibited from conducting FRA reasonable cause tests in lieu of, or in addition to, the required PAT tests. Second, FRA would remove the word "compulsory," which misleadingly implies that FRA reasonable cause testing is required, when it is optional but authorized in certain situations. Third, FRA would remove the second sentence of the current § 219.301(e), which, in part, states that "breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of an accident and conduct of such tests does not materially impede the collection of specimens under Subpart C of this part." FRA believes this sentence is confusing because FRA is proposing, in § 219.203(c), to allow only PAT breath alcohol tests to be performed after a PAT qualifying event, although such testing should be recorded on the Part 40 Alcohol Testing Form (ATF).

Paragraph (b)

For reasons similar to those discussed in proposed § 219.211(b), paragraph (b) of this section would prohibit a railroad from holding a regulated employee out of service pending the results of an FRA reasonable cause test. A railroad would not be prohibited from holding an employee out of service under its own authority, however, so long as the railroad is not doing so simply because it is waiting for the employee's FRA reasonable cause test result.

Paragraph (c)

This paragraph would contain new language requiring a supervisor to make a reasonable cause determination for each crew member, instead of for the crew as a whole. For example, if a train crew operated their train past an absolute block signal, a supervisor would have to consider the engineer's actions apart from those of the conductor, to ensure that only those crew members who may have contributed to the rule violation are tested. In this example, if a supervisor discovers that the conductor was on the ground setting out a freight car when the train passed the signal, the supervisor should require only the engineer to undergo FRA reasonable cause testing.

Subpart F—Pre-Employment Tests

Section 219.501—Pre-Employment Drug Testing

Paragraph (a)

Currently, paragraph (a) of this section prohibits a railroad from allowing an individual to perform

covered service unless the individual has had a Federal pre-employment drug test with a negative test result. FRA is proposing to amend this paragraph to require a regulated employee to have a negative Federal pre-employment drug test result for each railroad for which the employee performs regulated service, although this requirement would apply only to a railroad's direct employees, and not to employees of contractors who perform regulated service for the railroad.

Paragraph (b)

Currently, paragraph (b) states that, for purposes of pre-employment drug testing only, the term covered employee includes an applicant. The paragraph also states that no record may be maintained if an applicant declines to be tested and withdraws his or her application for employment. FRA is proposing to move this language to new paragraph (e) and to amend it as discussed below.

As proposed, new paragraph (b) would address the pre-employment drug testing requirements for contractor employees. In contrast to its proposed pre-employment drug testing requirements for regulated employees (see the discussion of paragraph (a) above), FRA would not require a contractor employee who performs regulated service for multiple railroads to have a negative Federal pre-employment drug test result for each railroad. Instead, each railroad would only have to verify and document that the contractor employee has a negative Federal pre-employment drug test result on file with the contractor who is his or her direct employer. However, a contractor employee would be required to have a new Federal pre-employment drug test if the he or she switches direct employers by working for another contractor who provides regulated service to railroads.

Paragraph (c)

FRA is proposing a new paragraph (c) to clarify that a railroad would not have to conduct an FRA pre-employment drug test if an applicant or first-time transfer to regulated service already has a negative drug test result from a pre-employment test conducted by the railroad under the authority of another DOT agency, such as the Federal Motor Carrier Safety Administration (FMCSA). FRA believes this flexibility most benefits employees in positions requiring a commercial driver's license (CDL) (e.g., certain MOW employees and signal maintainers), since a negative FMCSA pre-employment drug test result is one prerequisite to holding a CDL.

See 49 CFR 382.301. Under this proposal, a railroad would not have to wait for a negative FRA pre-employment drug test result before transferring a CDL holder to a regulated service position for the first time, although the railroad would remain free to perform a second pre-employment drug test under its own authority. Since many MOW employees already hold CDLs because they operate railroad commercial motor vehicles, FRA believes this proposal would substantially lessen the number of pre-employment drug tests railroads would have to perform after the effective date of the final rule. (FRA has previously included this pre-employment drug testing interpretation in its guidance. See Interpretive Guidance Manual at 32.)

This provision would apply, however, only to negative DOT pre-employment drug tests that had been conducted by the railroad itself. A CDL holder would still need a negative FRA pre-employment drug test for each railroad for which he or she performs regulated service. For example, a CDL holder who had a negative DOT pre-employment drug test for Railroad A would still need a negative FRA pre-employment drug test result for Railroad B before he or she could begin to perform regulated service for Railroad B.

Paragraph (d)

As mentioned above, FRA would move an amended version of the language currently in paragraph (b) to a new paragraph (d). As proposed, to decline a pre-employment drug test and have no record kept of that declination, an applicant must withdraw his or her application before the drug testing process begins. In § 40.63(c), DOT states that the drug testing process begins when either the collector or the employee selects an individually wrapped or sealed collection container.

Paragraph (e)

In new paragraph (e), FRA would exempt two groups of employees from pre-employment drug testing: (1) Employees who are performing *MOW activities* for a railroad prior to the effective date of the final rule; and (2) employees who are performing *regulated service* for a *small* railroad (as defined in § 219.3(c)) prior to the effective date of the final rule. However, a MOW or regulated employee would be exempted only so long as the employee continues to work for the same railroad that he or she was working for prior to the effective date of the final rule. A previously exempted employee would be required to have a negative Federal pre-employment drug test result if he or

she applies to perform regulated activities for a new railroad.

Section 219.502—Pre-Employment Alcohol Testing

FRA is proposing only minor amendments to this section, which addresses optional pre-employment alcohol testing.

Paragraphs (a)(1)–(a)(2)

Currently, paragraphs (a)(1) and (a)(2) of this section refer to pre-employment alcohol testing for “safety-sensitive employees” who perform “safety-sensitive functions.” (In this context, “safety-sensitive” is referring to “DOT safety-sensitive functions” and “DOT safety-sensitive employees,” as defined in this proposed rule, and not FRA “safety-sensitive functions” as used in § 209.301 and § 219.303.) For clarification purposes only, FRA would substitute “regulated employees” and “regulated service” wherever “safety-sensitive employees” or “safety-sensitive functions” now appear, since FRA would designate regulated employees and regulated service as DOT safety-sensitive employees and DOT safety-sensitive functions for purposes of this part.

Paragraph (a)(5)

As in paragraphs (a)(1) and (a)(2) of this section, FRA would amend paragraph (a)(5) by substituting “regulated service” for “safety-sensitive functions.” FRA would also amend this paragraph to clarify that a railroad may not permit a regulated employee with an alcohol concentration of 0.04 or greater to perform regulated service until the employee has completed the return-to-duty process in § 219.104(d).

Paragraph (b)

Currently, paragraph (b) of this section (addressing pre-employment alcohol testing) contains language identical to current § 219.501(b) (addressing pre-employment drug testing), which provides that, as used in subpart H of this part, the term covered employee includes an applicant for pre-employment testing only. It also provides that no record may be maintained if an applicant declines to be tested and withdraws his or her application for employment. As discussed above for § 219.501(b), FRA is also proposing to amend the language in § 219.502(b) to clarify that an individual must decline to participate in a pre-employment alcohol test by withdrawing his or her application before the testing process begins. As defined by DOT in § 40.243(a), the testing process begins when an

individually wrapped or sealed mouthpiece is selected by the collector or the employee.

Section 219.503—Notification; Records

Currently, the first and second sentences of this section require railroads to provide medical review of pre-employment drug tests and to “notify” an applicant of the “results of the drug and alcohol test” as provided for by subpart H. FRA would amend both sentences to clarify that subpart H incorporates the requirements found in part 40. In addition, FRA would amend the second sentence to clarify that a railroad must provide written notice not only when an applicant has a positive test result but also when an applicant has another type of non-negative test result (an adulteration, substitution, or refusal). FRA would not, however, require written notification of negative pre-employment alcohol or drug tests.

FRA would also amend the third sentence of this section to clarify that a railroad must maintain a record if an application was denied because the applicant had a non-negative Federal pre-employment test. It is important to maintain records for individuals who have a non-negative test result on a pre-employment test, even if it resulted in their application for employment being denied, because such individuals must comply with the return-to-service and follow-up testing requirements of part 40 prior to performing DOT safety-sensitive functions for any employer regulated by a DOT agency. FRA is therefore proposing to specify that the only time a record does not have to be maintained is when an applicant withdrew an application to perform regulated service prior to the commencement of the testing process. FRA believes that this is the only time that such records are not necessary.

Section 219.505—Non-Negative Tests and Refusals

Currently, this section provides that an individual who “refuses” a pre-employment test may not perform covered service based upon the application and examination with respect to which such refusal is made. FRA believes this language is too narrow for two reasons. First, it should also clarify that an individual may not begin performing regulated service if he or she has a non-negative test result (e.g., a positive, adulterated, or substituted test result) on a DOT pre-employment test. Second, the prohibition on performing covered service should be extended to the performance of any DOT safety-sensitive functions. FRA therefore proposes to

amend this section to specifically prohibit individuals who refused or who had a non-negative pre-employment test result from performing DOT safety-sensitive functions for any DOT-regulated employer until they have completed the Federal return-to-duty process of § 219.104(d). This amendment would also standardize the requirements of this section with § 40.25(e), which provides that an employer who obtains information that an employee has violated a DOT agency drug or alcohol regulation must not use that individual to perform DOT safety-sensitive functions unless the employer receives information that the individual has complied with the return-to-duty requirements of part 40 or any other DOT agency.

Subpart G—Random Drug and Alcohol Testing Programs

A properly constructed and managed random testing program is a valuable tool for deterring the misuse of drugs and abuse of alcohol by regulated employees. As such, it is an essential cornerstone to a successful part 219 drug and alcohol safety program. The goal of random drug and alcohol testing is for all regulated employees to believe that they may be called for a random test without advance warning any time they are on-duty and subject to performing regulated service.

Subpart G currently contains few definite requirements for FRA random testing. Given this lack of specificity, finding and understanding FRA's random testing requirements can sometimes be a difficult task. FRA is proposing to revise and expand subpart G, although very few of the proposed amendments would result in substantive changes to the regulatory requirements. Rather, the primary purpose of the proposed amendments is to clarify the applicable requirements and provide railroads additional information on how to properly implement and manage an FRA random testing program. Much of this additional information is currently contained in the second edition of FRA's Part 219 Alcohol/Drug Program Compliance Manual ("Compliance Manual"). Available to the public on FRA's Web site (<http://www.fra.dot.gov/eLib/details/L01186>), the Compliance Manual promotes part 219 compliance by clarifying both the regulation's requirements and FRA's expectations. See Compliance Manual 1.2. The program standards contained in the Compliance Manual have formed the basis of FRA's part 219 railroad audits for over nine years and have been particularly useful in helping railroads

establish effective FRA random testing programs. Incorporating this important guidance into the regulations will help railroads understand and implement the complex random testing requirements of subpart G, thereby improving the deterrence value of FRA random testing and promoting railroad safety.²⁴

In order to effectively incorporate this operational guidance, FRA is proposing to reorganize subpart G. The principal proposed changes can be summarized as follows:

- Individual sections on random drug testing requirements (§§ 219.601–219.605) and random alcohol testing requirements (§§ 219.607–219.611) would be combined into single sections addressing both drug and alcohol random testing. Because the differences between the requirements for random drug and alcohol testing are minimal, this consolidation would eliminate a significant amount of redundancy.

- Requirements for random testing plans, pools, selections, and collections would be separated and placed into individual sections dedicated to those subjects. These sections would also incorporate guidance from the Compliance Manual.

- Subpart G would be amended to explain how a regulated service contractor could either participate in a railroad's FRA random testing program or operate its own FRA-accepted random testing program (either independently or through a C/TPA).

- Railroads would be required to demonstrate that all employees (defined in § 219.5 to include employees, volunteers, or probationary employees of a railroad or a contractor to a railroad), performing regulated service are in compliance with the random testing requirements of subpart G. FRA is also proposing a mechanism that would provide a clear path for the future incorporation of any additional categories of employees into the random testing requirements of subpart G. This mechanism would eliminate the need to extensively amend subpart G if the scope of part 219 was expanded again in the future.

Section 219.601—Purpose and Scope of Random Testing Programs

This section would contain general language explaining the purpose of Federal random testing programs and would clarify how subpart G applies to regulated employees, including contractors and volunteers, who work for more than one railroad or are subject

to the random testing requirements of more than one DOT agency.

Paragraph (a) would explain that the purpose of random testing programs is to promote safety by deterring regulated employees from misusing drugs or abusing alcohol.

Paragraph (b) would require a railroad to ensure that all of its regulated employees are subject to the random testing requirements of subpart G, including its regulated employees who are contractors or volunteers performing regulated service for the railroad.

Specifically, this paragraph is intended to clarify that a railroad is obligated to ensure that all individuals performing regulated service for the railroad either as a contractor or volunteer are subject to FRA's random testing requirements when performing regulated service for that railroad. Of course, a railroad would *not* be required to ensure that contractor employees or volunteers are compliant with subpart G when they are performing regulated service for another railroad. FRA believes this clarification is necessary given the proposed expansion of part 219 to cover a large population of MOW contractors. A contractor who failed or refused to comply with the random testing requirements of this subpart when performing regulated service for any railroad could be subject to the civil penalty sanctions of § 219.9.

Paragraph (c) would state that a regulated service contractor or volunteer could be incorporated into more than one FRA random testing program if: (1) The contractor or volunteer would otherwise not be part of a non-railroad testing program (discussed in proposed § 219.609) that meets the requirements of subpart G and is acceptable to the contracting railroad; or (2) the contracting railroad cannot verify that the contractor or volunteer is part of an FRA random testing program that meets the requirements of subpart G and is acceptable to the railroad. This section would not require a railroad to accept either a railroad or non-railroad random testing program. A railroad would always be free to incorporate regulated service contractor employees and volunteers into its own random testing program, regardless of whether or not they are already part of a program run by another railroad or a contracting company.

Paragraph (d) would explain how railroads must handle regulated employees who are subject to the random testing regulations of more than one DOT agency. (For example, a regulated employee may be subject to the random testing requirements of both FRA and FMCSA if he or she holds a

²⁴ After publication of the final rule, FRA will revise and update the Compliance Manual as necessary to reflect any new requirements.

CDL.) The proposed language of paragraph (d) is generally consistent with paragraph (h) of existing § 219.602, but would be revised to clarify that regulated employees subject to the random testing regulations of more than one DOT agency may not be included in more than one DOT random testing pool and that this provision applies to both random drug and alcohol testing, as discussed below.

Currently, paragraph (h) of § 219.602 states that covered employees subject to random drug testing under the drug testing rules of more than one DOT agency for the same railroad must be subject to random drug testing selection at the applicable rate set by the DOT agency regulating more than 50% of the employee's functions. For example, if FMCSA regulates 60 percent of a regulated employee's DOT functions, the railroad must subject him or her to random testing selection at or above the minimum annual random testing rate set by FMCSA. This has been historic DOT guidance regarding Federal random testing. *See* Office of Drug & Alcohol Policy and Compliance, U.S. Dep't. of Transp., Best Practices for DOT Random Drug and Alcohol Testing 3, available at <http://www.dot.gov/odapc/best-practices-dot-random-drug-and-alcohol-testing>. A similar provision is inexplicably missing, however, from the random alcohol testing sections of the existing regulation. As there is no logical reason for this provision to apply only to random drug testing, FRA believes that this is an accidental oversight in the current regulation. Furthermore, FRA guidance has historically applied this requirement to random alcohol testing, as well as drug testing. *See generally* Compliance Manual 9.5.3.1(e) (discussing the requirements for employees from different DOT agencies without distinguishing between random drug and alcohol testing). Accordingly, proposed paragraph (d) would correct this oversight and clarify that this provision applies to both drug and alcohol random testing.

Section 219.603—General Requirements for Random Testing Programs

This section would contain requirements that apply generally to FRA random testing programs. This section would also act as a table of contents for subpart G, directing readers to the specific sections containing the detailed requirements for random testing entries, pools, selections, etc. FRA believes including such information near the beginning of subpart G would help make the regulation more reader-friendly.

Paragraph (a) would generally require a railroad to ensure that its random testing program is designed and implemented in a way that its regulated employees should reasonably believe that they may be called for FRA random testing without advance notice any time they are on duty and subject to performing regulated service. FRA understands that ensuring this perception may be difficult for smaller railroads and contractor companies with a limited number of individuals in a testing pool, but FRA expects all entities to comply with this provision to the extent possible. FRA could find a railroad in violation of this section if it determines the railroad has not made a good faith effort to comply.

Paragraph (b) would prohibit a random testing program from having a bias, having an appearance of bias, or providing an opportunity for a regulated employee to avoid complying with subpart G. For example, this paragraph would prohibit a supervisor from performing the selection for a random testing pool to which he or she belonged, as this would create an appearance of bias.

Paragraph (c) would require a railroad to submit for FRA approval a random testing plan meeting the requirements of §§ 219.603–219.609 and addressing all employees as defined in § 219.5 (including contractors and volunteers) who perform regulated service on the railroad's behalf. Paragraphs (d)–(j) would identify where railroads may find the subpart G requirements for random pools (§ 219.611), random selections (§ 219.613), random collections (§ 219.615), railroad and employee cooperation (§ 219.617), responsive action (§ 219.619), service agents (§ 219.621), and records (§ 219.623), respectively.

Section 219.605—Submission and Approval of Random Testing Plans

This section would contain requirements for the submission, approval, and amendment of random testing plans by railroads subject to the requirements of subpart G.

Paragraph (a)(1) would require a railroad to submit a random testing plan directly to the FRA Drug and Alcohol Program Manager (Program Manager) for approval. This submission must be made no later than 30 days prior to the date a railroad commences operations. If a railroad previously qualified for the small railroad exception under § 219.3, but no longer does, it must submit its random testing plan no later than 30 days after it ceases to qualify as a small railroad. No random testing plan or substantive amendment to such plan

may be implemented prior to obtaining FRA approval. While §§ 219.601(a) and 219.607(a) currently direct railroads to submit random testing plans to the Associate Administrator for Safety (for plan approval by the Administrator), the task of approving random testing plans has been delegated as a matter of practice to the Program Manager, who has played this role since the implementation of random testing in 1989. Amending this section to specify that plans must be submitted to the Program Manager would not substantively alter the approval process, but would enhance the efficiency by reflecting actual FRA practice.

Paragraph (a)(2) would provide a railroad three options for addressing different categories of regulated employees in its random testing plan. A railroad could either submit a separate plan for each category, combine all categories into a single plan, or amend a plan currently approved by FRA to incorporate an additional category. This approach is intended to provide maximum flexibility for railroads incorporating additional categories of regulated employees into their random testing plans. (Under the proposed rule, the only categories of regulated employees subject to the requirements of part 219 are covered employees and MOW employees. This proposed requirement would also apply, however, to any additional categories of employees that might be added to the scope of part 219 in the future.) FRA would still independently evaluate each plan or plan amendment submitted by a railroad to ensure that it met the requirements of subpart G. FRA would not approve individual plans or plan amendments that appear to discriminate against a particular group of regulated employees or that fail to meet the requirements of subpart G. A railroad could also not submit separate random testing plans for subcategories of regulated employees, such as engineers, conductors, or signalmen.

Paragraph (b) would specify that FRA will notify a railroad in writing whether its plan is approved, with specific explanation as to necessary revisions if the plan is not approved. Plans that are not approved must be revised and resubmitted by a railroad within 30 days of that notice. Failure to resubmit a disapproved plan with the necessary revisions would be considered a failure to submit a plan. This is slightly different from language currently found in § 219.601(c),²⁵ which states that a

²⁵ The requirements of proposed paragraph (b) are currently found in § 219.601(c) for random drug testing, but are inexplicably missing from the

failure to resubmit is a failure to *implement* a plan. FRA believes that the proposed language is a more accurate description of the underlying violation, however, because in such a situation there is no approved random testing plan to implement. This amendment would not substantively change existing requirements.

Paragraph (c) would require a railroad to implement a random testing plan no later than 30 days after FRA approval. Currently, railroads are required to implement random testing plans no later than 60 days following FRA approval. *See* §§ 219.601(d)(2) and 219.607(c)(2). When FRA's random testing requirements first became effective in 1988, allowing railroads 60 days to implement an approved random testing plan was appropriate given the newness of the regulation. Since that time, however, the railroad industry has become quite familiar with FRA's random testing requirements. Even if a railroad underwent an operational change that required it to implement an FRA random testing program for the first time (for example, if a railroad with 15 or fewer covered employees began engaging in joint operations²⁶), there are numerous existing resources (such as established service agents, C/TPAs, FRA guidance, etc.) that can help the railroad promptly and efficiently implement a random testing plan. Given the availability of these resources and the knowledge of FRA's random testing program requirements throughout the railroad industry, FRA believes that 30 days is now sufficient for a railroad to implement a random testing plan following FRA approval.

Paragraph (d)(1) would require a railroad to submit a substantive amendment to an already-approved random testing plan at least 30 days prior to its intended effective date. Any such amendment could not be implemented prior to FRA approval. *See* §§ 219.601(a) and 219.607(a). An example of a substantive amendment would be any change to a railroad's construction of its random testing pools or its method of conducting random selections. If a railroad is uncertain whether an amendment is substantive or

sections on random alcohol testing. FRA believes this is an accidental oversight, as there is no logical reason for these plan submission requirements to apply only to random drug testing. Proposed paragraph (b) would correct the oversight and ensure that the requirements apply to both random drug and alcohol testing.

²⁶ Railroads should note that because this NPRM is not proposing any amendments to the small railroad exception of § 219.3(c), no railroad that was previously excepted from the Subpart G random testing requirements would lose that exception as a result of this proposed rule.

not, it should contact the Program Manager for guidance.

Paragraph (d)(2) would incorporate FRA guidance by clarifying that FRA pre-approval is not required for non-substantive amendments, but that the railroad must notify FRA of any such amendment prior to its effective date. *See* Compliance Manual 9.4.3.2. Examples of non-substantive amendments would include, but not be limited to, replacing or adding a service provider, such as a C/TPA, laboratory, collector, or MRO. FRA recognizes that current guidance in the Compliance Manual describes a change in service provider (except for a collector) as a substantive change for which pre-approval is necessary. *Id.* FRA's experience, however, has indicated that requiring approval for a change of service provider is not necessary because it imposes a burden on railroads that does not significantly promote safety. Accordingly, paragraph (d)(2) would specifically note that a change in service providers is not a substantive change requiring pre-approval.

Paragraph (e) would address railroad random testing plans that were approved prior to the effective date of the final rule. A railroad would not be required to resubmit such a plan unless it required amendment to comply with the final rule. If a railroad is required to submit either a new or an amended plan as a result of the final rule, this submission must be made at least 30 days before the effective date of the final rule.

Section 219.607—Requirements for Random Testing Plans

Generally, this section would direct a railroad to submit and comply with a random testing plan containing certain items of information. This is not a new requirement, and FRA guidance provides direction on what information such plans must contain.

Paragraph (a) would generally require a railroad to submit a random testing plan meeting the requirements of subpart G and to comply with those requirements when implementing the plan. Similar language can currently be found in § 219.601(b).

New language in paragraph (b) would inform railroads, contractor companies, and service agents that they may request a model random testing plan from the Program Manager. While this proposed language is new, FRA has historically made a model random testing plan available to railroads, and the plan is available for review and download on FRA's Web site at <http://www.fra.dot.gov/Page/P0345>. After

modifying the model plan as necessary to fit its needs and the requirements of subpart G, a railroad could then submit it to FRA for approval.²⁷

New language in paragraph (c) would specify certain information that a railroad's random testing plan must contain. Each item of information identified by paragraph (c) would have to be contained in a separate, clearly identified section of a random testing plan. For example, each plan would be required to have separate sections dedicated to items of information such as the total number of covered employees; the name, address, and contact information for the railroad's Designated Employer Representative; the method used to make random selections; etc. While section 9.4.3 of the Compliance Manual briefly discusses similar information requirements, proposed paragraph (c) provides additional detail and specificity regarding these mandatory elements of information, which largely mirror and somewhat expand the format of FRA's model random testing plan. By specifying the elements that must be included in every random testing plan, FRA intends to further the standardization of random testing plans. Standardizing random testing plans would promote compliance with subpart G by making it easier for FRA inspectors to evaluate plans, provide guidance and feedback on the development and implementation of such plans to regulated entities, and compare a railroad's actual practice with the required plan elements.

Section 219.609—Inclusion of Contractors and Volunteers in Random Testing Plans

Currently, subpart G does not discuss how a railroad's random testing plan should incorporate contractor employees and volunteers. FRA has nevertheless historically provided railroads informal guidance on how to manage random testing for covered service contractors and volunteers. This section would incorporate this guidance into part 219.

The introductory text of paragraph (a) would clearly state that a railroad's random testing plan must demonstrate that all of its regulated service contractor employees and volunteers are part of an FRA-compliant random testing program. Paragraphs (a)(1) and (a)(2) would explain two ways that a railroad could demonstrate compliance with this requirement:

²⁷ After publication of the final rule, FRA will revise and update its model random testing plan as necessary to reflect any new requirements.

- Under paragraph (a)(1), a railroad could incorporate into its own random testing plan any contractor employee and/or volunteer performing regulated service on its behalf. The railroad would be responsible for ensuring that such individuals were selected and tested according to its random testing plan; or

- Under paragraph (a)(2), a railroad could indicate in its random testing plan that all contractor employees and/or volunteers performing regulated service on its behalf are included in a non-railroad random testing program meeting subpart G requirements. As used in subpart G, a non-railroad random testing program is one conducted by either a service agent (such as a C/TPA) or a contractor company. A railroad utilizing this option would be required to append to its random testing plan one or more addenda explaining how it would ensure that its regulated service contractor employees and volunteers are in compliance with subpart G. Such addenda could be either the non-railroad random testing program itself or a detailed description of the program and how it complies with FRA requirements.²⁸

FRA believes the above options would facilitate subpart G compliance. For example, a railroad utilizing the paragraph (a)(2) option would be able to directly analyze the random testing programs of its contracting companies. This would help ensure that contracting companies performing regulated service for more than one railroad are in compliance with subpart G.

Railroads should note that paragraph (a) would not require them to accept and incorporate a non-railroad random testing program into their own random testing programs. A railroad would always be able to comply with subpart G by incorporating regulated service contractor employees and volunteers into its own random testing program, regardless of whether or not such individuals were already part of a non-railroad random testing program that complied with the requirements of subpart G.

Paragraph (b) would generally require a random testing plan and any attached addenda to contain sufficient details to fully document that the railroad is meeting the subpart G requirements for all personnel performing regulated service on its behalf.

²⁸ Railroads would be able to obtain information about the non-railroad random testing program under proposed § 219.623 (discussed below), which would require contractor companies and service agents to provide random testing records upon request to any railroad for which they are performing random testing responsibilities.

Paragraph (c) would specify that a railroad accepting a non-railroad random testing program would remain responsible for ensuring that the non-railroad program is properly subjecting the railroad's regulated service contractor employees and volunteers to the random testing requirements of subpart G. For example, this provision would require a railroad to evaluate for subpart G compliance any non-railroad random testing plan that it accepts.

Paragraph (d) would specify that FRA would not require submission and would not approve random testing plans for contractor companies or service agents under the provisions of § 219.603. FRA believes there may be a vast number of such contractor companies and service agents, and does not believe it would be a beneficial use of its resources to attempt to approve and audit all of them. Rather, as provided in paragraph (c), responsibility for ensuring that such plans and programs comply with the requirements of subpart G would rest with the railroad employing the contractor company or service agent. The only time FRA might address a non-railroad random testing plan would be when the plan itself was appended to a railroad's random testing plan, as described in paragraph (a)(2). In such situations, FRA could look at the non-railroad plan and note instances of non-compliance, which FRA would then communicate to the railroad for it to pursue on its own behalf with the contracting company or service agent.

Section 219.611—Random Alcohol and Drug Testing Pools

Subpart G currently provides railroads little guidance on the creation or management of random testing pools. Random testing pools are only briefly discussed in § 219.601(b)(2)(ii)–(iii), which requires all covered employees to be included in an FRA random testing pool and each random testing pool to contain only covered employees. FRA believes that subpart G can be improved by including this new section dedicated to requirements on how to implement random testing pools. In addition to some new substantive requirements (discussed below), this section would also incorporate FRA guidance on the proper creation and management of random testing pools. *See generally* Compliance Manual 9.5. FRA has been auditing railroads according to the standards of the Compliance Manual since it was published in 2002.

Paragraph (a)—General

Paragraph (a) would require a railroad to ensure that its random testing pools

include all personnel performing regulated service on its behalf, except that a railroad would not have to include regulated employees who are part of a non-railroad random testing program that has been accepted by the railroad and is compliant with subpart G.

Paragraph (b)—Pool Entries

Paragraph (b) would contain requirements for pool entries, and the introductory text would state that a railroad must clearly indicate who will be tested when a specific pool entry is selected. FRA would not approve vaguely defined pool entries lacking either clarity or specificity. For example, if a railroad's pool entry is a job function, the railroad must indicate exactly who would be tested when an entry is selected. Would the individual performing that job function on the first shift of the selected day be tested, or the individual performing that job function for the first train into a certain yard after midnight? Would all individuals performing that job function be tested or would a single individual from that group be tested? As an illustration, if a pool entry was the job function "third shift dispatcher," additional information (such as the desk that the dispatcher was working on) would be required if there was more than one individual acting as a third shift dispatcher and only one random test was to be performed.

Paragraph (b)(1) would identify three types of pool entries that are generally permitted: (1) Individual employee names or identification numbers; (2) train symbols; and (3) specific job assignments. These three options have traditionally been accepted by FRA as pool entries if they otherwise meet the requirements of subpart G. *See* Compliance Manual 9.5.3.1(f). If a railroad wishes FRA to consider other types of pool entries, it should include them in the random testing plan submitted to FRA for approval under proposed § 219.605. Although not required, FRA encourages smaller railroads to use individual employees or identification numbers as pool entries, rather than trains or job assignments. Individual pool entries are preferable for a smaller railroad because this maximizes its limited number of pool entries. Larger pool entries (such as train symbols), contain more than one employee, and would make a small railroad reach its required minimal annual testing rate earlier in the year than if it used individual pool entries. This could be problematic if the small railroad's random testing is not spread evenly through the year to achieve

maximum deterrence effect, as required by proposed § 219.615(c)(2) (discussed below). Small railroads also do not face the same logistical and cost difficulties that make train symbols or job functions useful as entries for larger railroads.

Paragraph (b)(1) would also incorporate FRA guidance by stating that pool entries must be of a generally consistent size and type. See Compliance Manual 9.5.3.1(f). For example, a pool could not combine individual employee entries with job function entries that identify multiple individuals. FRA would likely not take exception to a pool consisting of train symbols where the crew sizes might slightly vary. However, FRA may take exception to a pool made up of both individual employees and job assignments, or with job assignments which might vary in size from one employee to dozens of employees, as pool entries of vastly different size and type would adversely affect the chances that some individuals may be selected over others. A railroad contemplating unusual or possibly controversial pool make-ups should request FRA approval for that approach in its random testing plan.

Paragraph (b)(2) would state that pool entries may not be constructed in a way that permits a railroad field manager or field supervisor to have discretion over which regulated employees would be selected for random testing. For example, if the selected entry was “third shift dispatcher” and more than one individual met this description, a railroad could not permit a field manager/supervisor to decide which third shift dispatcher would be subject to random testing. Field managers/supervisors may personally know the individuals involved in a random selection, and permitting a field manager/supervisor to exercise discretion in this manner could create a situation where he or she was using that discretion to target or protect a specific individual. This language would supplement other proposed provisions prohibiting railroads from utilizing a selection method or conducting random testing collections in a way that permits a railroad field manager or supervisor to have discretion over which particular regulated employees would be selected for random testing.

Paragraph (b)(3) would incorporate FRA guidance by requiring a railroad to construct and maintain pool entries so that all regulated employees have an equal chance of being selected for random testing during each selection draw. See Compliance Manual 9.6.3. This requirement would apply even to regulated employees who were selected

for random testing during a previous selection draw. For example, a railroad could not remove a regulated employee from a testing pool simply because he or she had already been selected for random testing that year. In order for a random testing program to have a deterrence effect, each regulated employee must believe that he or she could be selected for testing during any selection draw, regardless of whether or not he or she was selected for testing the week, month, or year before.

Paragraph (c)—Minimum Number of Pool Entries

Paragraph (c) would contain new language requiring a random testing pool to have at least four entries. A railroad could not use placeholder entries (entries that do not represent legitimate selections of regulated employees, whether individuals, train symbols, or job assignments) to comply with this requirement. This would be a new requirement not currently found in the regulation, Compliance Manual, or other published FRA guidance.

This proposal would address FRA’s concern that random testing pools with fewer than four entries (regardless of whether the entries are individuals, trains, or job assignments) can diminish the deterrence effect of random testing. For example, if a railroad with only three regulated employees as entries in a pool was required to test for alcohol at a minimum annual rate of 10 percent,²⁹ the railroad would meet this requirement once it had selected and tested only one regulated employee. Once this test was completed, the deterrence effect of random testing would vanish because the railroad’s other regulated employees could learn that the only test required for the year had already been completed. The purpose of random testing is to make every regulated employee expect that he or she could be subject to an alcohol or drug test any day. If the railroad has a limited number of entries in its random testing pool, this purpose is defeated.

Of course, the problem of small random testing pools and a diminished deterrence effect does not vanish once a pool has four or more entries. The same concern can exist for random testing pools with 5, 10, or even more entries, depending on the minimum annual testing rate. For this reason, this proposed amendment is only one component of FRA’s solution for this difficulty. The second component is

²⁹ In this scenario, even though the railroad has 15 or fewer covered employees, it is required to implement a Subpart G random testing program under § 219.3 because it engages in joint operations with another railroad.

found in proposed § 219.613(d), which would require a railroad to select and test at least one entry from a random testing pool per quarter (i.e., every three months), regardless of the size of the pool and regardless of whether the railroad has already met its minimum annual random testing rate requirement. (A quarter would not need to be based on a calendar determination if a railroad is making selections on a monthly basis.) While § 219.613(d) will be independently discussed below, its relevance to § 219.611(c) lies in the fact that even a small random testing pool can provide a deterrence effect, so long as the pool members anticipate that at least one individual will be selected and tested per quarter. FRA intends §§ 219.611(c) and 219.613(d) to work together to promote the deterrence effect of random testing.

FRA does not believe it would be appropriate under § 219.613(d) to require railroads to select and test at least one entry from a pool per quarter without also requiring pools to have at least four entries. If the four entry requirement did not exist, a railroad could theoretically maintain a random testing pool with only one entry, which would then necessarily be subject to random testing four times a year as a result of proposed § 219.613(d). FRA believes that four is appropriate for the minimum number of pool entries because it complements the proposed § 219.613(d) requirement to select and test at least one entry per pool per quarter, which results in a minimum number of four tests per year. Under this approach, perfect odds for a four entry pool would result in each entry being selected for random testing once per year. (Of course, the odds are not perfect, and any entry in a four entry pool could end up being selected for random testing four times a year. It is this imperfection that generates the deterrence effect of random testing, so that every regulated employee believes that he or she can be selected for testing at any time, regardless of whether he or she was previously selected for testing.)

Overall, FRA’s experience in helping railroads implement random testing programs indicates that there is no compelling reason for a railroad to maintain a random testing pool with fewer than four entries. FRA believes that this new requirement would not adversely impact railroads with fewer than four regulated employees, since paragraph (c) would specify that a railroad with fewer than four regulated employees could comply with this requirement by having those employees incorporated into either a railroad program or a non-railroad program (e.g.,

by joining a C/TPA), so long as the random testing pool contained at least four entries.

Paragraph (d)—Pool Construction

Paragraph (d) would contain requirements for the construction of random testing pools.

Paragraph (d)(1) would prohibit a railroad from placing in an FRA random testing pool anyone who is *not* an individual subject to the random alcohol and drug testing requirements of a DOT agency (i.e., an individual who is not a “DOT-regulated employee”). Including non-DOT-regulated employees in an FRA random testing pool would dilute the chances of a DOT-regulated employee being selected, thereby diminishing the deterrence value of random testing. Furthermore, a railroad mixing DOT-regulated and non-DOT-regulated employees in random testing pools would find it difficult to determine whether it was properly testing at the mandatory minimum percentage rate for DOT-regulated employees.

Paragraph (d)(2) would prohibit a single railroad from including a regulated employee in more than one DOT random testing pool. For example, a railroad could not include a regulated employee who holds a CDL in both an FRA and an FMCSA random testing pool. Rather, as provided by proposed § 219.601(d), a railroad must determine which agency regulates more than 50 percent of a regulated employee’s DOT safety-sensitive duties and place that employee in the random testing pool that is testing at the required minimum annual rate of that agency. This paragraph would not prohibit a regulated employee from belonging to more than one FRA random testing pool if he or she performs regulated service for more than one railroad, each of which includes him or her in its own random testing program. Rather, it merely would state that an individual cannot be included in more than one DOT testing pool *by the same railroad*.

Paragraph (d)(3) would permit a railroad to place all DOT-regulated employees (both FRA and non-FRA regulated individuals) in a single random testing pool. Such a mixed pool, however, would have to be tested at the highest minimum random testing rate mandated by a DOT agency for any individual pool entry. For example, if the highest rate for an individual pool entry was 50 percent, the entire pool must be tested at a rate of 50 percent, regardless of whether other individual pool entries were subject to a lower minimum testing rate. Similarly, this paragraph would also permit railroads

to place different categories of FRA regulated employees into a single testing pool, even if the minimum annual testing rates for those categories were different, so long as the entire pool was tested at the highest minimum testing rate for any individual entry.

This proposal is different from the strict wording of certain provisions in current part 219, which require railroads using a service agent to ensure that only FRA “covered employees” are in the service agent’s random testing pool. *See* §§ 219.601(b)(2)(iii) and 219.607(b)(1)(i). However, FRA has not been actively enforcing this requirement, and other current provisions contradict it. *See* §§ 219.602(i) and 219.608(f). Furthermore, both FRA and ODAPC have independently published guidance specifying that employees regulated by different DOT agencies can be mixed in the same pool. *See* Compliance Manual 9.5.3.1(e) and Office of Drug and Alcohol Policy and Compliance, Best Practices for DOT Random Drug and Alcohol Testing, available at <http://www.dot.gov/odapc/best-practices-dot-random-drug-and-alcohol-testing>. Paragraph (d)(3), therefore, would make the wording of part 219 consistent with FRA and DOT’s actual practice.

Paragraph (d)(4) would incorporate FRA guidance indicating that a railroad does not need to place regulated employees in separate pools for random drug and alcohol testing selection. *See* Compliance Manual 9.5.3.1(c). This paragraph would not, however, permit a railroad to make selections from a pool for drug testing, and then sub-select for alcohol testing from within that selected group. It would permit a railroad, however, to select employees for drug testing only and other employees for both drug and alcohol testing so long as every employee in the pool had an equal chance for selection for each group.

Paragraph (d)(5) would require a railroad to incorporate an individual into a random testing pool as soon as possible after his or her hire or transfer into regulated service. This requirement would promote both safety and fairness by ensuring that an individual newly hired or transferred into regulated service would be subject to selection during the next random testing selection period. Railroads must have a mechanism to ensure that these personnel are entered into a random pool without delay.

Paragraph (e)—Frequency of Regulated Service

Paragraph (e) would incorporate FRA guidance addressing the potential dilution of random testing pools by

individuals who perform regulated service on a de minimis basis. *See* Compliance Manual 9.5.3.2. FRA considers such individuals to present a lesser safety risk than individuals who routinely perform regulated service. The purpose of paragraph (e) is to promote safety by focusing random testing on the population of employees who perform regulated service on a routine basis.

Paragraph (e)(1) would prohibit a railroad from placing individuals into a random testing pool for any selection period in which they are not expected to perform regulated service. Such individuals present a lesser safety risk, and their inclusion in a random testing pool would dilute the chances that an individual who routinely performs regulated service would be selected.

Paragraph (e)(2) would address railroad employees who perform regulated service on average less than once a quarter. FRA considers such employees to be a de minimis safety concern and do not require them to be included in a railroad’s random testing program. A railroad may randomly test de minimis employees, but must do so by placing them in a separate random testing pool, and not in a random testing pool that includes employees who perform regulated service on a routine basis.

Paragraph (e)(3) would require railroads to make a good faith effort when determining the frequency with which an individual performs regulated service. Individuals who perform regulated service on a de minimis basis would have to be evaluated each selection period as to the likelihood of their performing regulated service in the upcoming quarter.

Paragraph (f)—Pool Maintenance

Paragraph (f) would incorporate FRA guidance by requiring a railroad to update pool entries at least monthly, regardless of how often selections are made. *See* Compliance Manual 9.5.3.1 (introductory text) and 9.5.3.3. For example, if a railroad conducted selections every three months, it would still have to update the pool entries on a monthly basis. At each monthly update, a railroad would be required to ensure that each random testing pool was complete and did not contain outdated or inappropriate entries. It is important for outdated and inappropriate entries to be immediately removed from random testing pools because their inclusion dilutes the population of regulated employees in the pool.

Paragraph (g)—Multiple Pools

Paragraph (g) would permit a railroad to maintain more than one random testing pool if it can demonstrate that selecting from multiple pools would still meet the requirements of subpart G and that having multiple pools would not adversely impact the construction of pool entities. *See* Compliance Manual 9.5.3.1 (c). Multiple random testing pools can be problematic if they create an unnecessary level of complexity in the management of the railroad's random selection and testing process. Under paragraph (g), FRA would evaluate the structure of a railroad's random testing pools to ensure that it facilitates a coherent, effective, and efficient deterrence program. Multiple random testing pools that adversely impact the deterrence value of random testing would not be approved as part of a railroad's random testing plan.

Section 219.613—Random Testing Selections

Properly constructed pools will not guarantee an effective random testing program if the method of selection from those pools is flawed. Random testing selections must be conducted in a manner ensuring that each regulated employee has an equal chance of being selected during each selection draw. This applies to selections at the level of both the random testing pool and the railroad as a whole. The purpose of this section, therefore, is to ensure that a railroad's random testing selections are conducted in a way that promotes the deterrence effect of random testing.

Discussed in greater depth below, paragraphs (a) through (k) would incorporate FRA guidance on proper random testing selections. *See generally* Compliance Manual 9.6.

Paragraph (a)—General

Paragraph (a) would require a railroad to ensure that each regulated employee has an equal chance of being selected for random testing whenever a selection is performed. A railroad may not increase or decrease an individual's chance of selection by weighting any particular entry or pool. *See* Compliance Manual 9.6.3.3. For example, a railroad may not remove an already-selected regulated employee from a pool in order to increase the chances that another regulated employee will be selected for testing. This requirement is intended to help ensure that each regulated employee believes that he or she can be selected for testing during any selection draw, even if he or she was already selected for testing the week, month, or year before.

Paragraph (b)—Method of Selection

Paragraph (b)(1) would incorporate FRA guidance by requiring a railroad to utilize a selection method that meets the requirements of subpart G and that is acceptable to FRA. *See* Compliance Manual 9.6.4.2. An acceptable method would be either a computer selection program or the proper use of a random number table. *Id.* A railroad could include a different selection method in the random plan that it submits for FRA approval under § 219.603, but the plan would likely not be approved unless the railroad could demonstrate clearly that the method complied with subpart G. For railroads wishing to conduct selections through the use of a random number table, FRA has drafted a guidance document explaining how this approach can be implemented in compliance with subpart G. A railroad can obtain this guidance document by contacting the FRA Drug and Alcohol Program Manager. It is also included as Appendix C to the model random testing plan, available on FRA's Web site at <http://www.fra.dot.gov/Page/P0345>.

Paragraph (b)(2) would specify that a selection method must be free of bias (either real or apparent) and must employ objective, neutral criteria to ensure that every employee has a statistically equal chance of being selected during a specified time frame. A selection method could not utilize subjective factors that would permit a railroad to manipulate selections to either target or shield from testing a certain regulated employee. *See* Compliance Manual 9.6.1. These requirements are found in multiple sections of the current rule addressing random drug testing (for example, § 219.601(b)(1) and § 219.602(e)), but are missing from the sections on random alcohol testing. FRA believes that this is an accidental oversight, as there is no logical reason for drug selections to be made according to objective and neutral criteria, but not alcohol selections. Furthermore, FRA has historically interpreted subpart G in a manner that applies these requirements to random alcohol testing. *See generally* Compliance Manual 9.6 (discussing selection procedures without distinguishing between random drug and random alcohol testing). This paragraph would correct this oversight and ensure that the requirements specifically apply to both random drug and random alcohol testing.

Paragraph (b)(3) would require a railroad to be able to verify the randomness of its selection method. Examples of how a railroad could do so

include, but are not limited to, analyzing the source code of a computer selection program or reviewing past selections to ensure that the results appear to conform to randomness (e.g., the same individual is not always selected first). Paragraph (b)(3) would also require a railroad to maintain any records necessary to document random selections for a minimum of two years from the date the designated testing window for the selection closed. Such records include, but are not limited to, documentation indicating the composition of the random selection pool and the entries that were selected from it. *See* Compliance Manual 9.6.2.

Paragraph (c)—Minimum Random Testing Rate

Paragraph (c) would incorporate FRA guidance by requiring a railroad to make sufficient selections to ensure that each random testing pool will meet the minimum annual testing rates. *See* Compliance Manual 9.6.5. To support the deterrence effect of random testing, railroads would also have to ensure that random tests are reasonably distributed throughout the calendar year. *See* Compliance Manual 9.6.5.1. FRA understands that the distribution of random selections and tests throughout the year cannot be absolutely perfect. Nevertheless, a railroad would be in violation of this section if its distribution of selections and tests throughout the year suggested that the tests were loaded into certain months or quarters because the railroad had failed to properly monitor its random test completion rate and was trying to comply with the minimum annual testing rate at the last minute. Similarly, a railroad would be in violation of this paragraph if it made all its selections and conducted all required testing within the first quarter of a year, thereby eliminating the deterrence value of random testing for the remainder of the year.

Paragraph (c)(2) would incorporate FRA guidance by requiring a railroad to continuously monitor changes in its workforce to ensure that the required number of selections and tests will be completed annually. *See* Compliance Manual 9.6.5.4.

Paragraph (c)(3) would explain how a railroad must calculate the total number of regulated employees eligible for random testing selection throughout a year and the total number of selections that it needs to complete and test to meet the minimum annual testing rate. The substantive requirements of this proposed paragraph are essentially the same as those contained in current

§§ 219.601(b)(2)(ii) and 219.607(b)(1), and no substantive change is intended.

Paragraph (d)—Selection Frequency

Paragraph (d) would require a railroad to select and test at least one entry from each random testing pool every three months (i.e., once per quarter), regardless of the size of the pool or how often selections are made. This is a new requirement not currently found in subpart G or FRA's published guidance. Paragraph (d) would not, however, excuse the railroad from complying with the applicable minimum annual percentage rates (e.g., for a pool of 16 MOW workers subject to a minimum annual random drug testing rate of 50 percent, a railroad would still have to select and test a minimum of eight entries per year).

This paragraph would complement proposed § 219.611(c) (discussed above), which would require random testing pools to include at least four entries. Both proposals would address FRA's concern that small random testing pools do not create a sufficient deterrence effect. As discussed above, FRA believes a sufficient deterrence effect would be created if at least one entry from a random testing pool is selected for testing each quarter. FRA is soliciting public comment on whether it should consider requiring at least one selection to be made at a rate greater or less than quarterly.

FRA does not believe that the combined requirements of proposed §§ 219.611(c) and 219.613(d) would create an undue burden for railroads. A railroad would have the following options to comply with these proposed provisions:

- If the railroad has four or more entries in each random testing pool, it could select and test at least one entry from each pool per quarter.
- If the railroad has fewer than four regulated employees, it could join a C/TPA so that its regulated employees are placed into a pool with regulated employees from other DOT-regulated entities. Any C/TPA pool with FRA regulated employees would still be required to have more than four entries, and at least one entry from each pool must still be tested per quarter.
- If an employer is a contractor company performing regulated service for a railroad, the contractor's regulated employees could be incorporated into the railroad's subpart G random testing program.

Paragraph (e)—Discarded Selection Draws

Paragraph (e) would require a railroad to utilize a completed selection draw to

identify which individuals must be subject to random testing. This requirement would apply regardless of the number of entries selected. A completed selection draw could not be discarded without an acceptable explanation, such as the selection was made from a pool that was incomplete or inaccurate (e.g., a selected employee was no longer employed by the railroad).³⁰ For each instance where selected individuals were not random tested, a railroad would have to maintain records documenting the specific reason why testing was not completed. This requirement would prevent a railroad from discarding a selection simply because it was not satisfied with who was or was not selected for random testing (i.e., because the railroad wished to either target or protect certain regulated employees). For example, a railroad manager would be prohibited from discarding a selection draw because he wished to protect a selected individual whom he knew was using drugs or alcohol in violation of FRA prohibitions. See Compliance Manual 9.6.4.1.

Paragraph (f)—Increasing Random Selections

Paragraph (f) would specify that if a railroad was not able to complete a collection for all selections during the designated testing window, as provided by § 219.615(f) (which would require a railroad to have an acceptable reason for an incomplete collection) or § 219.617(a)(3) (which would excuse an employee notified of a random test in a situation involving a substantiated medical emergency involving the employee or an immediate family member), the railroad may over-select during the draw for the next designated window to ensure that it is meeting the minimum random testing rate. Railroads doing so should remain aware, however, of the § 219.613(c) requirements that random tests be distributed reasonably throughout the calendar year. A railroad could violate this requirement if it had numerous incomplete collections throughout the calendar year and then drastically increased selection during the final designated testing window in that year in order to meet the minimum random testing rate.

³⁰ Railroads should note that while proposed § 219.613(e) would permit a selection draw to be discarded for an "acceptable" reason, it does *not* permit the cancellation of a random test that has already been completed as a result of that draw. See § 40.209(b)(10) (prohibiting a railroad from cancelling a test because an employee claimed that he or she was improperly selected for testing).

Paragraph (g)—Selection Snapshots

Paragraph (g) would incorporate FRA guidance by requiring a railroad to capture and maintain an electronic or hard copy snapshot of the entries in each random testing pool at the time of a selection. While FRA guidance currently directs railroads to maintain a hard copy of such snapshots, this proposed provision would specifically permit electronic copies. See Compliance Manual 9.5.3.4. The snapshot must be contemporaneous with the time of the selection, and pool entries could not be re-created from records after the time of the selection. Documentation of each snapshot would be required to be maintained for two years, in accordance with the record-keeping requirements of subpart J (referenced by proposed § 219.623). FRA would review such snapshots during its audits to ensure that the random testing pool from which a selection was made was complete.

Paragraph (h)—Multiple DOT Agencies

Paragraph (h) would remind railroads that regulated employees who are subject to the regulations of more than one DOT agency must be subject to random drug testing at or above the minimum annual percentage rate set by the DOT agency regulating more than 50 percent of the employee's DOT functions, as provided by proposed § 219.601(d).

Section 219.615—Random Testing Collections

This section would contain requirements governing random testing collections, many of which are incorporated from traditional FRA guidance on the proper management of random testing collections. See *generally* Compliance Manual 9.7.3. These requirements would supplement, and not replace, the drug and alcohol testing procedural requirements of part 40, which apply to random testing under § 219.701.

Overall, the proposed requirements of this section would continue to emphasize the deterrence value of random testing. If specimen collections are thoughtfully planned and properly executed, regulated employees should generally perceive that they may be selected for random testing anytime they are subject to performing regulated service.

Paragraph (a)—Minimum Random Testing Rates

Paragraph (a) would require a railroad to complete a sufficient number of random testing collections from each

random testing pool to meet the minimum annual percentage rates.

Paragraph (b)—Designated Testing Window

Paragraph (b) would incorporate FRA guidance by requiring a railroad to complete the collection for a selected pool entry within its designated testing window (which a railroad must describe in its random testing plan under proposed § 219.607(c)(13)). See generally Compliance Manual 9.7.3.2. A designated testing window is the specified time frame within which a railroad must complete a collection once an entry has been selected for random testing (for example, from midnight on Monday through midnight the following Monday). Such designated testing windows are necessary because regulated employees may not be on-duty and subject to performing regulated service on the date for which they are selected. If a railroad does not complete a collection within the designated testing window, the selection is no longer valid. A selected employee cannot be subjected to random testing outside a designated testing window. See generally Compliance Manual 9.7.3.2.

Paragraph (c)—Collection Timing

Paragraph (c)(1) would state that a regulated employee may be subject to random testing only when he or she is on duty and subject to performing regulated service. Sections 219.601(b)(6) and 219.607(b)(5) currently require a covered employee to be on-duty when subject to testing. The additional language in this proposed paragraph is intended for clarification purposes only.

Paragraph (c)(2) would restate the current requirement that random collections must be unannounced and spread reasonably through the calendar year. See § 219.602(g) and § 219.607(b)(3). As provided by FRA guidance, collections must also be spread unpredictably throughout a designated testing window and reasonably cover all operating days of the week (including operating weekends and holidays), shifts, and locations. See Compliance Manual 9.7.3.3. While the distribution of collections during a specific time period does not have to be perfectly equal to that time period's percentage of a railroad's total operations (e.g., if 20 percent of a railroad's operations occur during a specific day in a week, a railroad is not required to conduct exactly 20 percent of its random tests during that day), sufficient random testing during a time period must be conducted to establish a deterrence effect. *Id.* For example, a

railroad would be in violation of this provision if 30 percent of its operations occurred on Saturdays and Sundays, but only 5 percent of collections occurred on a Saturday and no tests occurred on Saturday afternoons. *Id.* If a railroad predictably did not perform random testing during a certain time, day, month, etc., an employee may believe that he or she could use drugs and/or alcohol at those times, without risk of FRA random testing.

Paragraph (c)(3) would incorporate FRA guidance by requiring random alcohol test collections to be performed unpredictably and in sufficient numbers at either end of an operating shift to establish an acceptable deterrence effect throughout the entire shift. See Compliance Manual 9.7.3.5. The predictability of alcohol testing is a special concern for FRA because breath testing can only detect alcohol use for a limited amount of time (a few hours) afterwards. As stated earlier, FRA realizes that railroads often conduct alcohol tests at the beginning or end of a train crew's shift for operational reasons, but alcohol testing must be conducted at other times to prevent crews from being able to predict when tests are likely to occur. For example, if random alcohol testing occurs only at the end of shifts, an employee may consume alcohol at the beginning of a shift under the assumption that his or her alcohol use would not be detectable by the end of the shift. FRA is therefore proposing to require a railroad to conduct some of its random alcohol tests at both the beginning and end of shifts. At least 10 percent of a railroad's random alcohol tests should occur at the opposite end of the shift in which it usually tests in order to generate an acceptable level of deterrence throughout an entire shift. See Compliance Manual 9.7.3.5.

Paragraph (c)(4) would clarify that if a regulated employee is selected for both random drug and alcohol testing, these tests may be conducted separately, so long as both tests can be completed by the end of the employee's shift and the railroad does not inform the employee that an additional random test will occur later. Conducting the tests in this manner could have two benefits for a railroad. First, it could minimize burdens resulting from either operational delays or possible hours-of-service violations due to the sometimes lengthy times required for drug testing specimen collections. Second, it could support the railroad's compliance with the FRA requirement that at least 10 percent of random alcohol tests must be conducted at opposite ends of the shift.

Paragraph (d)—Collection Scheduling

The introductory text of paragraph (d) would incorporate FRA guidance by clarifying that, while pool entries must be selected randomly, railroads do not have to select random testing dates or schedule specimen collections randomly. See Compliance Manual 9.7.3.2. A railroad may choose the date and time on which a pool entry is to be notified and tested, so long as its pool entries are randomly selected and urine collections and breath alcohol tests are completed within the railroad's designated testing window. As provided by paragraph (d)(1), scheduling could be based upon the availability of the selected pool entry, the logistics of performing the collection, and any other requirements of subpart G. See Compliance Manual 9.7.3.2. However, when a selected pool entry contains different employees at different times (such as a train crew or a job function), paragraph (d)(2) would prohibit a railroad from using its discretion to schedule the test on a date which would deliberately target or protect a particular employee. See Compliance Manual 9.7.3.2.

Similarly, paragraph (d)(2) would prohibit railroad field supervisors and/or managers from using their discretion or personal knowledge to intentionally choose dates or times that would alter the identity of who would be tested. See Compliance Manual 9.7.3.6. FRA understands that the individual who schedules testing dates for a railroad may have some personal knowledge as to who would be tested as a result of that scheduling. Generally, FRA believes that any risk to the integrity and credibility of a random testing program is minimized when the person making scheduling decisions is located at the level of the railroad's headquarters, rather than at the field level where it is easier for personal considerations to come into play.

Paragraph (e)—Notification Requirements

Paragraph (e)(1) would restate existing § 219.601(b)(4), which prohibits a railroad from notifying a regulated employee of his or her random testing selection until the duty tour in which the random testing collection is to be conducted. Consistent with this existing regulatory requirement, notification may occur only so far in advance as is reasonably necessary to ensure the regulated employee's presence at the

time and place of the scheduled collection.³¹ See § 219.601(b)(4).

Paragraph (e)(2) would further provide that, unless there is an acceptable reason for the delay, collections must be conducted as soon as possible and commence no later than two hours after notification. This would be a new requirement not currently found in FRA regulations or guidance. (While FRA guidance currently directs railroads to notify train crews in transit no more than an hour before their arrival, this guidance applies only to train crews selected for random testing and does not directly address the time in which a random testing collection must begin. See Compliance Manual 9.7.3.8.) FRA believes that two hours is more than enough time to begin a collection once a regulated employee has been notified of his or her selection for random testing.

Consistent with current guidance, paragraph (e)(2) would require a regulated employee to be monitored after notification and, when possible, immediately escorted by supervisory or management personnel to the collection location. *Id.* These requirements would ensure that a regulated employee notified of his or her selection for random testing does not have the opportunity to either obtain false samples/contaminating products or to otherwise avoid the collection. *Id.*

Paragraph (e)(3) would restate current provisions requiring a railroad to inform a notified regulated employee that his or her selection was on a random basis. See §§ 219.601(b)(7) and 219.607(b)(7). It would also clarify that a railroad may satisfy this requirement by showing the regulated employee a completed DOT Custody and Control Form (CCF) or DOT Alcohol Testing Form (ATF) indicating the basis for testing, so long as the employee has been shown and directed to sign the CCF or ATF as required by §§ 40.73 and 40.241.

Paragraph (f)—Incomplete Collections

Paragraph (f) would require a railroad to use due diligence to ensure that a test is completed for each selection, unless there is an acceptable reason for not conducting the test. This language would incorporate historic FRA guidance directing railroads to ensure that a collection is completed for each selection, unless there is an acceptable reason for failing to do so. See

³¹ As stated earlier, while § 219.601(b)(4) currently specifies that these notification requirements apply to random drug testing, similar language is missing from the sections on random alcohol testing. The proposed provision would correct this oversight and clarify that these requirements also apply to random alcohol testing.

Compliance Manual 9.7.3.7. New language would require a railroad to document its reasons for failing to complete the test of a selection in sufficient detail to allow FRA to determine whether due diligence was exercised and whether there was an acceptable reason for the failure.

Under this paragraph, only an unforeseen and unpredictable problem would be an acceptable explanation for not completing a collection. An example of an acceptable explanation would be an illness of a regulated employee that extended throughout the entire designated testing window. FRA would likely not accept explanations involving problems that should be within the railroad's control (for example, a collector that does not show up for a collection or the lack of an available supervisor when required). FRA would also not accept an explanation that was based upon convenience or the operational priority of certain trains within a railroad's system.

Paragraph (g)—Hours-of-Service Limitations

For covered employees, paragraph (g) would govern the relationship between FRA's random testing and HOS requirements. Under this paragraph, a random testing collection not completed within a covered employee's HOS limitations must be immediately terminated and may not be rescheduled. Since the railroad controls the timing of a random test, a railroad is responsible for ensuring that sufficient time is available to complete a random testing collection, even for situations involving an employee who has a shy bladder and utilizes the entire three hours permitted by § 40.193 to provide a urine sample for drug testing. See Interpretive Guidance Manual at 41.

Paragraph (g)(2), however, would require a railroad to continue a random testing collection regardless of any HOS limitations when a direct observation collection is required under § 40.67(a) or (c).³² See Interpretive Guidance Manual at 41. Generally, a mandatory direct observation is required when: (1) There is evidence indicating that the employee

³² Direct observation collections are also required under § 40.67(b) for all return-to-duty and follow-up testing. Proposed paragraph (g)(2) would not apply to Federal return-to-duty tests, however, because an employee must have a negative return-to-duty test before resuming the performance of regulated service. It also would not apply to Federal follow-up tests because their scheduling is within the discretion of the railroad. However, a direct observation follow-up test would have to proceed regardless of HOS limitations if something occurred during the collection that would have independently triggered a mandatory direct observation test under §§ 40.67(a) and (c).

may have attempted to tamper with his or her specimen at the collection site (for example, the temperature of the employee's urine specimen is out of the normal range); or (2) an MRO has ordered an immediate direct observation collection because the employee had no legitimate medical reason for an invalid laboratory result or because the employee's positive or refusal (adulterated/substituted) test result was cancelled because a split specimen test could not be performed. See Office of Drug and Alcohol Policy and Compliance, DOT's Direct Observation Procedures, available at <http://www.dot.gov/odapc/dot-direct-observation-procedures>. Direct observation collections would have to be completed in these situations, regardless of HOS limitations, because there is some indication that the employee, perhaps knowing that he or she may test positive, may have tried to beat the test. If a mandatory direct observation collection does result in an HOS violation, the railroad would be required to submit an excess service report as required by 49 CFR part 228. In such situations FRA would use its prosecutorial discretion in deciding whether to pursue action against the railroad for the HOS violation. See Interpretive Guidance Manual at 41.

Section 219.617—Participation in Random Alcohol and Drug Testing

This section would combine, clarify, and expand upon the participation requirements currently found at § 219.603 (for drug testing) and § 219.609 (for alcohol testing).

Under paragraph (a)(1), a railroad would have to require a selected regulated employee to cooperate in random testing. If an individual was performing regulated service when notified of his or her selection, paragraph (a)(2) would require the railroad to ensure that he or she ceased to perform regulated service and proceeded to the testing site as soon as possible without affecting safety. The railroad would also have to ensure that a regulated employee's absence from his or her assigned duties did not adversely affect safety.

Paragraph (a)(3) would specify that a regulated employee who has been notified of his or her selection could be excused from random testing only by a substantiated medical emergency involving either the employee or an immediate family member. This requirement is currently found in §§ 219.603 and 219.609, and railroads have often questioned FRA to clarify its meaning when faced with an employee who failed to appear for or abandoned

a random test, claiming a medical emergency.³³ New language in paragraph (a)(3) would clarify that a medical emergency is an acute medical condition requiring immediate emergency care. A regulated employee claiming that he or she had a medical emergency would be required to provide verifiable documentation from a credible outside professional (such as a doctor, dentist, hospital, law enforcement officer, or school authority) within a reasonable time after the emergency occurred. A regulated employee who was excused from random testing because of a properly documented medical emergency could not be later subject to random testing by the railroad under the same selection. A regulated employee who avoided a random test by claiming a medical emergency that was unverifiable or did not meet the threshold of an acute medical condition requiring immediate emergency care would be deemed to have refused the test.

While paragraph (a) would address the random testing responsibilities of a railroad, paragraph (b) would address the random testing responsibilities of a regulated employee. Under paragraph (b)(1), a regulated employee would be required to cooperate with the random selection and testing process and to proceed to a testing site upon notification as soon as possible without adversely affecting safety. Under paragraph (a)(2), the responsibility for determining whether there would be an adverse effect on safety would rest with the railroad, and a railroad should not notify a regulated employee of his or her selection for random testing until it has determined that the individual's absence from his or her duties would not adversely affect safety. A notified regulated employee should therefore assume that the railroad has already determined that he or she may report immediately for testing without adversely affecting safety. Under paragraph (b)(2), a regulated employee

would be required to fully cooperate and comply with the testing procedures of part 40 (such as providing the required specimens and completing the required paperwork and certifications), which are incorporated into FRA's random testing requirements by § 219.701.

Section 219.619—Positive Alcohol and Drug Test Results and Refusals; Procedures

This section would combine the requirements for responding to positive random alcohol and drug testing results currently found in §§ 219.605 and 219.611, and would clarify that these procedures apply to refusals as well. No substantive change is intended to the current requirements.

Section 219.621—Use of Service Agents

This section would contain new provisions clarifying the role that a service agent, such as a consortium/third party administration (C/TPA), may play in supporting a railroad's FRA random testing program. Although the role of service agents is discussed in subpart Q and Appendix F of part 40, part 219 does not discuss the responsibilities and limitations for service agents that perform random testing responsibilities on behalf of railroads. Currently, service agents are only incompletely addressed in §§ 219.601(b)(2)(iii) and 219.607(b)(1)(i), which briefly mention how a railroad can use a service agent to maintain random testing pools and perform random selections. Proposed § 219.621 would improve the regulation by providing additional direction on how service agents may and may not be utilized.

Paragraph (a) would clarify that railroads may use service agents to perform any role specifically permitted under subpart Q of part 40 (Roles and Responsibilities of Service Agents). Examples of these roles include, but are not limited to, maintaining random testing pools, conducting random selections, and performing random drug collections or alcohol tests.

Paragraph (b) would prohibit railroads from using a service agent to notify a regulated employee that he or she has been selected for Federal random testing, as this function must be performed by the individual's direct employer. Using a service agent (such as a collector) to notify a regulated employee of his or her selection is problematic because the regulated employee may not be aware that the service agent is an authorized agent of the railroad. This doubt may lead the regulated employee to refuse to comply

with the service agent's random testing instructions, which could result in the employee being charged with a refusal. Rather than addressing the difficulties of ensuring that regulated employees are fully aware and confident of a service agent's authority, FRA believes it is simpler to require all notifications to be issued by an individual's direct employer, unless otherwise provided for by the railroad's FRA-approved random testing plan. If a railroad's random testing plan does specifically authorize a service agent to notify regulated employees, FRA would likely only approve that plan if it specified that the railroad would train or otherwise ensure that its regulated employees knew that a service agent was authorized to provide such notification. A direct employer must notify regulated employees of their selection for random testing also because § 219.617(a)(2) requires a railroad to ensure that a notified regulated employee proceeds to the collection site as soon as possible without affecting safety. This safety determination should be made by an individual who is responsible for the operational safety of the railroad, not a service agent who would probably not have the requisite knowledge and experience to make such a safety determination.

Paragraph (b) would also remind railroads that a service agent may not perform any roles that are reserved for employers under § 40.355 and would specify that only a railroad or a contractor company performing railroad-accepted testing can be considered an employer under § 40.355.

Paragraph (c) would remind railroads and contractor companies of their responsibilities under § 219.9 (discussed above) by clarifying that the primary responsibility for subpart G compliance rests with the railroad, although FRA reserves the right to bring an enforcement action against a railroad, its service agents, its contractors, or its employees.

Paragraph (d) would clarify that a C/TPA conducting random testing may calculate the number of regulated employees who must be tested either for each individual railroad belonging to the C/TPA, or for the total number of regulated employees covered by the C/TPA. If a C/TPA is making selections from a combined employer random pool, it must ensure that it is testing at a rate equal to the highest minimum annual percentage rate established under the random testing regulations of a DOT agency for any individual member of that pool.

³³ The text of current §§ 219.603 and 219.609 specifically states that an employee may be excused from testing only for a "documented medical or family emergency." Historically, FRA has interpreted a "family emergency" to mean a medical emergency involving a family member. In other words, FRA would not permit a covered employee to be excused from random testing for a "family emergency" that was not also a medical emergency. For example, a covered employee would not be excused from random testing because he or she needed to pick up his or her child at daycare, unless that child was experiencing a medical emergency. Therefore, the purpose of FRA's proposed language, which applies to a "substantiated medical emergency involving the employee or an immediate family member," is to clarify how FRA has been interpreting the current language, and not to make any substantive changes to the current requirements.

Section 219.623—Records

This section would contain general provisions governing the maintenance of random testing records. This section would not make any major substantive changes to the record requirements currently found in subpart G.

Paragraph (a) would specify that railroads are required to maintain random testing records for a minimum of two years, as provided by proposed § 219.901. This requirement is currently found in § 219.901(c) and § 219.903(c).

Paragraph (b) would contain new language clarifying that contractor companies and service agents performing subpart G random testing requirements must provide required records whenever requested either by FRA or the employing railroad, although the railroad remains ultimately responsible for maintaining the records required by subpart G.

Section 219.625—FRA Administrator's Determination of Random Alcohol and Drug Testing Rates

FRA is proposing to combine the provisions currently addressing the Administrator's determination of the minimum annual percentage rate for random drug testing (current § 219.602) and random alcohol testing (current § 219.608) into a new § 219.625. No substantive changes have been made to the rate determination criteria found in the current rule for either drugs or alcohol, although some of the language has been streamlined and clarified. (For example, FRA is proposing minor changes to clarify that FRA only considers MIS data for random testing positives and/or violations when determining the minimum annual random percentage rates.) With the exception of the proposed provisions contained in paragraph (c), this section only contains provisions related to the determination of random testing rates that are already in current subpart G.

Paragraph (c) would contain new language establishing criteria for the future incorporation of any new category of regulated employees added to the scope of part 219. Although paragraph (c) would immediately affect the expansion of part 219 to MOW employees, it is also intended to apply if FRA decides to expand part 219 to cover additional categories of employees.

For any new category of employees, the introductory text of paragraph (c) would establish the initial minimum annual percentage rates for random drug testing (50 percent) and random alcohol testing (25 percent). As previously discussed in Section III.H of this NPRM

in relation to MOW employees, FRA believes that these higher initial random testing rates are appropriate because FRA set the same rates when it initiated random testing for covered employees. FRA believes it is fair to start all new categories of regulated employees at the same rates.

Paragraph (c)(1) would provide that the Administrator would reconsider these initial minimum annual percentage rates once FRA had at least 18 months worth of MIS testing data for the new category of regulated employees. FRA briefly considered proposing that the rates could be changed once it had data for two years, but concluded that this approach could be problematic given that railroads are only required to submit MIS data annually. *See* § 219.800(a). If a new category of regulated employee was added to part 219 any time after the start of the MIS reporting year, it would take three MIS reporting cycles (three years) to collect two complete years' worth of data. By requiring only 18 months of MIS data, FRA could reconsider its initial testing rates based on only two years of MIS reports on the drug and alcohol testing results of regulated employees, so long as this new employee category was incorporated within the first six months of FRA's MIS reporting cycle. FRA believes this approach would provide greater flexibility to adjust initial testing rates in response to MIS data indicating that such an adjustment may be appropriate.

Paragraph (c)(2) would provide that the Administrator will determine separate random testing rates for each new category of regulated employees for a minimum of three full calendar years after that category has been incorporated into part 219. Paragraph (c)(3) would further provide that the Administrator could combine a new category of regulated employees with the larger regulated employee population once the categories' positive rates have been identical for two years. This would permit the Administrator sufficient time to ensure that the deterrence value of the random testing rates has been clearly established before considering whether to change the testing rates for a new employee category. The Administrator would also be able to carefully monitor positive rate trends for the new category that might otherwise be lost if these employees were automatically made part of the larger population of regulated employees.

Subpart H—Drug and Alcohol Testing Procedures

Section 219.701—Standards for Drug and Alcohol Testing

Paragraphs (a) and (b) of this section would be amended to reflect the proposed separation of the requirements for reasonable suspicion and reasonable cause into two separate subparts, as discussed in Section VI.A of this preamble. These paragraphs would also be amended to clarify that any alcohol or drug testing conducted as the result of a co-worker or non-peer referral under a proposed subpart K peer prevention program must be conducted under FRA authority and comply with the requirements of part 40.

Currently, paragraph (c) of this section requires covered employees notified of their selection for testing to proceed to the testing site immediately, or as soon as they can stop performing covered service safely. FRA is proposing to move this requirement to § 219.11(e). FRA believes this provision is a general requirement that belongs more appropriately in § 219.11, titled "General conditions for chemical tests".

Subpart I—Annual Report

Section 219.800—Annual Reports

Paragraph (b) of this section would be amended to update and correct the internet link containing the electronic version of the MIS form and information on where to submit the form.

FRA is also proposing a new paragraph (f) specifying that railroads would be required to report MIS information separately for covered employees and MOW employees. Separate MIS reporting would allow FRA to gather the data necessary to establish separate random testing rates for MOW employees. FRA is specifically requesting public comment on what type of burdens this would impose on railroads and whether separate MIS reporting should be required only when there are separate testing rates for covered employees and MOW employees.

Subpart J—Recordkeeping Requirements

Section 219.901—Retention of Alcohol and Drug Testing Records

FRA's requirements for the retention of alcohol testing records are currently contained in § 219.901, while the requirements for the retention of drug testing records are contained in § 219.903. The requirements contained in these two sections, however, are essentially identical. For the purpose of streamlining the regulations, therefore,

FRA is proposing to incorporate the requirements for both alcohol and drug testing records into § 219.901, which would be renamed “Retention of alcohol and drug testing records.” This structural change is intended for clarification purposes only, and no major substantive amendments are being proposed.

In addition to this structural change, FRA is also proposing several minimal and clarifying amendments to the provisions of § 219.901, as discussed below.

Paragraph (a)(2)

FRA currently requires railroads to maintain all Federal alcohol and drug test results, including negative or cancelled results, for a period of two years. *See* § 219.901(c)(2)(i)–(iii) and § 219.903(c)(2)(i)–(ii). Under § 40.333(a)(4), however, railroads must maintain documents related to negative or cancelled alcohol and drug tests only for a period of one year. Generally, whenever a railroad is subject to multiple recordkeeping requirements of different lengths, it must comply with the requirement that mandates the longest retention period. *See* Compliance Manual 14.5. Railroads are not excused from complying with FRA’s two-year retention requirement for negative and cancelled test records, therefore, simply because § 40.333(a)(4) requires employers to keep such records only for one year.

However, in an effort to ease this recordkeeping burden on railroads, new language in proposed paragraph (a)(2) would permit railroads to maintain legible and accessible scanned or electronic copies of test records for the second year that they are required to be maintained by FRA, whenever § 40.333 requires those records to be kept only for one year. Permitting railroads to maintain legible and accessible scanned or electronic copies of test records for the second year of FRA’s mandatory retention period would reduce any difficulties railroads may face in finding physical space in which to maintain hardcopies of these records.

Paragraph (b)(1)

Railroads must currently maintain a summary record of each covered employee’s alcohol or drug test results for a period of five years. *See* § 219.901(b)(1) and § 219.903(b)(1)(i). FRA has not been actively enforcing this requirement, however, so long as a railroad has maintained the individual files of each regulated employee’s alcohol and drug tests for a period of five years. Therefore, FRA is proposing to amend paragraph (b)(1) to permit a

railroad to comply by maintaining either a summary record or the individual files for the five year period. This amendment would both reflect FRA’s enforcement policy and support smaller railroads, which often find it impractical to maintain the summary records currently required.

Paragraph (c)(1)(ii)

Railroads must currently maintain documents related to the random testing process. Proposed paragraph (c)(1)(ii) would be amended to clarify that the scope of this requirement includes the railroad’s approved random testing plan and FRA’s approval letter for that plan.

Paragraph (c)(1)(iii)

Currently, the language of § 219.901(c)(1)(iii) and § 219.903(c)(1)(ii) specifies that railroads must maintain records related to decisions to administer Federal reasonable suspicion tests for a period of two years. Decisions to administer Federal reasonable cause tests, however, are not specifically addressed by this requirement. In its guidance, FRA states that this oversight was inadvertent and that this requirement also applies to Federal reasonable cause testing determinations. *See* Compliance Manual 14.5. Proposed paragraph (c)(1)(iii) would incorporate this guidance by clarifying that the two-year retention requirement also applies to records related to Federal reasonable cause testing determinations.

Paragraph (c)(4)(iii)

Railroads are currently required to maintain documentation on supervisor training regarding reasonable suspicion testing determinations. *See* § 219.901(c)(4)(iii) and § 219.903(c)(4)(iii). Under § 219.11(g), however, railroads must train supervisors regarding both reasonable suspicion testing determinations and the criteria for making determinations concerning PAT testing. New language in proposed paragraph (c)(4)(iii) would clarify that the maintained training documents must include training attendance records and training materials, and that railroads must also maintain supervisor training documents related to PAT testing determinations. FRA guidance applies this provision to documents related to the training requirements of § 219.11(g), which addresses both reasonable suspicion and PAT testing determinations. *Id.* The proposed amendment would incorporate this guidance into the regulations.

FRA Would No Longer Require Training Certification

Under § 219.901(c)(iv) and § 219.903(c)(iv), railroads are currently required to maintain records certifying that any training conducted under part 219 complies with the requirements for such training. In its retrospective review, FRA found that it had never inspected for this requirement because it audits railroads’ training documents directly to ensure that they comply with part 219. FRA is proposing to reduce its recordkeeping requirements by removing the need to maintain certification records.

Section 219.903—Access to Facilities and Records

Due to the consolidation of the provisions in § 219.901 and § 219.903 into proposed § 219.901, which would apply both to alcohol and drug testing records, the requirements for facilities and records access currently contained in § 219.905 would be moved to proposed § 219.903, entitled “Access to facilities and records.” Paragraph (a) of this section would also be further amended to reflect the consolidation of § 219.901 and § 219.903 into a single § 219.901.

Subpart K—Peer Support Programs

Currently, subpart E requires railroads to design and implement voluntary referral and co-worker report policies. Under these policies, a covered employee who abuses alcohol or drugs as part of a treatable condition may maintain an employment relationship with a railroad so long as he or she obtains counseling and treatment by entering the railroad’s subpart E program. These policies are beneficial because they provide assistance to valuable covered employees who have substance abuse disorders that can be addressed through appropriate counseling or treatment.

The success of peer support programs would be supported if the benefit of addressing substance abuse disorders through such rehabilitative programs is clearly understood by railroad management, employees, and any involved collective bargaining organizations. Over the years, however, FRA’s experience enforcing the requirements of the current subpart E has revealed that the railroad industry is sometimes confused about the subpart’s intent and FRA’s expectations for compliance. This NPRM is therefore proposing to rewrite various peer support program provisions to provide additional detail, clarity, and focus. The proposed amendments would also give

railroads greater flexibility to develop peer support programs that both promote safety and encourage regulated employees to utilize the peer support programs to address any treatable substance abuse issues.

FRA's audits of subpart E programs have also discovered that covered employee usage of peer support programs can vary from railroad to railroad, even though the various programs all appear to meet the subpart E requirements. To the extent that low usage rates of a subpart E program at a railroad may be the result of policies that are unclear or misunderstood, FRA's proposed amendments are an effort to bolster participation by ensuring that the requirements for peer support programs are clearly understood by the railroad industry.

Furthermore, in order to accommodate dedicating an entire subpart each to reasonable cause testing and reasonable suspicion testing, as discussed above in Section VI.A of this preamble, this NPRM is proposing to move the requirements for peer support programs from the current subpart E to a new subpart K. FRA would also change the title of subpart K from "Identification of Trouble Employees" to "Peer Support Programs." FRA believes the new title is a more accurate reflection of the purpose and intent of subpart K, which is to provide support to regulated employees who abuse alcohol or drugs as part of a treatable condition.

Similarly, FRA is proposing to replace the phrase "co-worker report" with the phrase "co-worker referral" throughout subpart K. FRA believes that "referral" is preferable in this situation because "report" may sometimes have a negative connotation that discourages employees from referring co-workers who genuinely need assistance.

FRA is also proposing to streamline the regulations by requiring railroads to maintain a single peer support program policy, as opposed to the current rule, which requires a separate voluntary referral policy and co-worker report policy. The peer support program policy required by proposed subpart K would then be required to contain both a self-referral policy and a co-worker referral policy. By making self-referrals and co-worker referrals part of the same peer support program policy, FRA is emphasizing that these programs work together towards the same purpose. FRA is also proposing to clarify that peer support program policies are permitted to accept non-peer referrals, as will be discussed further in the section-by-section analysis below.

Section 219.1001—Requirement for Peer Support Programs

Paragraph (a)

Paragraph (a) of this section would specify that the purpose of subpart K is to help prevent the adverse effects of alcohol misuse and drug use by regulated employees through the implementation of peer referral and support programs. This purpose is slightly more specific than that contained in current § 219.401(a), which states only that the purpose of subpart E is to prevent the use of alcohol and drugs in connection with covered service.

Paragraph (b)

Paragraph (b) would require a railroad to adopt, publish, and implement a subpart K-compliant peer support program policy that is designed to encourage and facilitate the referral and rehabilitative support of regulated employees who abuse alcohol or drugs. This language is slightly different from that contained in current § 219.401(b)(1), which states that the policy must be designed to also facilitate the "identification" of employees who abuse drugs or alcohol. Because FRA believes that the word "identification" does not accurately reflect the purpose of subpart K, FRA is proposing to generally remove it from the regulations' discussion of peer support program policies. Paragraph (b) would also clarify that peer support programs are established under the railroad's authority. For example, any follow-up testing recommended for a regulated employee who entered a peer support program would be conducted under the railroad's own authority and would not have to meet the part 40 requirements, unless the regulated employee had committed a substantiated part 219 violation.

Paragraph (c)

Paragraph (c) would specify that a railroad may comply with subpart K by either adopting, publishing, and implementing a policy meeting the requirements of proposed § 219.1003 or by complying with proposed § 219.1007 (which discusses alternate peer support program policies). The substance of this paragraph is essentially identical to current § 219.401(c).

Paragraph (d)

Paragraphs (d)(1), (d)(2), and (d)(5) would place specific limitations on how the requirements of subpart K may be construed. These provisions are not new, being identical to those contained in current § 219.401(e)(1)–(e)(3).

Paragraphs (d)(3) and (d)(4) would contain new proposed limitations on how the requirements of subpart K may be construed. Under paragraph (d)(3), subpart K could not be construed to interfere with mandatory reasonable suspicion testing under subpart D when a supervisor properly determines that a regulated employee is exhibiting signs and symptoms of alcohol or drug use. For example, if a trained (in accordance with § 219.11(g)) supervisor noticed that a regulated employee was exhibiting signs and symptoms, a railroad would not be excused from performing a Federal reasonable suspicion test if the individual choose that moment to inform the railroad that he or she wished to self-refer to the subpart K peer support program. A trained supervisor observing signs and symptoms may also not make a co-worker referral for the regulated employee in lieu of performing a reasonable suspicion test. These limitations are necessary because reasonable suspicion testing is mandatory when a supervisor's independent actions alert him or her to the signs and symptoms of alcohol or drug use.

Similarly, paragraph (d)(4) would specify that subpart K may not be construed to interfere with the § 219.104 responsive action requirements when a violation of § 219.101 or § 219.102 has been substantiated. For example, a regulated employee who tests positive on a Federal random drug test may not avoid the § 219.104 responsive action requirements by self-referring into the railroad's subpart K peer support program.

Section 219.1003—Peer Support Program Requirements

Paragraph (a)

Paragraph (a) would state that § 219.1003 prescribes the minimum requirements and standards for peer support programs. It also specifies that all individuals involved in the implementation of a peer support program must comply with the program's policies and implementation procedures.

Paragraph (b)—Policies Required

Paragraph (b)(1) would require a railroad peer support program policy to include a self-referral policy that provides regulated employees the opportunity to obtain referral, education, counseling, and/or treatment before the employee's alcohol or drug abuse problem results in an accident, injury, or detected part 219 violation. Because a self-referral does not involve

a 219 violation, a SAP may not provide such treatment. Instead, part 240 requires a locomotive engineer to receive these services from a qualified EAP counselor, while part 242 requires a conductor to receive such services from a DAC. For regulated employees who self-refer and are neither engineers or conductors, an EAP counselor evaluation would be required. Paragraph (b)(2), in turn, would require the establishment and support of a co-worker referral policy. Such policies are already required by §§ 219.403 and 219.405 of the current rule.

Paragraph (b)(3) would indicate that a peer support program policy may provide for the acceptance of referrals from non-peers. This language clarifies and expands upon the current § 219.403(b)(1), which states that a “railroad must specify whether, and under what circumstances, its policy provides for the acceptance of referrals from other sources, including (at the option of the railroad) supervisory employees.” As used in proposed subpart K, the term “non-peer” would refer to an individual who is not considered an employee’s co-worker, and could include a trained supervisor, representative of an employee’s collective bargaining organization, or family member. This provision would not require a railroad to accept non-peer referrals. If a railroad did develop a non-peer referral policy, however, this paragraph would require the railroad to include that policy in its subpart K peer support program policy. FRA believes that permitting non-peer referral policies would create additional flexibility for railroads to accept referrals from various sources other than a regulated employee’s co-workers. For example, a non-peer referral policy could permit a concerned family member to refer a regulated employee to the railroad’s peer support program for assistance. Such a family member may be in a better position than a co-worker to realize that a regulated employee might be abusing alcohol or drugs to the extent that he or she is a safety concern that could require counseling and treatment.

Paragraph (c)—Referral Conditions

Paragraph (c) would generally require a peer support program policy to specify the conditions under which a referral could occur. Under paragraphs (c)(1)–(4) these conditions must encompass (but are not limited to) the following:

- For self-referrals, a policy would have to identify and include the contact information for a designated EAP or DAC (the phone number and email, if available). The policy would also have

to indicate when a self-referral could be made. For example, a policy could provide that a self-referral could not be made while a regulated employee was actually on-duty and impaired;

- Whether non-peer referrals are accepted, and any allowances, conditions, or procedures of such referrals;
- A policy must specify that a railroad may accept a co-worker or non-peer referral only if it alleges that the regulated employee was apparently unsafe to work with or in violation of either part 219 or the railroad’s alcohol and drug rules. Similar language for co-worker referrals is already found in current § 219.405(c)(1); and
- In order to remove from service a regulated employee who is the subject of a co-worker or non-peer referral, a railroad would have to confirm that the individual was indeed unsafe to work with or in violation of either part 219 or the railroad’s alcohol and drug rules. Such confirmation could consist of a credible positive test result or an observation made by a supervisor trained according to the requirements of § 219.11(g). Similar language for co-worker referrals is already found in current § 219.405(c)(2).

Paragraphs (d)–(e)—Employment Maintained

To encourage utilization of peer prevention programs, the introductory text of paragraph (d) would state that a regulated employee affected by an alcohol or drug use problem may maintain an employment relationship with the railroad so long as he or she entered the railroad’s peer support program (either through a self-referral, co-worker referral, or non-peer referral) and successfully completed the education, counseling, or treatment program specified by an EAP or DAC under the provisions of this subpart. Similar language specifying that an individual entering a peer support program may maintain an employment relationship with a railroad is currently found in § 219.403(b)(1) for voluntary referrals and § 219.405(b) for co-worker reports. Paragraph (e) would further clarify that a regulated employee with an alcohol or drug use problem would be subject to the railroad’s normal employment action if he or she either did not enter the peer support program or failed to cooperate with the program.

Paragraph (f)–(g)—EAP/DAC or SAP Evaluations

Under paragraph (f)(1), a regulated employee entering a peer support program through a self-referral would have to be evaluated by an EAP

counselor or DAC acceptable to the railroad. A regulated employee entering the program through a co-worker or non-peer referral would have to be evaluated by a SAP counselor acceptable to the railroad (under the standards of part 40) if the referral involved a substantiated violation of part 219. (As discussed in the section-by-section analysis for the proposed definition of “Counselor,” FRA is proposing to use the term Counselor whenever a requirement may be met by an DAC, EAP counselor or SAP, rather than repeating all three terms.) A SAP evaluation must be performed in such cases because a regulated employee who violates part 219 is subject to the responsive action requirements of § 219.104(d), which requires a SAP evaluation for all such violations if the individual wishes to return to regulated service. If a co-worker or non-peer referral does not involve a substantiated part 219 violation, but the individual is found to be unsafe to work with or in violation of only the railroad’s alcohol and drug rules, the regulated employee must be evaluated by an EAP or DAC.

While this NPRM is proposing to provide EAP or DAC evaluations for individuals entering a peer support program without a part 219 violation, FRA is also taking this opportunity to solicit public input on whether a DAC evaluation should be required for all peer support program participants, regardless of whether they have had a part 219 violation. Part 242 already requires a DAC to have the same credentialing and qualifications a SAP must have under part 40. Would requiring SAP-level evaluations for all regulated employees more effectively support subpart K’s goal of helping to prevent the adverse effects of alcohol and drug use by regulated employees? If so, how?

Paragraph (f)(3) would provide that a Counselor evaluating a regulated employee who has entered a peer support program must determine the appropriate level of care (education, counseling, and/or treatment) necessary to resolve any identified active substance abuse problem (such as, but not limited to, substance dependency). If treatment and/or education is required, the Counselor must refer the regulated employee to an appropriately qualified rehabilitation program in the community, if one is available. A regulated employee who fails to cooperate with the evaluation, referral process, or aftercare can be dismissed from the peer support program and made subject to the railroad’s normal employment action.

Under paragraph (g), if a Counselor's evaluation determines that a regulated employee has an active substance abuse disorder, the peer support program policy would have to require the removal of that individual from regulated service until the Counselor determines that he or she can safely return to service. The railroad must do so in a manner that complies with the confidentiality provisions found in proposed paragraph (h) of this section. For example, a railroad could maintain confidentiality by coding the regulated employee's removal as a medical reason.

Paragraph (h)—Confidentiality

Paragraph (h) would require a peer support program policy to treat any referral and subsequent handling as confidential. Only personnel who administer the program may have access to the identities of individuals in it. The only required exception to this confidentiality requirement would be provided by paragraph (l) of proposed § 219.1003, which would state (in part) that confidentiality may be waived for a certified locomotive engineer or conductor (or candidate for engineer or conductor certification) who refuses to cooperate in a recommended course of counseling or treatment. The provisions of proposed paragraph (l) will be discussed further below.

Railroads are currently required to treat voluntary referrals as confidential under § 219.403(b)(2). The current § 219.403(c) also provides that a policy may contain provisions waiving confidentiality when an employee refuses to cooperate with the recommended treatment/counseling or is later determined to have been involved in an alcohol or drug related disciplinary offense growing out of subsequent conduct. An identical optional provision would also be included in proposed § 219.1005, discussed below.

Paragraph (i)—Leave of Absence

Paragraph (i) would require a railroad to grant a regulated employee who has entered a peer support program a leave of absence for the period necessary to complete any primary education, counseling, or treatment program recommended by a Counselor. The leave of absence must be long enough for the regulated employee to establish control over his or her alcohol or drug abuse problem to the extent that the evaluating Counselor determines that he or she is a low risk to return to substance abuse. Similar language is found in §§ 219.403(b)(3) and § 219.405(d)(1) of the current rule, except that the current rule specifically states that the leave of

absence must be at least 45 days long, if necessary. FRA is proposing to remove this specific time requirement because it believes that a Counselor should determine the period of time an employee requires to obtain control over a substance abuse problem.

Paragraph (j)—Return to Regulated Service

Paragraph (j)(1) would state that a regulated employee must be returned to regulated service based upon a Counselor's recommendation when he or she has established controlled over any substance abuse problem, when the Counselor has determined that he or she is a low risk to return to substance abuse, and when he or she has completed any return-to-service requirements recommended by a Counselor. The only exceptions to this requirement would be found in proposed § 219.1005, which discusses optional provisions that may be contained in a peer support program policy, and in proposed § 219.1001(d)(4), which references the responsive action requirements of § 219.104 for part 219 violations. This proposed language would expand and clarify the language currently found in § 219.403(b)(4), which states that an employee who has voluntarily referred must be returned to service on the recommendation of a SAP.³⁴ The proposed language is otherwise essentially identical to that contained in § 219.405(d)(3)–(d)(4) for co-worker reports, except that the proposed language would not contain the current requirement that a program for follow-up treatment may not exceed 60 months. A new limitation on how long any follow-up treatment may last would be found in proposed paragraph (o) of this section.

Paragraph (j)(2) would specify that a Counselor is required to determine the appropriate number and frequency of follow-up tests (if required), while the railroad would determine the dates of the testing.

Paragraph (j)(3) would state that an employee's return to regulated service may be conditioned upon successful completion of a return-to-service medical evaluation, as directed by the railroad. This is currently permitted for co-worker reports under § 219.405(d)(3), and would be expanded in the proposed language to self-referrals and non-peer referrals as well.

Paragraph (j)(4) would state that approval to return to regulated service

³⁴ Under the proposed rule, this recommendation would be made by an EAP counselor because employee who self-refers would not be required to have a SAP counselor evaluation.

may not be unreasonably withheld; a railroad must return an employee to regulated service within five working days of a Counselor's recommendation that the employee is fit to return. The requirement that such approval may not be unreasonably withheld is currently found in § 219.403(b)(4) and § 219.405(d)(3), although the proposed language goes further in specifying that the regulated employee must be returned to service within five days. The current § 219.405(e)(1) requires a railroad to return an employee to covered service within five days only in situations where the SAP has determined that treatment is not required for a co-worker reported employee.

Paragraph (k)—Rehabilitation Plan

Paragraph (k) would provide that no person or entity may change a Counselor's evaluation or recommendation for assistance. However, the Counselor who made the initial evaluation would be permitted to modify that evaluation and any follow-up recommendations based upon new or additional information.

Paragraph (l)—Locomotive Engineers and Conductors

Paragraph (l) would state that a peer support program policy must waive confidentiality for a locomotive engineer, conductor, or candidate for engineer or conductor certification who refuses to cooperate in recommended counseling or treatment, to the extent that the Counselor must provide the railroad official notice if the locomotive engineer or conductor has an active substance abuse disorder. A railroad receiving such notice must suspend, revoke, or deny the engineer's or conductor's certification, as appropriate. For locomotive engineers, this requirement is currently found for voluntary referrals in § 219.403(b)(5), which simply requires railroads to comply with the requirements of § 240.119(e). (Part 219 does not currently have a similar requirement for certified conductors because these individuals only recently became subject to the certification requirements of part 242.) FRA believes it is important in the proposed rule to also apply this requirement to co-worker and non-peer referrals.

New language in this paragraph would also specify that a Counselor who is managing the employee's case is not required to provide this notice if the locomotive engineer or conductor is medically restricted from performing regulated service while undergoing treatment to correct the active substance

abuse disorder. If, in the Counselor's opinion, the engineer or conductor fails to make the necessary rehabilitative progress during this medical restriction from regulated service, then the Counselor must provide the railroad official notice of the active substance abuse disorder.

Paragraph (m)—Contacting a SAP

Paragraph (m) would state that if a regulated employee enters a peer support program as the result of a co-worker or non-peer referral for a verified violation of § 219.101 or § 219.102, he or she must contact a SAP within a reasonable period of time, specified by the railroad's peer support program policy. If the regulated employee does not contact a SAP within this time period, the railroad could investigate his or her cooperation and compliance with the peer support program.

Paragraph (n)—Time Requirements for Counselor Evaluations

Paragraph (n) would state that once a regulated employee entering a peer support program contacts the designated Counselor, the Counselor's evaluation must be completed within 10 working days. If more than one evaluation is required, they must be completed within 20 working days. This requirement is currently found in § 219.405(b)(4) for co-worker reports, and FRA's proposed language would expand it to non-peer and self-referrals as well.

Paragraph (o)—Regulated Employee Agreement

Paragraph (o) would provide that a peer support program policy must require a participating regulated employee to agree to undertake and successfully complete a course of prescribed care and any Counselor recommended follow-up care (including follow-up testing). This paragraph would also state that any follow-up treatment, care, or testing may not exceed 24 months beyond the regulated employee's removal from service, unless the regulated employee had committed a substantiated part 219 violation. If the regulated employee has committed such a violation, any follow-up treatment would be subject to the requirements of part 40, which states that a SAP may require follow-up testing for 60 months following the violation. See 49 CFR 40.307(d)(2). Currently, § 219.405(d)(4) states that the follow-up treatment for a co-worker report may not exceed 60 months. FRA is proposing this change because it believes that 24 months is a more appropriate time frame for regulated employees who have not

committed a substantiated part 219 violation to be part of a peer support program.

Section 219.1005—Optional Provisions

This section would describe provisions that a railroad may, but is not required to, include in its peer support program policy. The inclusion of any such provisions may be subject to the agreement of an affected labor organization.

Under paragraph (a), the policy could include a mark-off provision under which a regulated employee may refuse an assignment because of a concern that he or she may not be safe to work due to alcohol or prescription medication use.

Paragraphs (b)–(e) would contain optional provisions that are essentially identical to optional provisions currently provided for voluntary referral policies by § 219.403(c)(1)–(4). FRA's proposed text would make these optional provisions available to peer support program policies in general (including co-worker and non-peer referral policies).

Paragraph (b) would permit a peer support program policy to waive the rule of confidentiality if a regulated employee refuses to cooperate in a course of education, counseling, or treatment recommended by a Counselor or if the railroad determines later, after investigation, that a regulated employee was involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct. This proposed text is identical to that currently found in § 219.403(c)(1) for voluntary referrals.

Under paragraph (c), a peer support program policy could require successful completion of a return-to-service medical examination as a condition of reinstatement in regulated service.

Under paragraph (d), a peer support program policy could state that it does not apply to a regulated employee who has previously been assisted by the railroad under a policy or program substantially consistent with the requirements of subpart K.

Under paragraph (e), a policy could provide that an employee invoking the benefits of a peer support program policy must report to a railroad-designated contact either during non-duty hours or while unimpaired and otherwise in compliance with the railroad's alcohol and drug rules consistent with proposed subpart K.

Section 219.1007—Alternate Peer Support Programs

This paragraph would permit a railroad to comply with subpart K by developing, publishing, and

implementing an alternate program or policy meeting the various standards of § 219.1003. Paragraphs (a)–(d) of this section are very similar to provisions contained in current § 219.407(a)–(d), although there are some minor differences intended to clarify the applicable standards.

Paragraph (a) would permit a railroad to develop, publish, and implement an alternate program or policy that meets the standards of § 219.1003. Any alternate program or policy must have the written concurrence of the recognized representatives of the regulated employees.

Paragraph (a) would also specify that nothing in subpart K prevents a railroad or labor organization from adopting, publishing, and implementing peer support program policies that afford more favorable conditions to regulated employees with substance abuse problems, consistent with the railroad's responsibility to prevent violations of §§ 219.101 and 219.102. This language is currently found in §§ 219.403(a) and 219.405(a), but FRA believes it belongs more appropriately in the section addressing alternative programs.

Paragraph (b) would provide that the concurrence of the recognized representatives of the regulated employees in an alternate program must be evidenced by a collective bargaining agreement or other document describing the class or craft of employees to which the alternate program applies. This agreement would have to expressly reference subpart K and the intention of the railroad and the employee representatives that the alternate program applies in lieu of the program required by subpart K. With a few non-substantive revisions, this language is identical to that currently found in § 219.407(b).

Paragraph (c) would require a railroad to file the agreement or other document described in paragraph (b), along with the alternate program described in paragraph (a), with the FRA Drug and Alcohol Program Manager for approval. Currently, § 219.407(c) only requires the railroad to file with FRA the agreement described in § 219.407(b). FRA believes that the railroad must also be required to submit the alternate program for FRA approval, so that FRA can ensure that the program does indeed meet the requirements and objectives of proposed § 219.1003. This paragraph would specify that this approval would be based on FRA's ability to ascertain whether the alternative program meets the § 219.1003 standards. An alternative program would not have to meet each specific § 219.1003 component, but would be required to meet the general

standards and intent of § 219.1003. If an alternate policy is amended or revoked, a railroad must file a notice with FRA of such at least 30 days prior to the effective date, as a railroad is currently required to do by § 219.407(c).

Paragraph (d) would specify that § 219.1007 does not excuse a railroad from adopting, publishing, and implementing the § 219.1003-required programs for any group of regulated employees not covered by an approved alternate program. This provision is essentially identical to that currently found in § 219.407(d).

New language in paragraph (e) would reference a proposed provision of § 219.105(d), which specifies that FRA has the authority to audit any railroad alcohol and/or drug use education, prevention, identification, and rehabilitation program or policy (including, but not limited to, alternate peer support programs), to ensure that they are not designed or implemented in such a way that they circumvent or otherwise undermine Federal requirements, including the requirements in this part regarding peer support programs. Peer support program usage data could be requested as one tool to evaluate whether a railroad program or policy is having a positive or negative impact on a required subpart K peer support program. For example, a railroad program or policy may not be implemented in a way that directly or indirectly discourages regulated employees from entering a subpart K peer support program, and FRA may compare usage data from both the railroad program and the subpart K program to determine whether the railroad program may be having a negative impact on the subpart K program.

VIII. Regulatory Impact and Notices

A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant, under both Executive Orders 12866, and 13563, and DOT policies and procedures. See 44 FR 11034, Feb. 26, 1979. FRA has prepared and placed in the docket (No. FRA–2009–0039) a regulatory impact analysis (RIA) addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. As part of the RIA, FRA has assessed quantitative measurements of the cost and benefit streams expected to result from implementation of this proposed rule. Overall, the proposed rule would result in safety benefits and potential business benefits for the railroad industry. It would also, however, generate an additional burden on railroads and railroad contractors, mainly due to the expenses associated with increased drug and alcohol testing and program administration, particularly regarding MOW employees.

The costs would primarily be derived from implementation of the statutory mandate to expand the scope of part 219 to cover MOW employees. The benefits will primarily accrue from the expected injury, fatality, and property damage avoidance resulting from the expansion

of part 219 to cover MOW employees, as well as the PAT testing threshold increase.

Table 1 summarizes the quantified costs and benefits expected to accrue from implementation of the proposed rule over a 20-year period. It presents costs associated with the various types of drug and alcohol testing proposed in the NPRM and details the statutory costs (those required by the RSIA mandate to expand part 219 to MOW employees), discretionary costs (those that are due to the non-RSIA requirements that FRA is proposing) and the total of the two types of costs. Table 1 also presents the quantified benefits expected to accrue over a 20-year period and details the statutory benefits (those that would result from implementation of the RSIA mandate to expand part 219 to MOW employees) and the discretionary benefits (those that are due to the non-RSIA requirements that FRA is proposing). The benefits include not only injury, fatality, and property damage avoidance (accident reduction benefits), but also the savings, or benefit, that would accrue from fewer PAT tests being conducted due to FRA’s proposal to increase the property damage threshold for major train accidents.

For the 20-year period analyzed, the estimated quantified cost that would be imposed on industry totals \$24, 261,999 (undiscounted), with discounted costs totaling \$14.2 million (Present Value (PV), 7 percent) and \$18.9 million (PV, 3 percent). The estimated quantified benefits for this 20-year period total approximately \$115.8 million (undiscounted), with discounted benefits totaling \$57.4 million (PV, 7 percent) and \$83.6 million (PV, 3 percent).

TABLE 1—SUMMARY COSTS AND BENEFITS: DISCRETIONARY AND STATUTORY—UNDISCOUNTED VALUES

20 Year costs	Statutory	Discretionary
<i>PAT Testing Costs—Adding MOW</i>	\$52,000	.....
<i>PAT Testing Costs—Impact Def + Xing</i>		\$241,974
<i>Reasonable Suspicion Testing Costs</i>	842,398	.....
<i>Pre-Emp. Testing Costs—Adding MOW</i>	673,897	.....
<i>Pre-Emp. Testing Costs—Sm. RR</i>		29,904
<i>Random Testing Costs</i>	20,863,074	.....
<i>Annual Report Costs</i>	160,911	.....
<i>Recordkeeping Requirements Costs</i>	1,397,840	.....
Total Costs	23,990,121	271,878
	24,261,999	
20 Year benefits	Statutory	Discretionary
<i>Accident Reduction Benefits</i>	115,369,281	.....
<i>PAT Testing Threshold Reduction Benefits</i>		388,295
Total Benefits	115,757,576	

Overall, the RIA demonstrates that the costs, both statutory and discretionary, associated with implementing the proposed rule are expected to be outweighed by the benefits resulting from reduced injuries, fatalities, and property damage attributable to drug and alcohol misuse by regulated employees. FRA has also found that the costs would be outweighed by injury and fatality mitigation alone, and benefits will further accrue due to reduced property damage. Specifically, the statutory requirements incur a discounted 20-year cost of \$14.1 million (PV, 7 percent) and \$18.6 million (PV, 3 percent). The discretionary proposals incur a discounted 20-year cost of \$143,665 (PV, 7 percent) and \$202,023 (PV, 3 percent), with discounted 20-year benefits of \$205,574 (PV, 7 percent) and \$288,776 (PV, 3 percent).

B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) and Executive Order 13272 (67 FR 53461; Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. The Federal Railroad Administration (FRA) has used the available data and robust assumptions to evaluate the impacts of this proposed rule and believes that it would not have a significant economic impact on a substantial number of small entities. FRA is publishing this IRFA to aid the public in commenting on the potential small business impact of the proposed requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a determination regarding economic impacts on small entities in the final rule.

The proposed rule would apply to all employees of railroad carriers, contractors, or subcontractors to railroad carriers who perform maintenance-of-way activities. Based on information currently available, FRA estimates that less than 14 percent of the total railroad costs associated with implementing the proposed rule would be borne by small entities. This percentage is based directly upon the percentage of affected

employees estimated to be working for small entities. Small entities are exempt from certain requirements of the current and proposed rule, and otherwise bear proportional burden for the rule based upon the number of regulated employees each entity employs. Small entities will not incur greater costs per employee than the larger entities.

FRA generally uses conservative assumptions in its costing of rules; based on those assumptions, FRA estimates that the cost for the proposed rule will be approximately \$24 million for the railroad industry. There are 654 railroads that would be considered small for purposes of this analysis, and together they comprise approximately 93 percent of the railroads impacted directly by this proposed regulation. The 14 percent of the burden would be spread amongst the 654 entities, based proportionally upon the number of employees each has. Thus, although a substantial number of small entities in this sector would likely be impacted, the economic impact on them would likely be insignificant. This IRFA is not intended to be a stand-alone document. In order to get a better understanding of the total costs for the railroad industry (which forms the basis for the estimates in this IRFA), or more cost detail on any specific requirement, please see the RIA that FRA has placed in the docket for this rulemaking.

In accordance with the Regulatory Flexibility Act, an IRFA must contain:

1. A description of the reasons why action by the agency is being considered.
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule.
3. A description and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
5. An identification to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action

FRA proposes to amend part 219 to further reduce the risk of serious injury or death to railroad employees, contractors, and anyone else affected by railroad accidents and incidents. In accordance with the statutory mandate

of Section 412 of the RSIA and to respond to NTSB safety recommendation R-08-07, FRA proposes to expand the applicability of the current part 219 requirements regarding testing and procedures to include maintenance-of-way (MOW) employees and contractors, as defined in the proposed regulation. FRA also proposes to amend part 219 for safety and clarity purposes by multiple discretionary changes that it believes will provide clarification and/or enhance and update the program to achieve safety benefits. Some of these discretionary proposals have associated costs.

2. Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

The purpose of part 219 and this proposed rule is to prevent accidents and casualties in railroad operations resulting from impairment of railroad employees and contractors due to the misuse of alcohol or drugs. FRA considers random drug and alcohol testing to be an important tool to deter drug use and alcohol misuse; therefore, expanding part 219 to include MOW employees (who would then be subject to selection for random testing) is expected to result in the reduction of the number of accidents and casualties to MOW employees.

The Federal Railroad Safety Act of 1970, as codified at 49 U.S.C. 20103, provides that “[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.” The Secretary’s responsibilities under this provision, and the balance of the railroad safety laws, have been delegated to the FRA Administrator (49 CFR 1.89). Reducing the use of drugs and alcohol among railroad employees has long been a concern of FRA. Both the industry and FRA have approached this concern by issuing regulations on the control of alcohol and drug use by certain railroad employees. While certain drug use is already illegal, FRA found a need to create a further deterrence against the use of drugs and alcohol before and/or during duty on the railroad. Furthermore, part 219 has a peer prevention component requiring railroads to establish a program permitting employees to self-refer if they have a substance abuse issue (and FRA is proposing clarifying changes to this program). These peer prevention programs are required to contain provisions protecting the employee’s job so long as the employee complies.

Therefore, safety is increased while protecting employees' jobs.

FRA has proposed the revision to part 219 in order to comply with Section 412 of the RSIA, Alcohol and Controlled Substance Testing for Maintenance-Of-Way Employees, required the Secretary of Transportation to "complete a rulemaking proceeding to revise the regulations prescribed under section 20140 of title 49, United States Code, to cover all employees of railroad carriers and contractors or subcontractors, volunteers, and random employees to railroad carriers who perform maintenance-of-way activities." FRA has also proposed various substantive amendments that would reflect lessons learned from the practical implementation of part 219 and improve the clarity and organization of the regulations, including the following: (1) Small railroads would no longer be excepted from the requirements for reasonable suspicion testing and pre-employment drug testing; (2) the PAT testing damage threshold for major train accidents would be increased; (3) the exceptions for derailment collisions and raking collisions would be removed from the part 219 definition of impact accident; (4) the provisions governing whether regulated employees could be recalled for PAT testing would be amended to remove the requirement that the qualifying event occurred while a regulated employee was on duty and to make recall of a regulated employee mandatory in certain circumstances; (5) reasonable cause testing would be authorized only for reportable "train accidents" and "train incidents"; and (6) federal reasonable cause testing would be authorized for additional operating rule violations or other errors.

3. Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The "universe" of the entities considered in an IRFA generally includes only those small entities that can reasonably expect to be directly regulated by this proposed action. The types of small entities potentially affected by this proposed rule are: (1) Small railroads; (2) small contractors that engage in MOW operations; and (3) small contractors that provide HOS services (such as dispatching, signal, and train and engine services).

"Small entity" is defined in 5 U.S.C. 601(3) as having the same meaning as "small business concern" under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its

field of operation. Section 601(4) likewise includes within the definition of "small entities" not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is "for profit" may be and still be classified as a "small entity" is 1,500 employees for "Line Haul Operating Railroads" and 500 employees for "Switching and Terminal Establishments." Additionally, 5 U.S.C. 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes "small entities" or "small businesses" as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. (See 68 FR 24891; May 9, 2003, codified at Appendix C to 49 CFR part 209.) The \$20 million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is using this definition for this rulemaking.

An estimated 1,098 entities will be affected by the rule. FRA estimates that there are approximately 400 MOW contractor companies and 698 railroads on the general system. All but 44 railroads and an estimated 30 MOW contractor companies, are small businesses as defined by the FRA waiver of small business size standard. FRA estimates that 86 percent of employees that will be regulated under this rule work for these 74 railroads and contractors. Most railroads must comply with all provisions of part 219. However, as previously indicated, FRA has a "small railroad" definition associated with part 219 that limits compliance requirements for railroads with 15 HOS employees or less and no joint operations to reduce burden on the smallest of railroads.

There are approximately 654 small railroads (as defined by revenue size).

Class II and Class III railroads do not report to the STB, and although the number of Class II railroads is known, the precise number of Class III railroads is difficult to ascertain due to conflicting definitions, conglomerates, and even seasonal operations. Potentially, all small railroads could be impacted by this proposed regulation. Part 219 has a small railroad exception for all railroads with 15 or fewer covered employees, except when these railroads have joint operations with another railroad, therefore increasing risk. Thus a railroad with such characteristics shall be called a "partially excepted small railroad" in this analysis, and is a subsection of the "small entities" as defined by the STB and FRA, addressed above. Currently, there are 288 partially excepted small railroads and, as FRA is not proposing amendments to the substantive criteria of classification, there should be no change in the number of partially excepted small railroads associated with the proposed rule.

FRA is aware of two commuter railroads that qualify as small entities: Saratoga & North Creek Railway, and Hawkeye Express, which is operated by the Iowa Northern Railway Company. All other commuter railroad operations in the United States are part of larger governmental entities whose jurisdictions exceed 50,000 in population.

As mentioned, all railroads must comply with all or limited subparts of part 219. For partially excepted small railroads, per FRA's definition, the significant burden involves the costs of adding MOW employees to the existing testing programs, and adding reasonable suspicion and pre-employment drug testing (which they currently do not need to comply with).

A significant portion of the MOW industry consists of contractors. FRA has determined that risk lies as heavily with contractors as with railroad employees, so contractors and subcontractors will be subject to the same provisions of part 219 as the railroads for which they do contract work. Whether contractors must comply with all or part of the provisions of part 219 will depend on the size of the largest railroad (assumed to have the largest risk) for which the contractor works.

FRA discussed with industry representatives how to ascertain the number of contractors that would be involved with this rulemaking. FRA is aware that some railroads hire contractors to conduct some or all of the MOW worker functions on their railroads. Generally, the costs for the

burdens associated with this rulemaking would get passed on from the contractor to the pertinent railroad. FRA has determined that there are approximately 400 MOW-related contractor companies who would be covered by the proposed rule. Of those, 370 are considered to be a "small entity." FRA has sought estimates of the number of contractors that may be fully compliant and how many may be partially excepted, depending on the size of the largest railroad for which they work. FRA requests comments on both the number of small contractors affected and the number of small railroads affected, as well as the burdens they may incur as a result of the proposed rulemaking and whether those burdens (costs) will be passed on the railroads.

FRA expects that some HOS small contractors will be impacted based upon the proposed compliance requirements for part 219 small railroads to now include reasonable suspicion testing and pre-employment drug testing. This burden is estimated to be minimal, as reasonable suspicion tests occur extremely infrequently on small railroads (average less than one time per year for all small railroads), and pre-employment drug tests, the least costly of all tests, will only be required for new employees.

No other small businesses (non-railroad related) are expected to be negatively impacted significantly by this proposed rulemaking. Conversely, this proposed regulation will bring business to consortiums, collectors, testing labs, and other companies involved in the drug and alcohol program business.

Expanding the program to cover MOW employees will only have a small effect in terms of testing burden for railroads, based upon the cost of pre-employment drug testing for new employees and the testing of MOW employees. FRA estimates that 90 percent of small railroads already conduct pre-employment drug testing under their own company authority. Many of these contractors have employees with commercial drivers' licenses (CDLs), and therefore fall under the drug and alcohol program requirements of the Federal Motor Carrier Safety Administration (FMCSA). Therefore, an estimated 40 percent of MOW contracted employees already participate in a DOT drug and alcohol testing program. Furthermore, FRA

estimates that as many as 50–75 percent of all MOW contractor companies have some form of a drug and alcohol testing program, and that around 25 percent of these companies currently complete random testing (the most burdensome type of testing).

Consortiums are companies that provide testing, random selection, collection, policy development, and training services to help employers stay compliant. Consortiums alleviate much of the administrative burden of a testing program and negotiate volume discounts on behalf of their clients. It is likely that all part 219 small railroads already have a compliant testing program for employees currently covered under the existing regulation. It should also be noted that approximately 125 of the small railroads that would be impacted are subsidiaries of large short line holding companies with resources comparable to larger railroads. Additionally, many small railroads are members of ASLRRA, which was consulted throughout the development of this regulatory proposal. ASLRRA has helped create a consortium for its members in the past, and FRA will work to ensure that small entities, as well as large, have the ability to adhere to the regulation as easily as possible. The consortium market will be affected in a positive manner due to new business from this rulemaking; this is a secondary benefit not discussed in this IRFA.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

The updating of a drug and alcohol program to be compliant with proposed part 219 changes can generate a burden for all entities, and especially small entities. However, FRA has taken steps to minimize the significant economic impact on small entities. For example, FRA currently exempts railroads with 15 or fewer hours of service (HOS) employees and no joint operations (as defined by § 219.5) from certain part 219 requirements, and is not proposing to amend this exemption definition in the proposed rule. *See* § 219.3(b)(2). (However there will be certain

compliance requirements incurred by this proposed rule for those small railroads.) FRA has an extensive compliance manual available on its Web site at www.fra.dot.gov that can be used to help railroads of all sizes understand and comply with the regulations. FRA also provides a model railroad plan, a model contract plan, and model prohibitions for small railroads. Furthermore, FRA is active with railroad organizations, large and small, that provide training on the current part 219, such as the American Short Line and Regional Railroad Association (ASLRRA), the Association of American Railroads (AAR), and labor unions. FRA will be prepared to assist all small railroads, or other entities that will need to comply with the proposed regulation. FRA's Web site (http://www.fra.dot.gov/rrs/pages/fp_504.shtml) has model plans, programs, and tools needed to comply with the requirements of the proposed regulation.

There is a small amount of reporting, recordkeeping, and compliance costs associated with the proposed regulation. However, many of the entities are already doing some sort of employer-based testing, reporting, recordkeeping, and compliance in accordance with the recordkeeping requirements subpart. FRA believes that the added burden due to these requirements is minimal. The total 20-year cost of this proposed rulemaking is \$44.4 million, of which FRA estimates approximately 14 percent will be to the 644 small railroads and 370 small contractors. FRA believes this total burden for small businesses of \$6.2 million from this proposed rule does not impose a substantial burden. This averages approximately \$306 a year per small entity. For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this rulemaking.

Based on the information in this analysis, FRA has determined that the proposed rule will not have a significant economic impact on a substantial number of small entities. Absent evidence to the contrary being submitted in response to this NPRM, FRA intends to certify at the final rule stage that no regulatory flexibility analysis is necessary.

In summary Table 1 breaks out the types of entities affected by the proposed rule and the specific impact area.

TABLE 1—EXPLANATION OF ENTITIES

Type of entity		Subparts applicable, current	Subparts applicable, proposed
SBA definition	Part 219 definition		
Non-Small Entities—Railroads and contractors with revenue of a Class I or II railroad as defined by STB: 46 Railroads and 30 Contractors, 86% of regulated employees.	Railroads with 400,000 + employee hours: 38 Railroads.	ALL	ALL.
Small entities—Railroads and contractors with revenue of a Class III railroad as defined by STB: 654 Railroads and 370 Contractors, 14% of regulated employees.	Railroads with less than 400,000 employee hours, but more than 15 covered service employees, railroads with joint operations, and contractors who work for them: 372 Railroads, unknown number of contractors.	All except for Subpart I.	All except for Subpart I.
	Smallest railroads—15 or fewer covered employees with no joint operations: 288 railroads, unknown number of contractors.	Subparts A, B, C, H, J ...	Subparts A, B, C, D, F, H, and J.

The following section outlines the potential additional burden on small railroads for each subpart of the proposed rule:

Subpart A—General

The majority of the policies and procedures outlined in subpart A do not impose any direct burdens on small railroads. However, § 219.23 will have an effect on the MOW contractors who are not already part of an FRA drug and alcohol testing program because they will be responsible for complying with the policies whenever a breath or body fluid test is required. These costs are accounted for in different subparts, and there is no direct burden on small entities from subpart A. Additionally, FRA has a sample drug and alcohol plan on its Web site that includes all pertinent compliance information.

Subpart C—Post-Accident Toxicological Testing

All MOW employees must be subject to post-accident toxicological (PAT) testing when a qualifying event occurs, as provided in subpart C. Additionally, several new qualifying events regarding highway-rail grade crossing accidents/incidents will trigger PAT testing. As smaller railroads generally have smaller risk, FRA expects fewer burdens per small railroad employee or contracted employee associated with this subpart. The only cost that the railroad is responsible for is the collection and shipment of the specimens. FRA bears the costs of testing the specimens. Historically, there are only one or two events that qualify for PAT testing involving any short line each year. All railroads, regardless of size, must currently train their covered service supervisors on PAT testing procedures, and thus already have existing compliance procedures. Additionally,

MOW employees are already subject to subpart C PAT testing if they are fatally injured during a qualifying event. This portion of the proposed rule will create less than 1 percent of the total burden for small entities.

Subpart D—Reasonable Suspicion Testing

Small railroads (15 or fewer covered service employees with no joint operation) and MOW workers will be subject to reasonable suspicion testing. The burden to small railroads is expected to be minimal as there are currently few reasonable suspicion tests performed on HOS employees (currently covered under part 219) by railroads of any size. FRA does not expect there to be proportionally more reasonable suspicion tests for MOW employees or other small railroads. FRA never intended to exclude small railroads from reasonable suspicion requirements and has been training short lines and small railroads to perform reasonable suspicion testing for years. This portion of the proposed rule will create approximately 1 percent of the total burden for small entities.

Subpart E—Reasonable Cause Testing

For this subpart all railroads can choose to use Federal or company authority reasonable cause testing. Furthermore, FRA has excluded partially excepted small railroads from the provisions of this subpart.

Subpart F—Pre-Employment Testing

FRA is proposing to change the pre-employment drug testing requirement to remove the small railroad exception, so small railroads (15 or fewer covered service employers) will now have to conduct Federal pre-employment drug testing. Many small railroads and contractors already test employees for

drugs under company authority prior to hiring and are already in compliance with the regulation. This portion of the proposed rule will create approximately 1 percent of the total burden for small entities.

In order to alleviate some of the burdens for all railroads, FRA proposes to allow all current MOW employees to be grandfathered for this requirement of the regulation.

Subpart G—Random Alcohol and Drug Testing Program

FRA has excluded small railroads from the requirements of this subpart. All MOW employees of railroads that do not qualify for the small railroad exception will be subject to random alcohol and drug tests. Contractors will be required to conform to the requirements of the largest railroad for which they work. All companies that must comply with this subpart are required to create and administer random plans, although the testing burden is proportional to the number of employees in each company. As previously mentioned, FRA has model plans for railroads and contractors; these plans include random plans. Consortiums also exist that will organize administration and testing, to include random selection and testing. Consortiums are a very convenient option for small businesses because they lessen the administrative burden. This portion of the proposed rule will create approximately 37 percent of the total burden for small entities.

Subpart H—Drug and Alcohol Testing Procedures

FRA is not proposing any substantive changes to this subpart, so there are no expected impacts on small businesses.

Subpart I—Annual Report

Annual reporting requirements have been required for railroads with 400,000 employee hours, and there are no proposed substantive changes to this subpart. FRA does not expect any impact on small businesses.

Subpart J—Recordkeeping Requirements

FRA is not proposing any substantive changes to this subpart, so the only impact on small businesses is for the recordkeeping requirements for the MOW employees added to the rule. This portion of the proposed rule will create less than 1 percent of the total burden for small entities.

Subpart K—Peer Support Programs

FRA is proposing amendments that are designed to provide additional detail, clarity, and focus to the peer support programs. Both partially excepted small railroads and contractors are excluded from this subpart, so the smallest railroads do not need to comply. Other Class III railroads that do not qualify for the small railroad exception under part 219 must have peer support programs. This may require railroads to redesign or reconfigure their existing programs. The proposed rule specifies that a railroad may comply with subpart K by adopting, publishing, or implementing a policy meeting the requirements of proposed § 219.1003, or by complying with proposed § 219.1007 (which discusses alternate peer support program policies). This provides flexibility for railroads. FRA will make its expertise available to all railroads and will be providing templates for peer support programs that railroads will be able to use. This portion of the proposed rule will create less than 1 percent of the total burden for small entities.

The economic impact from this regulation is primarily a result of the proposed requirements to expand drug and alcohol testing to MOW employees. The number of railroads and contractors expected to be affected (who are not already covered by part 219 or participating in some other form of voluntary or employer-based drug and alcohol testing) is small, and therefore the effect will be minimal. As such, there is not a significant impact on a substantial number of small entities. While there are many railroads considered to be small entities, per the SBA definition, many of these small railroads have 15 or fewer regulated employees or contractors with no joint

operations and therefore are not required to comply with all subparts of the regulation. Those that must implement full compliance programs should already be testing covered employees and have an established drug and alcohol testing program. For those contractors who do not fall under the current regulation but will fall under the proposed rule, the ability to join a consortium exists thus providing an effective way to mitigate the costs of starting and administering a program.

Market and Competition Considerations

The small railroad segment of the railroad industry faces little in the way of intramodal competition. Small railroads generally serve as “feeders” to the larger railroads, collecting carloads in smaller numbers and at lower densities than would be economical for larger railroads. They transport those cars over relatively short distances and then turn them over to the larger systems, which transport them to their final destination or for handoff back to a smaller railroad for final delivery. The relationship between the large and small entity segments of the railroad industry are more supportive and codependent than competitive. Furthermore, small railroads rarely compete with each other because they serve the smaller, lower-density markets and customers, and these markets generally do not have enough traffic to attract larger carriers or even other small carriers. The railroad industry has several significant barriers to entry, such as the need to own the right-of-way and the high capital expenditure needed to purchase a fleet, track, and equipment. As such, small railroads usually have monopolies over the small and segmented markets in which they operate. Thus, while this rule may have an economic impact on all railroads, it should not have an impact on the intramodal competitive position of small railroads.

Contractors in the railroad industry, such as those who provide MOW services, are likely to have more competition in the marketplace than railroads. Several barriers to entry exist, such as the capital required to purchase MOW machinery. Many contractors already have employees who have CDLs, and as such must follow the Federal drug and alcohol testing regulations promulgated by FMCSA, which are similar to FRA requirements. Implementation of the proposed rule is expected to be more efficient if a company already has a process in place

for testing some of its employees for drugs and alcohol under FMCSA regulations.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule, except for the alcohol and drug testing requirements of other DOT agencies (such as FMCSA's requirements for CDL holders). The proposed rule specifies, however, that: (1) FRA will accept a pre-employment drug testing conducted by an employer under any DOT regulation; and (2) regulated employees subject to random testing under the rules of more than one DOT agency for the same railroad are only subject to random testing selection at the applicable rate set by the DOT agency regulating more than 50% of the employee's functions. FRA believes this approach eliminates any potential duplication, overlap, or conflict with the alcohol and drug testing requirements of other DOT agencies. Furthermore, this approach is the one already taken for the potential duplication, overlap, or conflict that currently may exist for covered employees who are subject to both part 219 and the alcohol and drug testing requirements of other DOT agencies (e.g., train engineers who also have a CDL). Because this established approach has been successful with covered employees, FRA does not anticipate problems applying it to MOW employees as well.

Part 219 also incorporates the procedures established in 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. FRA's proposed revision to part 219 will not conflict with Part 40, nor will it be duplicative or overlapping. It is supplemental, specifying procedures directly related to the railroad industry.

C. Paperwork Reduction Act

The new information collection requirements in this proposed rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.4—Petition for Recognition of a Foreign Railroad's Workplace Testing Program (New Requirement).	2 Railroads	2 petitions	40 hours	80 hours.
219.7—Waivers	142,000 employees	4 waivers	2 hours	8 hours.
219.9—Joint Operating Agreement between Railroads Assigning Responsibility for Compliance this Part Amongst Themselves (Rev. Requirement).	698 railroads + 400 MOW contractors.	525 agreements	30 minutes	263 hours.
—Request to railroad for documents by employee engaged in joint operation and subject to adverse action after being required to participate in breath/body fluid testing under subpart C, D, or E of Part 219 (Rev. Requirement).	698 railroads + 400 MOW contractors.	2 requests/documents ...	1 hour	2 hours.
—Document by railroad/contractor delineating responsibility for Compliance with this Part (Rev. Requirement).	698 railroads + 400 MOW contractors.	10 documents	2 hours	20 hours.
219.11—Employee consent to participate in body fluid testing under subparts C.	698 railroads + 400 MOW contractors.	30 consent forms	2 minutes	1 hour.
—Notification to employees for testing (New Requirement).	142,000 employees	9,508 notices	5 seconds	13 hours.
—RR Alcohol & Drug Program that provides training to supervisors and information on criteria for post-accident toxicological testing contained in Part 219 subpart C and appendix C (Rev. Requirement).	698 railroads + 400 MOW contractors.	698 modified Programs	1 hour	698 hours.
—Alcohol and Drug Programs —New RRs	5 railroads	5 programs	3 hours	15 hours.
—Training of Supervisory Employees in signs/symptoms of alcohol/drug influence.	698 railroads + 400 MOW contractors.	2,462 trained supervisors.	3 hours	7,386 hours.
219.12—RR Documentation on need to place employee on duty for follow-up tests.	698 railroads + 400 MOW contractors.	5 documents	30 minutes	3 hours.
219.23—Educational materials concerning the effects of alcohol/drug misuse on individual employees.	698 railroads + 400 MOW contractors.	1,098 revised educational documents.	1 hour	1,098 hours.
—Copies of educational materials to employees.	142,000 employees	142,000 copies of documents.	2 minutes	4,733 hours.
219.104—Removal of employee from regulated service —(Rev. Requirement) Verbal Notice + Follow-up Written Letter.	698 railroads + 400 MOW contractors.	500 notices + 500 letters	30 seconds + 2 minutes.	21 hours.
—Request for Hearing by Employee who Denies Test Result or other Information is Valid Evidence of Part 219 Violation.	698 railroads + 400 MOW contractors.	50 requests + 50 hearings.	2 minutes + 4 hours.	202 hours.
—Applicants Declining Pre-Employment Testing and Withdrawing Employment Application—Communications (New Requirement).	698 railroads + 400 MOW contractors.	60 notices/communications.	2 minutes	2 hours.
219.105—RR Duty to prevent violation—Documents provided to FRA after agency request regarding RR's Alcohol and/or Drug Use Education/Prevention/Etc. Program (New Requirement).	698 railroads + 400 MOW contractors.	2 documents	5 minutes .....	.17 hour.
219.201(c)—Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing.	698 railroads + 400 MOW contractors.	2 reports	30 minutes	1 hour.
19.203/207—Major train accidents—Post Accident Toxicological Testing Forms				
—Completion of FRA F 6180.73	142,000 employees	240 forms	10 minutes	40 hours.
—Determination by RR representative to exclude surviving crewmember from testing (New Requirement).	698 railroads + 400 MOW contractors.	50 decisions/d determinations.	5 minutes	4 hours.
—Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours (New Requirement).	698 railroads + 400 MOW contractors.	80 notifications + 80 reports.	2 minutes + 30 minutes.	43 hours.
—Recall of employees for testing and Narrative Report Completion (New Requirement).	698 railroads + 400 MOW contractors.	4 calls + 4 reports	2 minutes + 30 minutes.	2 hours.

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—RR Reference to Part 219 requirements and FRA's post-accident toxicological kit in seeking to obtain facility cooperation (New Requirement).	698 railroads + 400 MOW contractors.	80 references	15 minutes	20 hours.
—RR Notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent (New Requirement).	698 railroads + 400 MOW contractors.	2 phone calls	10 minutes .....	.33 hour.
219.205—Specimen Handling/Collection (New Requirement)				
— Completion of Form FRA F 6180.74 by train crew members after accident.	698 railroads + 400 MOW contractors.	240 forms	15 minutes	60 hours.
—RR representative request to medical facility representative to complete remaining information on FRA F 6180.74.	698 railroads + 400 MOW contractors.	80 ph. requests	2 minutes	3 hours.
—RR representative completion of Form FRA F 6180.73.	698 railroads + 400 MOW contractors.	80 forms	10 minutes	13 hours.
—Request to FRA Alcohol and Drug Program Manager for order form for Standard Shipping Kits.	698 railroads + 400 MOW contractors.	5 requests	2 minutes .....	.17 hour.
—Request to National Response Center (NRC) for Post-Mortem Shipping Kit.	698 railroads + 400 MOW contractors.	1 request	2 minutes .....	.03333 hour.
—RR Request to Medical Facility to Transfer Sealed Toxicology Kit (Current Requirement).	698 railroads + 400 MOW contractors.	40 ph. Requests	2 minutes	1 hour.
—RR/Medical Facility Record of Kit Error ..	698 RRs + 400 Contr	20 Wr. Records	2 minutes	1 hour.
219.209(a)—Notification to NRC and FRA of Accident/Incident where Samples were Obtained.	698 railroads + 400 MOW contractors.	40 phone reports	2 minutes	1 hour.
219.211(b)—Results of post-accident toxicological testing to RR MRO and RR Employee.	698 railroads + 400 MOW contractors.	10 reports	15 minutes	3 hours.
(c)—MRO Report to FRA of positive test for alcohol/drugs of surviving employee.	698 railroads + 400 MOW contractors.	10 reports	15 minutes	3 hours.
219.303—Reasonable Suspicion Observations (Drug Test)				
—Communication between On-Site and Off-Site Supervisors regarding Reasonable Suspicion Observation (New Requirement).	698 railroads + 400 MOW contractors.	50 phone communications.	2 minutes	2 hours.
—RR Written Documentation of Observed Signs/Symptoms for Reasonable Suspicion Determination (New Requirement).	698 railroads + 400 MOW contractors.	30 documents	5 minutes	3 hours.
219.305—RR Written Record Stating Reasons Test was Not Promptly Administered (New Requirement).	698 railroads + 400 MOW contractors.	30 records	2 minutes	1 hour.
219.401—Notification to Employee regarding Reasonable Cause Testing (New Requirement).	698 railroads + 400 MOW contractors.	50 notifications	15 minutes	13 hours.
219.405—RR Documentation Describing Basis of Reasonable Cause Testing (New Requirement).	698 railroads + 400 MOW contractors.	50 documents	15 minutes	13 hours.
—RR Documentation of Rule/Part 225 Violation for Each Reasonable Cause Test (New Requirement).	698 railroads + 400 MOW contractors.	20 documents	15 minutes	5 hours.
219.407—Prompt specimen collection time limitation exceeded—Record (New Requirement).	698 railroads + 400 MOW contractors.	15 records	15 minutes	4 hours.
219.501—RR Documentation of Negative Pre-Employment Drug Tests (New Requirement).	698 railroads + 400 MOW contractors.	1,200 tests + 1,200 documents.	15 minutes + 5 minutes.	400 hours.
219.605—Submission of random testing plan (New Requirement)—Existing RRs.	698 railroads + 400 MOW contractors.	200 plans	1 hour	200 hours.
—New Railroads submission of random testing plans (New Requirement).	5 railroads	5 plans	1 hour	5 hours.
—Amendments to Currently-Approve FRA Random Testing Plan (New Requirement).	698 railroads + 400 MOW contractors.	20 amendments	1 hour	20 hours.
—Resubmitted random testing plans after notice of FRA disapproval (New Requirement).	698 railroads + 400 MOW contractors.	21 resubmitted plans	15 minutes	5 hours.
—Non-Substantive Amendment to an Approved Plan (New Requirement).	698 railroads + 400 MOW contractors.	50 amendments	10 minutes	8 hours.

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—New/Combined/Amended Random Testing Plans Incorporating New Categories of Regulated Employees (New Requirement).	698 railroads + 400 MOW contractors.	20 random testing plans	15 minutes	5 hours.
219.607—RR Requests to Contractor or Service Agent to Submit Part 219 Compliant Random Testing Plan on Its Behalf (New Requirement).	698 railroads + 400 MOW contractors.	50 requests	15 minutes	13 hours.
—Contractor Random Testing Plan (New Requirement).	400 MOW contractors	50 plans	1 hour	50 hours.
219.609—Inclusion of Regulated Service Contractor Employees/Volunteers in RR Random Testing Plan (New Requirement).	698 railroads + 400 MOW contractors.	15 plans	10 minutes	3 hours.
—Addenda to RR Random Testing Plan Describing Method Used to Test Contractor/Volunteer Employees in Non-Random Testing Plan (New Requirement).	698 railroads + 400 MOW contractors.	15 addenda	10 minutes	3 hours.
219.611—Random Alcohol and Drug Test Pools: Good Faith Determinations and Evaluations of Employee Likelihood of Performing Regulated Service (New Requirement).	698 railroads + 400 MOW contractors.	25,000 determinations + 25,000 evaluations.	30 seconds + 30 seconds.	417 hours.
—Random Testing Pool Updates (New Requirement).	698 railroads + 400 MOW contractors.	13,176 pool updates	5 minutes	1,098 hours.
—Documents on RR Multiple Random Testing Pools (New Requirement).	698 railroads + 400 MOW contractors.	96 documents	5 minutes	8 hours.
219.613—RR Identification of Total Number of Eligible Employees for Random Testing (New Requirement).	698 railroads + 400 MOW contractors.	2,196 IDs	2 minutes	73 hours.
—RR Records/Explanation of Discarded Selection Draws (New Requirement).	698 railroads + 400 MOW contractors.	10 records/explanations	2 minutes .....	.33 hour.
—Electronic or Hard Copy of RR Snapshot of Each Random Testing Pool (New Requirement).	698 railroads + 400 MOW contractors.	13,176 snapshots	2 minutes	1,098 hours.
219.615—Incomplete Random Testing Collections—Documentation (New Requirement).	698 railroads + 400 MOW contractors.	2,000 documents .....	.5 minute	17 hours.
219.617—Employee Exclusion from Random alcohol/drug testing after providing verifiable evidence from credible outside professional (New Requirement).	698 railroads + 400 MOW contractors.	5 documents	1 hour	5 hours.
219.619—Report by MRO of Verified Positive Test or by Breath Alcohol Technician of Breath Alcohol Specimen of 04 or Greater (New Requirement).	698 railroads + 400 MOW contractors.	88 reports	5 minutes	7 hours.
219.623—Random Testing Records (New Requirement).	698 railroads + 400 MOW contractors.	40,000 records	1 minute	667 hours.
219.901—RR Alcohol and Drug Misuse Prevention Records for MOW Employees Kept by FRA (New Requirement).	698 railroads + 400 MOW contractors.	16,960 records	5 minutes	1,413 hours.
219.1001—RR Adoption of Peer Support Program (New Requirement).	698 railroads + 400 MOW contractors.	698 programs	30 minutes	349 hours.
—New Railroads Adoption of Peer Support Program (New Requirement).	5 railroads	5 programs	30 minutes	3 hours.
219.1005—Peer Support Programs with Labor Organization Approvals that Include Optional Provisions (New Requirement).	698 railroads + 400 MOW contractors.	10 Peer Support Programs.	20 hours	200 hours.
219.1007—Filing of Documents/Records with FRA of Labor Concurrences for Alternate Peer Support Programs (New Requirement).	698 railroads + 400 MOW contractors.	10 documents	1 hour	10 hours.
—Notice to FRA of Amendment or Revocation of FRA Approved Alternate Peer Support Program (New Requirement).	698 railroads + 400 MOW contractors.	1 notice/amended peer support program.	1 hour	1 hour.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these

information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and

clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For

information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202-493-6292, or Ms. Kimberly Toone at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Mr. Brogan or Ms. Toone at the following address: *Robert.Brogan@dot.gov*; *Kim.Toone@dot.gov*. OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 4, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects 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." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults

with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the proposed rule will not have substantial direct effects 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. In addition, FRA has determined that this proposed rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This NPRM complies with a statutory mandate and would not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, this NPRM would not have any federalism implications that impose substantial direct compliance costs on State and local governments.

However, FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and codified at 49 U.S.C. 20106 (Sec. 20106). Sec. 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to Sec. 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106 and 20119. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to 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.

This proposed rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this NPRM in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this document is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment). In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this NPRM that might trigger the need for a more detailed environmental review. As a result, FRA finds that this NPRM is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted

annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This monetary amount of \$100,000,000 has been adjusted to \$140,800,000 to account for inflation. This proposed rule would not result in the expenditure of more than \$140,800,000 by the public sector in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, that: (1)(i) Is a significant regulatory action under Executive Order 12866 or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM would not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

I. Privacy Act Information

Interested parties should be aware that anyone is able to search the electronic form of all written communications and comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://www.dot.gov/privacy.html>.

List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety,

Reporting and recordkeeping requirements, Safety, Transportation.

The Proposed Rule

For the reasons stated above, FRA proposes to amend 49 CFR part 219 as follows:

PART 219—[Amended]

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

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Pub. L. 110–432, 122 Stat. 4889; and 49 CFR 1.89.

Subpart A—General

- 2. Revise § 219.1(a) to read as follows:

§ 219.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees (as defined in § 219.5) by alcohol or drugs.

* * * * *

- 3. Revise § 219.3 to read as follows:

§ 219.3 Application.

(a) *General.* This part applies to all railroads, except as provided in paragraphs (b), (c), and (d) of this section, and except for:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 219.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation, as defined in § 219.5; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) *Annual report requirements.* (1) Subpart I of this part does not apply to any domestic or foreign railroad that has fewer than 400,000 total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) Subpart I of this part does not apply to any contractor that performs regulated service exclusively for railroads with fewer than 400,000 total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(3) When a contractor performs regulated service for at least one railroad with fewer than 400,000 total annual employee hours, including hours

worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, subpart I applies as follows:

(i) A railroad with more than 400,000 total annual employee work hours must comply with Subpart I regarding any contractor employees it integrates into its own alcohol and drug testing program under this part; and

(ii) If a contractor establishes its own independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with subpart I if it has 200 or more regulated employees.

(c) *Small railroad exception.* (1) Subparts E, G, and K of this part do not apply to small railroads, and a small railroad may not perform the Federal alcohol and drug testing authorized by these subparts (except that a small railroad may establish a Federal authority peer prevention program that complies with the requirements of subpart K). For purposes of this part, a small railroad means a railroad that:

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW activities, as defined in § 219.5, does not count towards a railroad’s total number of covered employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW activities exclusively for small railroads also qualifies for the small railroad exception (i.e., is excepted from the requirements of subparts E, G, and K of this part). However, a contractor who would otherwise qualify for the small railroad exception is not excepted if it performs MOW activities for multiple railroads, and at least one or more of those railroads does not qualify for the small railroad exception under this section.

(4) If a contractor is subject to all of part 219 because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E, G, and K is shared

between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

(d) *Foreign railroad.* (1) This part does not apply to the operations of a foreign railroad that take place outside the United States. A foreign railroad is required to conduct post-accident toxicological testing or reasonable suspicion testing only for operations that occur within the United States.

(2) Subparts F, G, and K of this part do not apply to an employee of a foreign railroad whose primary reporting point is outside the United States if that employee is:

(i) Performing train or dispatching service on that portion of a rail line in the United States extending up to 10 route miles from the point that the line crosses into the United States from Canada or Mexico; or

(ii) Performing signal service in the United States.

■ 4. In § 219.4, revise paragraphs (a)(1) introductory text and (b)(1) and (2) to read as follows:

§ 219.4 Recognition of a foreign railroad's workplace testing program.

(a) * * *

(1) To be so considered, the petition must document that the foreign railroad's workplace testing program contains equivalents to subparts B, F, G, and K of this part:

* * * * *

(b) * * *

(1) Upon FRA's recognition of a foreign railroad's workplace alcohol and drug use program as compatible with the return-to-service requirements in subpart B and the requirements of subparts F, G, and K of this part, the foreign railroad must comply with either the enumerated provisions of part 219 or with the standards of its recognized program, and any imposed conditions, with respect to its employees whose primary reporting point is outside the United States and who perform train or dispatching service in the United States. The foreign railroad must also, with respect to its final applicants for, or its employees seeking to transfer for the first time to, duties involving such train or dispatching service in the United States, comply with either subpart F of this part or the standards of its recognized program.

(2) The foreign railroad must comply with subparts A (general), B (prohibitions, other than the return-to-service provisions in § 219.104(d)), C (post-accident toxicological testing), D (reasonable suspicion testing), I (annual report requirements), and J (recordkeeping requirements) of this

part. Drug or alcohol testing required by these subparts (except for post-accident toxicological testing required by subpart C) must be conducted in compliance with all applicable provisions of the DOT Procedures for Workplace Drug and Alcohol Testing Programs (part 40 of this title).

* * * * *

■ 5. Section 219.5 is amended by:

■ a. Revising the introductory text;

■ b. Adding definitions of "Administrator", "Associate Administrator", "category of regulated employee", "contractor", and "Counselor";

■ c. Revising the definitions of "covered employee", "covered service", and "DOT agency";

■ d. Adding definitions of "DOT, The Department, or DOT agency", "DOT-regulated employee", "DOT safety-sensitive duties or DOT safety-sensitive functions", "Drug and Alcohol Counselor or DAC," "employee", "Employee Assistance Program Counselor or EAP Counselor", "evacuation", "flagman", and "fouling a track";

■ e. Revising the definition of "FRA representative";

■ f. Removing the definition of "general railroad system of transportation";

■ g. Adding definitions of "highway-rail grade crossing" and "highway-rail grade crossing accident/incident";

■ h. Revising the definition of "impact accident";

■ i. Adding definitions of "joint operations", "maintenance-of-way activities or MOW activities", and "maintenance-of-way employee or MOW employee";

■ j. Revising the definition of "medical facility";

■ j. Adding definitions of "on-track or fouling equipment", "other impact accident", "person", and "plant railroad";

■ k. Revising the definition of "railroad property damage or damage to railroad property";

■ l. Adding the definitions of "raking collision", "regulated employee", "regulated service", "responsible railroad supervisor", "side collision", and "tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation";

■ m. Removing the definition of "train";

■ n. Revising the definitions of "train accident" and "train incident"; and

■ o. Adding the definition of "watchman/lookout".

The revisions and additions read as follows:

§ 219.5 Definitions.

As used in this part only—

* * * * *

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Associate Administrator means the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, or the Associate Administrator's delegate.

Category of regulated employee means a broad class of either covered service or maintenance-of-way employees (as defined in this section). For the purpose of determining random testing rates under § 219.625, if an individual performs both covered service and maintenance-of-way activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising more than 50 percent of his or her regulated service.

* * * * *

Contractor means a contractor or subcontractor performing functions for a railroad.

* * * * *

Counselor means a person who meets the qualifications and credentialing requirements for a Drug and Alcohol Counselor, Employee Assistance Program Counselor, or Substance Abuse Professional.

Covered employee means an employee (as defined in this section to include an employee, volunteer, or probationary employee performing activities for a railroad or a contractor to a railroad) who is performing covered service under the hours of service laws at 49 U.S.C. ch. 21101, 21104, or 21105 or who is subject to performing such covered service, regardless of whether the person has performed or is currently performing covered service. (An employee is not a "covered employee" under this definition exclusively because he or she is an employee for purposes of 49 U.S.C. 21106.) For the purposes of pre-employment testing only, the term "covered employee" includes a person applying to perform covered service in the United States.

Covered service means service in the United States that is subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction. Generally, this includes train and engine service persons who are involved in the movement of trains (e.g., a locomotive engineer, fireman, conductor, trainman, brakeman, switchman, or locomotive

hostler/helper); persons who handle orders governing the movement of trains (e.g., train dispatchers and control operators); and persons who inspect, repair, or install railroad signal systems (e.g., signal maintainers). See Appendix A to 49 CFR part 228, *Requirements of the Hours of Service Act: Statement of Agency Policy and Interpretation.*

* * * * *

DOT, The Department, or DOT agency means all DOT agencies, including, but not limited to, the United States Coast Guard (USCG), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the Office of the Secretary (OST). These terms include any designee of a DOT agency.

DOT-regulated employee means any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing DOT safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to pre-employment testing. For purposes of drug testing conducted under the provisions of 49 CFR part 40, the term employee has the same meaning as the term “donor” as found on the Custody and Control Form and related guidance materials produced by the Department of Health and Human Services.

DOT safety-sensitive duties or DOT-safety sensitive functions means functions or duties designated by a DOT agency, the performance of which makes an individual subject to the drug testing and/or alcohol testing requirements of that DOT agency. For purposes of this part, regulated service has been designated by FRA as a DOT safety-sensitive duty or function.

* * * * *

Drug and Alcohol Counselor or DAC means a person who meets the credentialing and qualification requirements described in § 242.7 of this chapter.

Employee means any individual (including a volunteer or a probationary employee) performing activities for a railroad or a contractor to a railroad.

Employee assistance program or EAP Counselor means a person qualified by experience, education, or training to counsel people affected by substance abuse problems and to evaluate their

progress in recovering from or controlling such problems. An EAP counselor can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified physician designated by the railroad to perform functions in connection with alcohol or substance abuse evaluation or counseling. As used in this part, the EAP counselor has a duty to make an honest and fully informed evaluation of the condition and progress of an employee.

Evacuation means the mandatory or voluntary relocation of at least one person who is not a railroad employee for the purpose of avoiding exposure to a hazardous material release. It does not include the closure of public transportation roadways for the purpose of containing a hazardous material release, unless the closure is accompanied by an evacuation order.

Flagman means any person designated by the railroad to direct or restrict the movement of trains past a point on a track to provide on-track safety for maintenance-of-way employees, while engaged solely in performing that function.

* * * * *

Fouling a track means the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

* * * * *

FRA representative means the Associate Administrator for Railroad Safety of FRA and staff, the Associate Administrator’s delegate (including a qualified State inspector acting under part 212 of this chapter), the Chief Counsel of FRA, the Chief Counsel’s delegate, or FRA’s Drug and Alcohol Program oversight contractor.

* * * * *

Highway-rail grade crossing means:

(1) A location where a public highway, road, or street, or a private roadway, including associated sidewalks, crosses one or more railroad tracks at grade; or

(2) A location where a pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others. The term “sidewalk” means that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or, on easements of private property, that

portion of a street that is paved or improved and intended for use by pedestrians.

Highway-rail grade crossing accident/incident means any impact between railroad on-track equipment and a highway user at a highway-rail grade crossing. The term “highway user” includes pedestrians, as well as automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, pedestrians, and all other modes of surface transportation motorized and un-motorized.

Impact accident means a train accident, as defined in this section, consisting either of—

- (1) A head-on or rear-end collision between on-track equipment;
- (2) A side collision, derailment collision, raking collision, switching collision, or “other impact accident,” as defined by this section;
- (3) Impact with a deliberately-placed obstruction, such as a bumping post (but not a derail); or
- (4) Impact between on-track equipment and any railroad equipment fouling the track, such as an impact between a train and the boom of an off-rail vehicle.

The definition of “impact accident” does not include an impact with naturally-occurring obstructions such as fallen trees, rock or snow slides, livestock, etc.

* * * * *

Joint operations means rail operations conducted by more than one railroad on the same track (except for minimal joint operations necessary for the purpose of interchange), regardless of whether such operations are the result of contractual arrangements between the railroads, order of a governmental agency or a court of law, or any other legally binding directive. For purposes of this part only, minimal joint operations are considered necessary for the purpose of interchange when:

- (1) The maximum authorized speed for operations on the shared track does not exceed 20 mph;
- (2) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer;
- (3) The maximum distance for operations on the shared track does not exceed 3 miles; and
- (4) Any operations extending into another railroad’s yard are for the sole purpose of setting out or picking up cars on a designated interchange track.

Maintenance-of-way activities or MOW activities means:

Maintenance-of-way activities or MOW activities means:

(1) The inspection, repair, or maintenance of track, roadbed, or electric traction systems;

(2) The operation of on-track or fouling equipment utilized for the inspection, repair, or maintenance of track, roadbed, or electric traction systems;

(3) The performance of flagman or watchman/lookout duties, as defined in this section;

(4) The obtaining of on-track authority and/or permission for the performance of the activities listed in paragraphs (1) through (3) of this definition; or

(5) The granting of on-track authority and/or permission for operation over a segment of track while workers are performing the activities listed in paragraphs (1) through (3) of this definition.

Maintenance-of-way employee or MOW employee means any employee (as defined in this section) who performs maintenance-of-way activities for a railroad.

Medical facility means a hospital, clinic, physician's office, or laboratory where post-accident toxicological testing specimens can be collected according to recognized professional standards, and where an individual's post-accident medical needs can be attended to.

* * * * *

On-track or fouling equipment means any railroad equipment that is positioned on the rails or that is fouling the track, and includes, but is not limited to, the following: A train, locomotive, cut of cars, single car, motorcar, yard switching train, work train, inspection train, track motorcar, highway-rail vehicle, push car, crane, or other roadway maintenance machine, such as a ballast tamping machine, if the machine is positioned on or over the rails or is fouling the track.

Other impact accident means an accident or incident, not classified as a head-on, rear-end, side, derailment, raking, or switching collision, that involves contact between on-track or fouling equipment. This includes impacts in which single cars or cuts of cars are damaged during operations involving switching, train makeup, setting out, etc.

* * * * *

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad, such as

a service agent performing functions under part 40 of this title; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

* * * * *

Railroad property damage or damage to railroad property means damage to railroad property (specifically, on-track equipment, signals, track, track structure, or roadbed) and must be calculated according to the provisions for calculating costs and reportable damage in the FRA Guide for Preparing Accident/Incident Reports (see § 225.21 of this chapter for instructions on how to obtain a copy). Generally, railroad property damage includes labor costs and all other costs to repair or replace in-kind damaged on-track equipment, signals, track, track structures (including bridges and tunnels), or roadbed. (Labor costs that must be accounted for include hourly wages, transportation costs, and hotel expenses.) It does not include the cost of clearing a wreck; however, additional damage to the above-listed items caused while clearing the wreck must be included in the damage estimate. It also includes the cost of rental and/or operation of machinery such as cranes and bulldozers, including the services of contractors, to replace or repair the track right-of-way and associated structures. Railroad property damage does not include damage to lading. Trailers/containers on flatcars are considered to be lading and damage to these is not to be included in on-track equipment damage. Damage to a flat car carrying a trailer/container, however, is included

in railroad property damage. Railroads should refer directly to the FRA Guide for Preparing Accident/Incident Reports for additional guidance on what constitutes railroad property damage.

Raking collision means a collision between parts or lading of a consist on an adjacent track, or with a structure such as a bridge.

Regulated employee means a covered employee or maintenance-of-way employee who performs regulated service for a railroad subject to the requirements of this part.

Regulated service means covered service or maintenance-of-way activities, the performance of which makes an employee subject to the requirements of this part.

* * * * *

Responsible railroad supervisor means any responsible line supervisor (e.g., a trainmaster or road foreman of engines) or superior official in authority over the regulated employees to be tested.

* * * * *

Side collision means a collision at a turnout where one consist strikes the side of another consist.

* * * * *

Train accident means a rail equipment accident described in § 225.19(c) of this chapter involving damage in excess of the current reporting threshold (see § 225.19(e) of this chapter), including an accident involving a switching movement. Rail equipment accidents include, but are not limited to, collisions, derailments, and other events involving the operations of on-track or fouling equipment (whether standing or moving).

Train incident means an event involving the operation of railroad on-track or fouling equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

* * * * *

Watchman/lookout means an employee who has been annually trained and qualified to provide warning of approaching trains or on-track equipment. Watchmen/lookouts must be properly equipped to provide visual and auditory warning by such

means as a whistle, air horn, white disk, red flag, lantern, or fusee. A watchman/lookout's sole duty is to look out for approaching trains/on-track equipment and provide at least fifteen seconds advanced warning to employees before arrival of trains/on-track equipment.

■ 6. Revise § 219.9 to read as follows:

§ 219.9 Responsibility for compliance.

(a) *General.* Although the requirements of this part are stated in terms of the duty of a railroad, when any person, as defined by § 219.5, performs any function required by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

(b) *Joint operations.* (1) In the case of joint operations, primary responsibility for compliance with subparts C, D, and E of this part rests with the host railroad, and all affected employees must be responsive to direction from the host railroad that is consistent with this part. However, nothing in this paragraph restricts railroads engaged in joint operations from appropriately assigning responsibility for compliance with this part amongst themselves through a joint operating agreement or other binding contract. FRA reserves the right to bring an enforcement action for noncompliance with this part against the host railroad, the employing railroad, or both.

(2) Where an employee of a railroad engaged in joint operations is required to participate in breath or body fluid testing under subpart C, D, or E of this part and is subsequently subject to adverse action alleged to have arisen out of the required test (or alleged refusal thereof), necessary witnesses and documents available to the other railroad engaged in the joint operations must be made available to the employee and his or her employing railroad on a reasonable basis.

(c) *Contractor responsibility for compliance.* As provided by paragraph (a) of this section, any independent contractor or other entity that performs regulated service for a railroad, or any other services under this part or part 40 of this title, has the same responsibilities as a railroad under this part with respect to its employees who perform regulated service or other service required by this part or part 40 of this title for the railroad. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad treating the entity's regulated employees as if they were the railroad's own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad

and the other entity or in another document. In the absence of a clear delineation of responsibility, FRA may hold the railroad and the other entity jointly and severally liable for compliance.

■ 7. Add § 219.10 to read as follows:

§ 219.10 Penalties.

Any person, as defined by § 219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$650 and not more than \$16,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$100,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which is construed to qualify the responsibility of a railroad for the unauthorized conduct of an employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

■ 8. In § 219.11, revise paragraphs (a), (b)(1) and (2), and (c) through (h) to read as follows:

§ 219.11 General conditions for chemical tests.

(a)(1) Any regulated employee who is subject to performing regulated service for a railroad is deemed to have consented to testing as required in subparts B, C, D, E, G, and K of this part.

(2) A regulated employee required to participate in alcohol and/or drug testing under this part must be on-duty and subject to performing regulated service when the specimen collection is initiated and the alcohol testing/urine specimen collection is conducted (with the exception of pre-employment testing under subpart F of this part).

(b)(1) Each regulated employee must participate in such testing, as required under the conditions set forth in this part and implemented by a representative of the railroad or employing contractor.

(2) In any case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s). A medical emergency is an acute medical

condition requiring immediate medical care. A railroad may require an employee to substantiate a medical emergency by providing verifiable documentation from a credible outside professional (e.g., doctor, dentist, hospital, or law enforcement officer) substantiating the medical emergency within a reasonable period of time.

* * * * *

(c) A regulated employee who is required to be tested under subpart C, D, or E of this part and who is taken to a medical facility for observation or treatment after an accident or incident is deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid specimen taken by the medical facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such specimen;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the medical facility on such specimen;

(3) The identity, dosage, and time of administration of any drugs administered by the medical facility prior to the time specimens were taken by the medical facility or prior to the time specimens were taken in compliance with this part; and

(4) The results of any breath tests for alcohol conducted by or for the medical facility.

(d) Any person required to participate in body fluid testing under subpart C of this part (post-accident toxicological testing) shall, if requested by a representative of the railroad or the medical facility, evidence consent to the taking of specimens, their release for toxicological analysis under pertinent provisions of this part, and release of the test results to the railroad's Medical Review Officer by promptly executing a consent form, if required by the medical facility. The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the railroad, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others. Any consent provided consistent with this section may be construed to extend only to those actions specified in this section.

(e)(1) A regulated employee who is notified of selection for testing under this part must cease to perform his or

her assigned duties and proceed to the testing site either immediately or as soon as possible without adversely affecting safety.

(2) A railroad must ensure that the absence of a regulated employee from his or her assigned duties to report for testing does not adversely affect safety.

(3) Nothing in this part may be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing.

(f) Any employee performing duties for a railroad who is involved in a qualifying accident or incident described in subpart C of this part, and who dies within 12 hours of that accident or incident as the result thereof, is deemed to have consented to the removal of body fluid and/or tissue specimens necessary for toxicological analysis from the remains of such person, and this consent is implied by the performance of duties for the railroad (i.e., a consent form is not required). This consent provision applies to all employees performing duties for a railroad, and not just regulated employees.

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in § 219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C and Appendix C of this part.

(h) Nothing in this subpart restricts any discretion available to the railroad to request or require that an employee cooperate in additional breath or body fluid testing. However, no such testing may be performed on urine or blood specimens provided under this part. For purposes of this paragraph, all urine from a void constitutes a single specimen.

* * * * *

■ 9. Add § 219.12 to read as follows:

§ 219.12 Hours-of-service laws implications.

(a) Railroads are not excused from performing alcohol or drug testing

under subpart C (post-accident toxicological testing) and subpart D (reasonable suspicion testing) of this part because the performance of such testing would violate the hours-of-service laws at 49 U.S.C. ch. 211. If a railroad establishes that a violation of the hours-of-service laws is caused solely because it was required to conduct post-accident toxicological testing or reasonable suspicion testing, FRA will not take enforcement action for the violation if the railroad used reasonable due diligence in completing the collection and otherwise completed it within the time limitations of § 219.203(d) (for post-accident toxicological testing) or § 219.305 (for reasonable suspicion testing), although the railroad must still report any excess service to FRA.

(b) Railroads may perform alcohol or drug testing authorized under subpart E (reasonable cause testing) of this part even if the performance of such testing would violate the hours-of-service laws at 49 U.S.C. ch. 211. If a railroad establishes that a violation of the hours-of-service laws is caused solely by its decision to conduct authorized reasonable cause testing, FRA will not take enforcement action for the violation if the railroad used reasonable due diligence in completing the collection and otherwise completed it within the time limitations of § 219.407, although the railroad must still report any excess service to FRA.

(c) Railroads must schedule random alcohol and drug tests under subpart G of this part so that sufficient time is provided to complete the test within a covered employee's hours-of-service limitations under 49 U.S.C. ch. 211. However, if a direct observation collection is required during a random test per the requirements of part 40 of this title, then the random test must be completed regardless of the hours-of-service law limitations. A railroad may not place a regulated employee on-duty for the sole purpose of conducting a random alcohol or drug test under subpart G of this part.

(d) Railroads must schedule follow-up tests under § 219.104 so that sufficient time is provided to complete a test within a covered employee's hours-of-service limitations under 49 U.S.C. ch. 211. If a railroad is having a difficult time scheduling the required number of follow-up tests because a covered employee's work schedule is unpredictable, there is no prohibition against the railroad placing an employee (who is subject to being called to perform regulated service) on duty for the purpose of conducting the follow-up tests; except that an employee may be

placed on duty for a follow-up alcohol test only if he or she is required to completely abstain from alcohol by a return-to-duty agreement, as provided by § 40.303(b) of this title. A railroad must maintain documentation establishing the need to place the employee on duty for purpose of conducting the follow-up test and provide this documentation for review upon request of an FRA representative.

■ 10. Revise § 219.23 to read as follows:

§ 219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority. The railroad must also provide the employee clear and unequivocal written notice of the type of test that is required (e.g., reasonable suspicion, reasonable cause, random selection, follow-up, etc.). These notice requirements are satisfied if:

(1) For all FRA testing except mandatory post-accident toxicological testing under subpart C of this part, a railroad uses the mandated DOT alcohol or drug testing form, circles or checks off the box corresponding to the type of test, and shows this form to the employee prior to the commencement of testing; or

(2) For mandatory post-accident toxicological testing under subpart C of this part, a railroad uses the approved FRA form and shows this form to the employee prior to the commencement of testing.

(b) Use of the mandated DOT alcohol or drug testing forms for non-Federal tests or mandatory post-accident toxicological testing under subpart C is prohibited (except for post-accident breath alcohol testing permitted under § 219.203(c)). Use of the approved FRA post-accident toxicological testing form for any testing other than that mandated under subpart C is prohibited.

(c) Each railroad must develop and publish educational materials, specifically designed for regulated employees, that clearly explain the requirements of this part, as well as the railroad's policies and procedures with respect to meeting those requirements. The railroad must ensure that a copy of these materials is distributed to each regulated employee hired for or transferred to a position that requires alcohol and drug testing under this part. (This requirement does not apply to an applicant for a regulated service

position who either refuses to provide a specimen for pre-employment testing or who has a pre-employment test with a result indicating a violation of the alcohol or drug prohibitions of this part.) A railroad may satisfy this requirement by either—

(1) Continually posting the materials in a location that is easily visible to all regulated employees going on duty at their designated reporting place and, if applicable, providing a copy of the materials to any employee labor organization representing a class or craft of regulated employees of the railroad;

(2) Providing a copy of the materials in some other manner that will ensure that regulated employees can find and access these materials explaining the critical aspects of the program (e.g., by posting the materials on a company Web site that is accessible to all regulated employees); or

(3) For a minimum of three years after the effective date of the final rule, a railroad must also ensure that a hard copy of these materials is provided to each maintenance-of-way employee.

(d) *Required content.* The materials to be made available to employees under paragraph (c) of this section must, at a minimum, include clear and detailed discussion of the following:

(1) The position title, name, and means of contacting the person(s) designated by the railroad to answer employee questions about the materials;

(2) The specific classes or crafts of employees who are subject to the provisions of this part, such as engineers, conductors, MOW employees, signal maintainers, or train dispatchers;

(3) Sufficient information about the regulated service functions performed by those employees to make clear that the period of the work day the regulated employee is required to be in compliance with the alcohol prohibitions of this part is that period when the employee is on duty and is required to perform or is available to perform regulated service;

(4) Specific information concerning employee conduct that is prohibited under subpart B of this part (e.g., the minimum requirements of §§ 219.101, 219.102, and 219.103);

(5) The requirement that a railroad utilizing the reasonable cause testing authority provided by subpart E of this part must give prior notice to regulated employees of the circumstances under which they will be subject to reasonable cause testing;

(6) The circumstances under which a regulated employee will be tested under this part;

(7) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the employee and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee;

(8) The requirement that a regulated employee submit to alcohol and drug tests administered in accordance with this part;

(9) An explanation of what constitutes a refusal to submit to an alcohol or drug test and the attendant consequences;

(10) The consequences for a regulated employee found to have violated subpart B of this part, including the requirement that the employee be removed immediately from regulated service, and the responsive action requirements of § 219.104;

(11) The consequences for a regulated employee who has a Federal alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04;

(12) Information concerning the effects of alcohol and drug misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol or drug problem (the employee's or a co-worker's); and available methods of evaluating and resolving problems associated with the misuse of alcohol and drugs, including utilization of the procedures set forth in subpart K of this part and the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(e) *Optional provisions.* The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration that are based on the railroad's company authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on the railroad's independent company authority.

■ 11. Add § 219.25 to subpart A to read as follows:

§ 219.25 Previous employer drug and alcohol checks.

(a) As required by § 219.701(a) and (b), which mandates that drug or alcohol testing conducted under this part be conducted in compliance with part 40 of this title (except for post-accident toxicological testing under subpart C of this part), a railroad must comply with § 40.25 and check the alcohol and drug testing record of any direct employee (an employee who is not employed by a contractor to the railroad) it intends to

use for regulated service before the employee performs such service for the first time. A railroad is not required to check the alcohol and drug testing record of contractor employees performing regulated service on its behalf (the alcohol and drug testing record of those contractor employees must be checked by their direct employers).

(b) When determining whether a person may become or remain certified as a locomotive engineer or a conductor, a railroad must comply with the requirements in § 240.119(c) (for engineers) or § 242.115(e) (for conductors) of this chapter regarding the consideration of Federal alcohol and drug violations that occurred within a period of 60 consecutive months prior to the review of the person's records.

Subpart B—Prohibitions

■ 12. Revise § 219.101(a) to read as follows:

§ 219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No regulated employee may use or possess alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad.

(2) No regulated employee may report for regulated service, or go or remain on duty in regulated service, while—

(i) Under the influence of or impaired by alcohol;

(ii) Having 0.04 or more alcohol concentration in the breath or blood; or

(iii) Under the influence of or impaired by any controlled substance.

(3) No regulated employee may use alcohol for whichever is the lesser of the following periods:

(i) Within four hours of reporting for regulated service; or

(ii) After receiving notice to report for regulated service.

(4)(i) No regulated employee tested under the provisions of this part whose Federal test result indicates an alcohol concentration of 0.02 or greater but less than 0.04 may perform or continue to perform regulated service for a railroad, nor may a railroad permit the regulated employee to perform or continue to perform regulated service, until the start of the regulated employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(ii) Nothing in this section prohibits a railroad from taking further action under its own independent company authority when a regulated employee tested under the provisions of this part

has a Federal test result indicating an alcohol concentration of 0.02 or greater, but less than 0.04. However, while a Federal test result of 0.02 or greater but less than 0.04 is a positive test and may be a violation of a railroad's operating rules, it is not a violation of § 219.101 and cannot be used to decertify an engineer under part 240 of this chapter or a conductor under part 242 of this chapter.

(5) If an employee tested under the provisions of this part has a test result indicating an alcohol concentration below 0.02, the test is negative and is not evidence of alcohol misuse. A railroad may not use a Federal test result below 0.02 either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may take further action to compel cooperation in other breath or body fluid testing only if it has an independent basis for doing so. An independent basis for subsequent company authority testing will exist only when, after having a negative Federal reasonable suspicion alcohol test result, the employee exhibits additional or continuing signs and symptoms of alcohol use. If a company authority test then indicates a violation of the railroad's operating rules, this result is independent of the Federal test result and must stand on its own merits.

* * * * *

■ 13. Revise § 219.102 to read as follows:

§ 219.102 Prohibition on abuse of controlled substances.

No regulated employee may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.

■ 14. Revise § 219.104 to read as follows:

§ 219.104 Responsive action.

(a) *Removal from regulated service.*

(1) If a railroad determines that a regulated employee has violated § 219.101 or § 219.102, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from regulated service and the procedures described in paragraphs (b) through (d) of this section apply.

(2) If a regulated employee refuses to provide a breath or body fluid specimen or specimens when required to by the railroad under a provision of this part, a railroad must immediately remove the regulated employee from regulated service, and the procedures described in paragraphs (b) through (d) of this section apply. This provision also applies to Federal reasonable cause

testing under subpart E of this part (if the railroad has elected to conduct this testing under Federal authority).

(b) *Notice.* Prior to or upon removing a regulated employee from regulated service under this section, a railroad must provide written notice to the employee of the reason for this action. A railroad may provide a regulated employee with an initial verbal notice so long as it provides a follow-up written notice to the employee as soon as possible. In addition to the reason for the employee's withdrawal from regulated service, the written notice must also inform the regulated employee that he may not perform any DOT safety-sensitive duties until he completes the return-to-duty process of part 40.

(c) *Hearing procedures.* (1) Except as provided in paragraph (e)(5) of this section, if a regulated employee denies that a test result or other information is valid evidence of a § 219.101 or § 219.102 violation, the regulated employee may demand and must be provided an opportunity for a prompt post-suspension hearing before a presiding officer other than the charging official. This hearing may be consolidated with any disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer must make separate findings as to compliance with §§ 219.101 and 219.102.

(2) The hearing must be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the regulated employee may demand that the hearing be convened within 10 calendar days of the employee's suspension or, in the case of a regulated employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the regulated employee becomes available for the hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under sec. 3 of the Railway Labor Act (49 U.S.C. 153), satisfies the procedural requirements of this paragraph (c).

(4) With respect to a removal or other adverse action taken as a consequence of a positive test result or refusal in a test authorized or required by this part, nothing in this part may be deemed to abridge any procedural rights or remedies consistent with this part that are available to a regulated employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law.

(5) Nothing in this part restricts the discretion of a railroad to treat a regulated employee's denial of prohibited alcohol or drug use as a waiver of any privilege the regulated employee would otherwise enjoy to have such prohibited alcohol or drug use treated as a non-disciplinary matter or to have discipline held in abeyance.

(d) *Compliance.* A railroad must comply with the requirements for Substance Abuse Professional evaluations, the return-to-duty process, and follow-up testing contained in part 40 of this title.

(e) *Applicability.* (1) This section does not apply to actions based on breath or body fluid tests for alcohol or drugs that are conducted exclusively under authority other than that provided in this part (e.g., testing under a company medical policy, for-cause testing policy wholly independent of the subpart E Federal authority of this part, or testing under a labor agreement).

(2) This section does not apply to Federal alcohol tests indicating an alcohol concentration less than 0.04.

(3) This section does not apply to locomotive engineers or conductors who have an off-duty conviction for, or a completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for operating while under the influence of or impaired by alcohol or a controlled substance. (However, this information remains relevant for the purpose of locomotive engineer or conductor certification, according to the requirements of part 240 or 242 of this chapter.)

(4) This section does not apply to an applicant who declines to be subject to pre-employment testing and withdraws an application for employment prior to the commencement of the test. The determination of when a drug or alcohol test commences is made according to the provisions found in subparts E and L of part 40 of this title.

(5) Paragraph (c) of this section does not apply to an applicant who tests positive or refuses a DOT pre-employment test.

(6) As provided by § 40.25(j) of this title, paragraph (d) of this section applies to any DOT-regulated employer seeking to hire for DOT safety-sensitive functions an applicant who tested positive or refused a DOT pre-employment test.

■ 15. Revise § 219.105 to read as follows:

§ 219.105 Railroad's duty to prevent violations.

(a) A railroad may not, with actual knowledge, permit a regulated employee to go or remain on duty in regulated

service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the actual knowledge imputed to the railroad is limited to that of a railroad management employee (such as a supervisor deemed an “officer,” whether or not such person is a corporate officer) or a supervisory employee in the offending regulated employee’s chain of command. A railroad management or supervisory employee has actual knowledge of a violation when he or she:

(1) Personally observes a regulated employee use or possess alcohol or use drugs in violation of this subpart. It is not sufficient for actual knowledge if the supervisory or management employee merely observes the signs and symptoms of alcohol or drug use that would require a reasonable suspicion test under § 219.301;

(2) Receives information regarding a violation of this subpart from a previous employer of a regulated employee, in response to a background information request required by § 40.25 of this title; or

(3) Receives a regulated employee’s admission of prohibited alcohol possession or prohibited alcohol or drug use.

(b) A railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each regulated employee.

(c) A railroad’s alcohol and/or drug use education, prevention, identification, intervention, and rehabilitation programs and policies must be designed and implemented in such a way that they do not circumvent or otherwise undermine the requirements, standards, and policies of this part. Upon FRA’s request, a railroad must make available for FRA review all documents, data, or other records related to such programs and policies.

■ 16. Revise § 219.107 to read as follows:

§ 219.107 Consequences of unlawful refusal.

(a) A regulated employee who refuses to provide a breath or a body fluid specimen or specimens when required to by the railroad under a provision of this part must be withdrawn from regulated service for a period of nine (9) months. Per the requirements of part 40 of this title, a regulated employee who provides an adulterated or substituted specimen is deemed to have refused to provide the required specimen and must be withdrawn from regulated service in accordance with this section.

(b) *Notice.* Prior to or upon withdrawing a regulated employee from regulated service under this section, a

railroad must provide written notice to the employee of the reason for this action, and the procedures described in § 219.104(c) apply. A railroad may provide a regulated employee with an initial verbal notice so long as it provides a follow-up written notice as soon as possible.

(c) The withdrawal required by this section applies only to an employee’s performance of regulated service for any railroad with notice of such withdrawal. During the period of withdrawal, a railroad with notice of such withdrawal must not authorize or permit the employee to perform any regulated service for the railroad.

(d) The requirement of withdrawal for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the nine month period described in this section, a railroad may permit an employee to return to regulated service only under the conditions specified in § 219.104(d), and the regulated employee must be subject to return-to-duty and follow-up tests, as provided by that section.

Subpart C—Post-Accident Toxicological Testing

■ 17. In § 219.201, revise paragraphs (a) and (b) to read as follows:

§ 219.201 Events for which testing is required.

(a) *List of events.* Except as provided in paragraph (b) of this section, FRA post-accident toxicological tests must be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (5) of this section:

(1) *Major train accident.* Any train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) that involves one or more of the following:

(i) A fatality to any person;

(ii) A release of hazardous material lading from railroad equipment accompanied by—

(A) An evacuation; or

(B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of \$1,500,000 or more.

(2) *Impact accident.* Any impact accident (i.e., a rail equipment accident defined as an “impact accident” in § 219.5) that involves damage in excess of the current reporting threshold, resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of \$150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to an on-duty employee (as defined in § 219.5) who dies within 12 hours of the incident as a result of the operation of on-track equipment, regardless of whether that employee was performing regulated service.

(4) *Passenger train accident.* Any train accident (i.e., a rail equipment accident involving damage in excess of the current reporting threshold) involving a passenger train and a reportable injury to any person.

(5) *Human-factor highway-rail grade crossing accident/incident.* A highway-rail grade crossing accident/incident when it involves:

(i) A regulated employee who interfered with the normal functioning of a grade crossing signal system, in testing or otherwise, without first taking measures to provide for the safety of highway traffic that depends on the normal functioning of such system, as prohibited by § 234.209 of this chapter;

(ii) A train crewmember who was, or who should have been, flagging highway traffic to a stop as the result of an activation failure of the grade crossing system, as provided by § 234.105(c)(3) of this chapter;

(iii) A regulated employee who was performing, or should have been performing, the duties of an appropriately equipped flagger (as defined in § 234.5 of this chapter) as a result of an activation failure, partial activation, or false activation of the grade crossing signal system, as provided by § 234.105(c)(2), § 234.106, or § 234.107(c)(1)(i) of this chapter;

(iv) A fatality to any regulated employee performing duties for the railroad, regardless of fault; or

(v) A regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have played a role in the cause or severity of the accident/incident.

(b) *Exceptions.* Except for a human-factor highway-rail grade crossing accident/incident described in paragraph (a)(5) of this section, no test may be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a highway/rail grade crossing. No test may be required for an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado, or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts

by the railroad representative responding to the scene.

* * * * *

■ 18. Revise § 219.203 to read as follows:

§ 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* Regulated employees subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part and Appendix C to this part.

(1) *General.* Except as otherwise provided for by this section, following each qualifying event described in § 219.201, all regulated employees directly involved in a qualifying event under this subpart must provide blood and urine specimens for toxicological testing by FRA. This includes any regulated employee who may not have been present or on-duty at the time or location of the event, but whose actions may have played a role in its cause or severity, including, but not limited to, an operator, dispatcher, or signal maintainer.

(2) *Fatalities.* Testing of the remains of an on-duty employee (as defined in § 219.5) who is fatally injured in a qualifying event described in § 219.201 is required, regardless of fault, if the employee dies within 12 hours of the qualifying event as a result of such qualifying event.

(3) *Major train accidents.* (i) For an accident or incident meeting the criteria of a Major Train Accident in § 219.201(a)(1), all assigned crew members of all trains or other on-track equipment involved in the qualifying event must be subjected to post-accident toxicological testing, regardless of fault.

(ii) Other surviving regulated employees who are not assigned crew members of an involved train or other on-track equipment (e.g., a dispatcher or a signal maintainer) must be tested if a railroad representative can immediately determine, on the basis of specific information, that the employee may have had a role in the cause or severity of the accident/incident. In making this determination, the railroad representative must consider any such information that is immediately available at the time the qualifying event determination is made under § 219.201.

(4) *Fatal train incidents.* For a Fatal Train Incident under § 219.201(a)(3), the remains of any on-duty employee (as defined in § 219.5) performing duties for a railroad who is fatally injured in the event are always subject to post-accident toxicological testing, regardless of fault.

(5) *Human-factor highway-rail grade crossing accident/incidents.* (i) For a Human-Factor Highway-Rail Grade Crossing Accident/Incident under § 219.201(a)(5)(i), only a regulated employee who interfered with the normal functioning of a grade crossing signal system and whose actions may have contributed to the cause or severity of the event is subject to testing.

(ii) For a Human-Factor Highway-Rail Grade Crossing Accident/Incident under § 219.201(a)(5)(ii), only a regulated employee who was a train crew member responsible for flagging highway traffic to a stop as the result of an activation failure of a grade crossing system (or who was on-site and directly responsible for ensuring that flagging was being performed), but who failed to do so, and whose actions may have contributed to the cause or severity of the event, is subject to testing.

(iii) For a Human-Factor Highway-Rail Grade Crossing Accident/Incident under § 219.201(a)(5)(iii), only a regulated employee who was responsible for performing the duties of an appropriately equipped flagger (as defined in § 234.5 of this chapter), but who failed to do so, and whose actions may have contributed to the cause or severity of the event is subject to testing.

(iv) For a Human-Factor Highway-Rail Grade Crossing Accident/Incident under § 219.201(a)(5)(iv), only the remains of any fatally-injured employee(s) (as defined in § 219.5) performing regulated service for the railroad are subject to testing.

(v) For a Human-Factor Highway-Rail Grade Crossing Accident/Incident under § 219.201(a)(5)(v), only a regulated employee who violated an FRA regulation or railroad operating rule and whose actions may have contributed to the cause or severity of the event is subject to testing.

(6) *Exception.* For a qualifying Impact Accident, Passenger Train Accident, Fatal Train Incident, or Human-Factor Highway-Rail Grade Crossing Accident/Incident under § 219.201(a)(2) through (5), a surviving crewmember or other regulated employee must be excluded from testing if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause or severity of the accident/incident. In making this determination, the railroad representative must consider any information that is immediately available at the time the qualifying event determination is made under § 219.201.

(i) This exception is not available for assigned crew members of all involved

trains if the qualifying event also meets the criteria for a Major Train Accident under § 219.201(a)(1) (e.g., this exception is not available for an Impact Accident that also qualifies as a Major Train Accident because it results in damage to railroad property of \$1,500,000 or more).

(ii) This exception is not available for any on-duty employee who is fatally-injured in a qualifying event.

(b) *Railroad responsibility.* (1) A railroad must take all practicable steps to ensure that all surviving regulated employees of the railroad are subject to FRA post-accident toxicological testing under this subpart provide blood and urine specimens for the toxicological testing required by FRA. This includes any regulated employee who may not have been present or on-duty at the time or location of the event, but whose actions may have played a role in its cause or severity, including, but not limited to, an operator, dispatcher, or signal maintainer.

(2) A railroad must take all practicable steps to ensure that tissue and fluid specimens taken from fatally injured employees are subject to FRA post-accident toxicological testing under this subpart.

(3) FRA post-accident toxicological testing under this subpart takes priority over toxicological testing conducted by state or local law enforcement officials.

(c) *Alcohol testing.* Except as provided for in paragraph (e)(4) of this section, if the conditions for mandatory post-accident toxicological testing exist, a railroad may also require employees to provide breath for testing in accordance with the procedures set forth in part 40 of this title and in this part, if such testing does not interfere with timely collection of required urine and blood specimens.

(d) *Timely specimen collection.* (1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either verbally or via a voicemail). The railroad must also submit a concise, written narrative report of the reasons for such a delay to the FRA Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC 20590. The report must be submitted within 30

days after the expiration of the month during which the accident or incident occurred. This report may also be submitted via email to an email address provided by the FRA Drug and Alcohol Program Manager.

(2) The requirements of paragraph (d) of this paragraph must not be construed to inhibit employees required to be post-accident toxicological tested from performing, in the immediate aftermath of an accident or incident, any duties that may be necessary for the preservation of life or property. Where practical, however, a railroad must utilize other employees to perform such duties.

(3) If a passenger train is in proper condition to continue to the next station or its destination after an accident or incident, the railroad must consider the safety and convenience of passengers in determining whether the crew should be made immediately available for post-accident toxicological testing. A relief crew must be called to relieve the train crew as soon as possible.

(4) Regulated employees who may be subject to post-accident toxicological testing under this subpart must be retained in duty status for the period necessary to make the determinations required by § 219.201 and this section and (as appropriate) to complete specimen collection.

(e) *Recall of employees for testing.* (1) Except as otherwise provided for in paragraph (e)(2) of this section, a regulated employee may not be recalled for testing under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Furthermore, nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (e.g., an employee who is absent without leave). However, subsequent testing does not excuse a refusal by the employee to provide the specimens in a timely manner.

(2) A railroad must immediately recall and place on duty a regulated employee for post-accident drug testing, if—

(i) The employee could not be retained in duty status because the employee went off duty under normal railroad procedures prior to being contacted by a railroad supervisor and instructed to remain on duty pending completion of the required determinations (e.g., in the case of a dispatcher or signal maintainer remote from the scene of an accident who was unaware of the occurrence at the time he or she went off duty); and

(ii) The railroad's preliminary investigation (contemporaneous with the determination required by § 219.201) indicates a clear probability that the employee played a role in the cause or severity of the accident/incident.

(3) If the criteria in paragraphs (e)(2)(i) and (ii) of this section are met, a regulated employee must be recalled for post-accident drug testing regardless of whether the qualifying event happened or did not happen during the employee's tour of duty. However, an employee may not be recalled for testing if more than 24 hours have passed since the qualifying event. An employee who has been recalled must be placed on duty for the purpose of accomplishing the required post-accident drug testing.

(4) Urine and blood specimens must be collected from an employee who is recalled for testing in accordance with this section. If the employee left railroad property prior to being recalled, however, the specimens must be tested for drugs only. A railroad is prohibited from requiring a recalled employee to provide breath specimens for alcohol testing, unless the regulated employee has remained on railroad property since the time of the qualifying event and the railroad has a company policy completely prohibiting the use of alcohol on railroad property.

(5) A railroad must document its attempts to contact an employee subject to the recall provisions of this section. If a railroad is unable, as a result of the non-cooperation of an employee or for any other reason, to obtain a specimen(s) from an employee subject to mandatory recall within the 24 hour period after a qualifying event and to submit specimen(s) to FRA as required by this subpart, the railroad must contact FRA and prepare a concise narrative report according to the requirements of paragraph (d)(1) of this section. The report must also document the railroad's good faith attempts to contact and recall the employee.

(f) *Place of specimen collection.* (1) With the exception of Federal breath testing for alcohol (when conducted as authorized under this subpart), employees must be transported to an independent medical facility for specimen collection. In all cases blood may be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional (e.g., a phlebotomist). A collector contracted by a railroad or medical facility may collect and/or assist in the collection of specimens at the medical facility if the medical facility does not object and the collector is qualified to do so.

(2) If an employee has been injured, a railroad must request the treating medical facility to obtain the specimens. Urine may be collected from an injured employee (conscious or unconscious) who has already been catheterized for medical purposes, but an employee may not be catheterized solely for the purpose of providing a specimen under this subpart. Under § 219.11(a), an employee is deemed to have consented to FRA post-accident toxicological testing by the act of being a regulated employee subject to performing regulated service for a railroad.

(g) *Obtaining cooperation of facility.*

(1) In seeking the cooperation of a medical facility in obtaining a specimen under this subpart, a railroad must, as necessary, make specific reference to the requirements of this subpart and the instructions in FRA's post-accident toxicological shipping kit.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood and/or urine specimens after having been informed of the requirements of this subpart, the railroad must immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802, stating the employee's name, the name and location of the medical facility, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required specimens.

(h) *Discretion of physician.* Nothing in this subpart may be construed to limit the discretion of a medical professional to determine whether drawing a blood specimen is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

■ 29. Revise § 219.205 to read as follows:

§ 219.205 Specimen collection and handling.

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart, the instructions provided inside the FRA post-accident toxicological shipping kit, and the technical specifications set forth in Appendix C to this part.

(b) *Information requirements.* In order to process specimens, analyze the significance of laboratory findings, and notify the railroads and employees of test results, it is necessary to obtain

basic information concerning the accident/incident and any treatment administered after the accident/incident. Accordingly, the railroad representative must complete the information required by Form FRA 6180.73 (revised) for shipping with the specimens. Each employee subject to testing must cooperate in completion of the required information on Form FRA F 6180.74 (revised) for inclusion in the shipping kit and processing of the specimens. The railroad representative must request an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. One Form 6180.73 must be forwarded in the shipping kit with each group of specimens. One Form 6180.74 must be forwarded in the shipping kit for each employee who provides specimens. Form 6180.73 and either Form 6180.74 or Form 6180.75 (for fatalities) are included in the shipping kit. (See paragraph (c) of this section.)

(c) *Shipping kits.* (1) FRA and the laboratory designated in Appendix B to this part make available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be placed in the shipping kit and prepared for shipment according to the instructions provided in the kit and Appendix C to this part.

(2) Standard shipping kits may be ordered directly from the laboratory designated in Appendix B to this part by first requesting an order form from FRA's Drug and Alcohol Program Manager at 202-493-6313. In addition to the standard kit for surviving employees, FRA also has a post-mortem shipping kit that has been distributed to Class I, II, and commuter railroads. The post-mortem kit may not be ordered by other railroads. If a smaller railroad has a qualifying event involving a fatality to an on-duty employee, the railroad should advise the NRC at 1-800-424-8802 of the need for a post-mortem kit, and FRA will send one overnight to the medical examiner's office or assist the railroad in obtaining one from a nearby railroad.

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to the laboratory designated in Appendix B to this part. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may

specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must request the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document secure chain of custody of the kit(s) from release by the medical facility to delivery for transportation, as described in Appendix C to this part.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than the laboratory designated in Appendix B to this part may open it. If the railroad or medical facility discovers an error with either the specimens or the chain of custody form after the kit or transportation box has been sealed, the railroad or medical facility must make a contemporaneous written record of that error and send it to the laboratory, preferably with the transportation box.

§ 219.207 [Amended]

■ 20. Section 219.207 is amended by—

■ a. In paragraph (a), removing the word “and/or” and adding, in its place, the word “and”; removing the words “timely collected” and adding, in their place, “collected in a timely fashion”; removing the word “shipping” and adding, in its place, “post-mortem shipping”; and removing the words “if a person” and adding, in their place, “if the custodian is someone”;

■ b. In paragraph (b) introductory text, removing “(800) 424-8801 or”;

■ c. In paragraph (c), removing the word “and/or” and adding, in its place, the word “and”; and

■ d. In paragraph (d), removing the word “specifies” and adding, in its place, the words “and the instructions included inside the shipping kits specify”.

■ 21. In § 219.209, revise paragraphs (a)(2)(iv) and (v) and (b) and remove paragraph (c).

The revisions read as follows:

§ 219.209 Reports of tests and refusals.

(a) * * *

(2) * * *

(iv) Brief summary of the circumstances of the accident/incident, including basis for testing (e.g., Impact Accident with a reportable injury); and

(v) Number of employees tested.

(b) If a railroad is unable, as a result of non-cooperation of an employee or

for any other reason, to obtain a specimen and provide it to FRA as required by this subpart, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either verbally or via a voicemail). The railroad must also provide a concise narrative written report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report must be appended to the report of the accident/incident required to be submitted under part 225 of this chapter and must also be mailed to the FRA Drug and Alcohol Program Manager at 1200 New Jersey Avenue SE., Washington, DC 20590.

■ 22. Section 219.211 is amended by—

■ a. Adding a sentence at the end of paragraph (b);

■ b. Revising the second sentence of paragraph (c) and the second sentence of paragraph (e); and

■ c. Revising paragraph (g)(3).

The revisions and addition read as follows:

§ 219.211 Analysis and follow-up.

* * * * *

(b) * * * An employer is prohibited from temporarily removing an employee from the performance of regulated service based only on a report from the laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

(c) * * * The Medical Review Officer must promptly report the results of each review to the Associate Administrator for Railroad Safety, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590. * * *

(e) * * * An employee wishing to respond may do so by email or letter addressed to the Drug and Alcohol Program Manager, Office of Railroad Safety, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590 within 45 days of receipt of the test results. * * *

* * * * *

(g) * * *

(3) This provision does not authorize holding any employee out of service pending receipt of PAT testing results. It also does not restrict a railroad from taking such action based on the employee's underlying conduct, so long as it is consistent with the railroad's disciplinary policy and any such action is done under the railroad's own company authority.

* * * * *

§ 219.213 [Amended]

- 23. In § 219.213, paragraphs (a) and (b), revise all references to “covered service” to read “regulated service,” and in paragraph (b), adding the word “written” in front of the word “notice”.
- 24. Revise subpart D to read as follows:

Subpart D—Reasonable Suspicion Testing

Sec.

- 219.301 Mandatory reasonable suspicion testing.
- 219.303 Reasonable suspicion observations.
- 219.305 Prompt specimen collection; time limitation.

Subpart D—Reasonable Suspicion Testing**§ 219.301 Mandatory reasonable suspicion testing.**

(a) A railroad must require a regulated employee to submit to a breath alcohol test when the railroad has reasonable suspicion to believe that the regulated employee has violated any prohibition of subpart B of this part concerning use of alcohol. The railroad’s determination that reasonable suspicion exists to require the regulated employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. A Federal reasonable suspicion alcohol test is not required to confirm the on-duty possession of alcohol.

(b) A railroad must require a regulated employee to submit to a drug test when the railroad has reasonable suspicion to believe that the regulated employee has violated the prohibitions of subpart B of this part concerning use of controlled substances. The railroad’s determination that reasonable suspicion exists to require the regulated employee to undergo a drug test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.

(c) Reasonable suspicion observations made under this section must comply with the requirements of § 219.303.

(d) As provided by § 219.11(b)(2), in any case where an employee is suffering a substantiated medical emergency and is subject to alcohol or drug testing under this subpart, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimens. However, when the employee’s condition is stabilized, reasonable suspicion testing must be completed if within the eight-hour limit provided for in § 219.305.

§ 219.303 Reasonable suspicion observations.

(a) With respect to an alcohol test, the required observations must be made by a responsible railroad supervisor (defined by § 219.5) trained in accordance with § 219.11(g). The supervisor who makes the determination that reasonable suspicion exists may not conduct the reasonable suspicion testing on that regulated employee.

(b) With respect to a drug test, the required observations must be made by two responsible railroad supervisors (defined by § 219.5), at least one of whom must be is both on site and trained in accordance with § 219.11(g). If one of the supervisors is off-site, the on-site supervisor must communicate with the off-site supervisor, as necessary, to provide him or her the information needed to make the required observation. This communication may be performed via telephone, but not via radio or any other form of electronic communication.

(c) This subpart does not authorize holding any employee out of service pending receipt of toxicological analysis for reasonable suspicion testing, nor does it restrict a railroad from taking such action based on the employee’s underlying conduct, so long as it is consistent with the railroad’s policy and any such action is done under the railroad’s own company authority.

(d) The railroad must maintain written documentation that specifically describes the observed signs and symptoms upon which determination that reasonable suspicion exists is based. This documentation must be completed promptly by the trained supervisor.

§ 219.305 Prompt specimen collection; time limitations.

(a) Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.

(b) If a test required by this subpart is not administered within two hours following a determination made under this section, the railroad must prepare and maintain on file a record stating the reasons the test was not administered within that time period. If an alcohol or drug test required by this subpart is not administered within eight hours of the determination made under this subpart, the railroad must cease attempts to administer the test and must record the reasons for not administering the test. The eight-hour requirement is satisfied if the individual has been delivered to the collection site (where the collector

is present) and the request has been made to commence collection of the specimens within that period. The records required by this section must be submitted to FRA upon request of the FRA Drug and Alcohol Program Manager.

(c) A regulated employee may not be tested under this subpart if that individual has been released from duty under the normal procedures of a railroad. An individual who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave).

- 25. Revise subpart E to read as follows:

Subpart E—Reasonable Cause Testing

Sec.

- 219.401 Authorization for reasonable cause testing.
- 219.403 Requirements for reasonable cause testing.
- 219.405 Documentation requirements.
- 219.407 Prompt specimen collection; time limitations.
- 219.409 Limitations on authority.

Subpart E—Reasonable Cause Testing**§ 219.401 Authorization for reasonable cause testing.**

(a) A railroad may, at its own discretion, elect to conduct Federal reasonable cause testing authorized by this subpart. If a railroad chooses to do so, the railroad must use only Federal authority for all reasonable cause testing that meets the criteria of § 219.403. In addition, the railroad must notify its regulated employees of its decision to use Federal reasonable cause testing authority in the employee educational policy required by § 219.23(e)(5). The railroad must also provide written notification of its decision to FRA’s Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC, 20590.

(b) If a railroad elects to conduct reasonable cause testing under the authority of this subpart, the railroad may, under the conditions specified in this subpart, require any regulated employee, as a condition of employment in regulated service, to cooperate with breath or body fluid testing, or both, to determine compliance with §§ 219.101 and 219.102 or a railroad rule implementing the requirements of §§ 219.101 and 219.102. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of

this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section. A railroad may not require an employee to be tested under the authority of this subpart unless reasonable cause, as defined in this section, exists with respect to that employee.

§ 219.403 Requirements for reasonable cause testing.

A railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of § 219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart.

(a) *Train accident or train incident.* The regulated employee has been involved in a train accident or train incident (as defined in § 219.5) reportable under part 225 of this chapter, and a responsible railroad supervisor (as defined in § 219.5) has a reasonable belief, based on specific, articulable facts, that the individual employee's acts or omissions contributed to the occurrence or severity of the accident; or

(b) *Rule violation.* The regulated employee has been directly involved in one or more of the following railroad or FRA rule violations or other errors:

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization; or

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(2) Failure to protect on-track equipment, including leaving on-track equipment fouling an adjacent track;

(3) Operation of a train or other speedometer-equipped on-track equipment at a speed that exceeds the maximum authorized speed by at least 10 miles per hour or by 50% of such maximum authorized speed, whichever is less;

(4) Alignment of a switch in violation of a railroad rule, failure to align a switch as required for movement,

operation of a switch under on-track equipment, or unauthorized running through a switch;

(5) Failure to restore and secure a main track switch as required;

(6) Failure to apply brakes or stop short of a derail as required;

(7) Failure to secure a hand brake or failure to secure sufficient hand brakes, as required;

(8) Entering a crossover before both switches are lined for movement or restoring either switch to normal position before the crossover movement is completed;

(9) Failure to provide point protection by visually determining that the track is clear and giving the signals or instructions necessary to control the movement of on-track equipment when engaged in a shoving or pushing movement;

(10) In the case of a person performing a dispatching function or block operator function, issuance of a mandatory directive or establishment of a route that fails to provide proper protection for on-track equipment;

(11) Interference with the normal functioning of any grade crossing signal system or any signal or train control device without first taking measures to provide for the safety of highway traffic or train operations which depend on the normal functioning of such a device. Such interference includes, but is not limited to, failure to provide alternative methods of maintaining safety for highway traffic or train operations while testing or performing work on the devices or on track and other railroad systems or structures which may affect the integrity of the system;

(12) Failure to perform stop-and-flag duties necessary as a result of a malfunction of a grade crossing signal system;

(13) Failure of a machine operator that results in a collision between a roadway maintenance machine and on-track equipment or a regulated employee;

(14) Failure of a roadway worker-in-charge to notify all affected employees when releasing working limits;

(15) Failure of a flagman or watchman/lookout to notify employees of an approaching train or other on-track equipment;

(16) Failure to ascertain that provision was made for on-track safety before fouling a track;

(17) Improper use of individual train detection (ITD) in a manual interlocking or control point; or

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a

reportable injury to a regulated employee.

§ 219.405 Documentation requirements.

(a) A railroad must maintain written documentation that specifically describes the basis for each reasonable cause test it performs under Federal authority. This documentation must be completed promptly by the responsible railroad supervisor; although it does not need to be completed before reasonable cause testing is conducted.

(b) For a rule violation, the documentation must include the type of rule violation and the involvement of each tested regulated employee. For a train accident or train incident reportable under part 225 of this chapter, it must describe either the amount of railroad property damage or the reportable casualty and the basis for the supervisor's belief that the employee's acts or omissions contributed to the occurrence or severity of the train accident or train incident.

§ 219.407 Prompt specimen collection; time limitations.

(a) Consistent with the need to protect life and property, testing under this subpart must be conducted promptly following the observations upon which the testing decision is based.

(b) If a test conducted pursuant to the authority of this subpart is not administered within two hours following the observations upon which the testing decision is based, the railroad must prepare and maintain on file a record stating the reasons the test was not conducted within that time period. If an alcohol or drug test authorized by this subpart is not administered within eight hours of the event under this subpart, the railroad must cease attempts to administer the test and must record the reasons for not administering the test. The eight-hour time period begins at the time a responsible railroad supervisor receives notice of the train accident, train incident, or rule violation. The eight-hour requirement is satisfied if the individual has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of specimen(s) within that period. The records required by this section must be submitted to FRA upon request of the FRA Drug and Alcohol Program Manager.

(c) A regulated employee may not be tested under this subpart if that individual has been released from duty under the normal procedures of the railroad. An individual who has been transported to receive medical care is not released from duty for purposes of

this section. Nothing in this section prohibits the subsequent testing of a regulated employee who has failed to remain available for testing as required (i.e., who is absent without leave).

§ 219.409 Limitations on authority.

(a) The alcohol and/or drug testing authority conferred by this subpart does not apply with respect to any event that meets the criteria for post-accident toxicological testing required under subpart C of this part.

(b) This subpart does not authorize holding an employee out of service pending receipt of toxicological analysis for reasonable cause testing because meeting the testing criteria is only a basis to inquire whether alcohol or drugs may have played a role in the accident or rule violation.

Notwithstanding this paragraph (b), this subpart does not restrict a railroad from holding an employee out of service based on the employee's underlying conduct, so long as it is consistent with the railroad's policy and any such action is done under the railroad's own company authority, not Federal authority.

(c) When determining whether reasonable cause testing is justified, a railroad must consider the involvement of each crewmember in the qualifying event, not the involvement of the crew as a whole.

Subpart F—Pre-Employment Tests

■ 26. Revise § 219.501 to read as follows:

§ 219.501 Pre-employment drug testing.

(a) Prior to the first time an individual performs regulated service for a railroad, the railroad must ensure that the employee undergoes testing for drugs in accordance with the regulations of a DOT agency. No railroad may allow a direct employee (a railroad employee who is not employed by a contractor to the railroad) to perform regulated service, unless that railroad has conducted a DOT pre-employment test for drugs on that individual with a result that did not indicate the misuse of any controlled substance. This requirement applies both to a final applicant for direct employment and to a direct employee seeking to transfer for the first time from non-regulated service to duties involving regulated service. A regulated employee must have a negative DOT pre-employment drug test for each railroad for which he or she performs regulated service as the result of a direct employment relationship.

(b) A railroad must ensure that each employee of a contractor who performs regulated service on the railroad's behalf

has a negative DOT pre-employment drug test on file with his or her employer. The railroad must also maintain documentation indicating that it had verified that the contractor employee had a negative DOT pre-employment drug test on file with his or her direct employer. A contractor employee who performs regulated service for more than one railroad does not need to have a DOT pre-employment drug test for each railroad for which he or she provides service.

(c) If a railroad has already conducted a DOT pre-employment test resulting in a negative for a regulated service applicant under the rules and regulations of another DOT agency (such as the Federal Motor Carrier Safety Administration), FRA will accept the result of that negative DOT pre-employment test for purposes of the requirements of this subpart.

(d) As used in subpart H of this part with respect to a test required under this subpart, the term regulated employee includes an applicant for pre-employment testing only. If an applicant declines to be tested and withdraws an application for employment before the pre-employment testing process commences, no record may be maintained of the declination. The determination of when a drug test commences must be made according to the provisions found in subpart E of part 40 of this title.

(e) The pre-employment drug testing requirements of this section do not apply to covered employees of railroads qualifying for the small railroad exception (see § 219.3(c)) or maintenance-of-way employees who were performing duties for a railroad prior to [EFFECTIVE DATE OF FINAL RULE]. However, a grandfathered employee must have a negative pre-employment drug test before performing regulated service for a new employing railroad after [EFFECTIVE DATE OF FINAL RULE].

■ 27. In § 219.502, revise paragraphs (a) introductory text, (a)(1), (a)(2), (a)(5), and (b) to read as follows:

§ 219.502 Pre-employment alcohol testing.

(a) A railroad may, but is not required to, conduct pre-employment alcohol testing under this part. If a railroad chooses to conduct pre-employment alcohol testing, the railroad must comply with the following requirements:

(1) The railroad must conduct a pre-employment alcohol test before the first performance of regulated service by every regulated employee, regardless of whether he or she is a new employee or a first-time transfer to a position

involving the performance of regulated service.

(2) The railroad must treat all regulated employees performing regulated service the same for the purpose of pre-employment alcohol testing (i.e., a railroad must not test some regulated employees and not others.)

* * * * *

(5) If a regulated employee's Federal pre-employment test indicates an alcohol concentration of 0.04 or greater, a railroad may not allow him or her to begin performing regulated service until he or she has completed the Federal return-to-duty process under § 219.104(d).

(b) As used in subpart H of this part with respect to a test authorized under this subpart, the term regulated employee includes an applicant for pre-employment testing only. If an applicant declines to be tested and withdraws his or her application for employment before the testing process commences, no record may be maintained of the declination. The determination of when an alcohol test commences must be made according to the provisions of § 40.243(a) of this title.

■ 28. Revise § 219.503 to read as follows:

§ 219.503 Notification; records.

The railroad must provide for medical review of drug test results according to the requirements of part 40 of this title, as provided in subpart H of this part. The railroad must also notify the applicant in writing of the results of any Federal drug and/or alcohol test that is a positive, adulteration, substitution, or refusal in the same manner as provided for employees in part 40 of this title and subpart H of this part. Records must be maintained confidentially and be retained in the same manner as required under subpart J of this part for employee test records, except that such records need not reflect the identity of an applicant who withdrew an application to perform regulated service prior to the commencement of the testing process.

■ 29. Revise § 219.505 to read as follows:

§ 219.505 Non-negative tests and refusals.

An applicant who has tested positive or refused to submit to pre-employment testing under this section may not perform regulated service for any railroad until he or she has completed the Federal return-to-duty process under § 219.104(d). Such applicants may also not perform DOT safety-sensitive functions for any other employer regulated by a DOT agency until they have completed the Federal return-to-

duty process under § 219.104(d). This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

■ 30. Revise subpart G to read as follows:

Subpart G—Random Alcohol and Drug Testing Programs

Sec.

- 219.601 Purpose and scope of random testing programs.
- 219.603 General requirements for random testing programs.
- 219.605 Submission and approval of random testing plans.
- 219.607 Requirements for random testing plans.
- 219.609 Inclusion of contractor employees and volunteers in random testing plans.
- 219.611 Random drug and alcohol testing pools.
- 219.613 Random testing selections.
- 219.615 Random testing collections.
- 219.617 Participation in random drug and alcohol testing.
- 219.619 Positive drug and alcohol test results and refusals; procedures.
- 219.621 Use of service agents.
- 219.623 Records.
- 219.625 FRA Administrator's determination of random drug and alcohol testing rates.

Subpart G—Random Alcohol and Drug Testing Programs

§ 219.601 Purpose and scope of random testing programs.

(a) *Purpose.* The purpose of random alcohol and drug testing is to promote safety by deterring the misuse of drugs and the abuse of alcohol by regulated employees.

(b) *Regulated employees.* A railroad must ensure that its regulated employees are subject to being selected for random testing as required by this subpart whenever they perform regulated service on the railroad's behalf.

(c) *Contractor employees and volunteers.* A regulated service employee who is a volunteer or an employee of a contractor to a railroad may be incorporated into the random testing program of more than one railroad if:

(i) The contractor employee or volunteer is not part of a random testing program that meets the requirements of this subpart and that is acceptable to the railroad for whom he or she performs regulated service (as described by § 219.609); or

(ii) The railroad for which the contractor employee or volunteer performs regulated service is unable to

verify that the individual is part of a random testing program acceptable to the railroad that meets the requirements of this subpart.

(d) *Multiple DOT agencies.* (1) If a regulated employee performs functions subject to the random testing requirements of more than one DOT agency, a railroad must ensure that the employee is subject to selection for random drug and alcohol testing at or above the current minimum annual testing rate set by the DOT agency that regulates more than 50 percent of the employee's DOT-regulated functions.

(2) A railroad may not include a regulated employee in more than one DOT random testing pool for regulated service performed on its behalf, even if the regulated employee is subject to the random testing requirements of more than one DOT agency.

§ 219.603 General requirements for random testing programs.

(a) *General.* To the extent possible, a railroad must ensure that its FRA random testing program is designed and implemented so that every regulated employee performing regulated service on its behalf should reasonably anticipate that he or she may be called for a random test without advance warning at any time while on-duty and subject to performing regulated service.

(b) *Prohibited selection bias.* A random testing program may not have a selection bias or an appearance of selection bias, or appear to provide an opportunity for a regulated employee to avoid complying with this section.

(c) *Plans.* As required by §§ 219.603–219.609, each railroad must submit for FRA approval a random testing plan meeting the requirements of this subpart. The plan must address all regulated employees, as defined in § 219.5.

(d) *Pools.* A railroad must construct and maintain random testing pools in accordance with § 219.611.

(e) *Selections.* A railroad must conduct random testing selections in accordance with § 219.613.

(f) *Collections.* A railroad must perform random testing collections in accordance with § 219.615.

(g) *Cooperation.* A railroad and its regulated employees must cooperate with and participate in random testing in accordance with § 219.617.

(h) *Responsive action.* A railroad must handle positive random tests and verified refusals to test in accordance with § 219.619.

(i) *Service agents.* A railroad may use a service agent to perform its random testing responsibilities in accordance with § 219.621.

(j) *Records.* A railroad must maintain records required by this subpart in accordance with § 219.623.

§ 219.605 Submission and approval of random testing plans.

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of § 219.607 and § 219.609 to the FRA Drug and Alcohol Program Manager, 1200 New Jersey Ave. SE., Washington, DC 20590. A railroad commencing start-up operations must submit its plan no later than 30 days prior to its date of commencing operations. A railroad that must comply with subpart G because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes subject to the requirements of this subpart. A railroad may not implement a Federal random testing plan or any substantive amendment to that plan prior to FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

(b) *Plan approval notification.* FRA will notify a railroad in writing whether its plan is approved. If the plan is not approved because it does not meet the requirements of this subpart, FRA will inform the railroad of its non-approval, with specific explanation as to necessary revisions. The railroad must resubmit its plan with the required revisions within 30 days of the date of FRA's written notice. Failure to resubmit the plan with the necessary revisions will be considered a failure to submit a plan under this part.

(c) *Plan implementation.* A railroad must implement its random testing plan no later than 30 days from the date of approval by FRA.

(d) *Plan amendments.* (1) A substantive amendment to an approved plan must be submitted to FRA at least 30 days prior to its intended effective date. A railroad may not implement any substantive amendment prior to FRA approval.

(2) Non-substantive amendments to an approved plan (such as replacing or adding service providers) must be provided to the FRA Drug and Alcohol Program Manager in writing (by letter or email) before their effective date, but do not require pre-approval by FRA.

(e) *Existing approved plans.* A railroad random testing plan approved before [EFFECTIVE DATE OF FINAL RULE] does not have to be resubmitted unless it has to be amended to comply with the requirements of this subpart. New plans, combined plans, or amended plans incorporating new categories of regulated employees (i.e. maintenance-of-way employees) must be submitted for FRA approval by a railroad at least 30 days before [EFFECTIVE DATE OF FINAL RULE].

§ 219.607 Requirements for random testing plans.

(a) *General.* A random testing plan submitted by a railroad under this subpart must address and comply with the requirements of this subpart. The railroad must also comply with these requirements in implementing the plan.

(b) *Model random testing plan.* A railroad (or a contractor or service agent requested to submit a part 219-compliant random testing plan to a railroad for submission as a part of the railroad's random testing plan) may complete, modify if necessary, and submit a plan based on the FRA model random testing plan that can be downloaded from FRA's Drug and Alcohol Program Web site.

(c) *Specific plan requirements.* Random testing plans must contain the following items of information, each of which must be contained in a separate, clearly identified section:

- (1) Total number of covered employees, including covered service contractor employees and volunteers;
- (2) Total number of maintenance-of-way employees, including maintenance-of-way contractor employees and volunteers;
- (3) Names of any contractors who perform regulated service for the railroad, with contact information;
- (4) Method used to ensure that any regulated service contractor employees and volunteers are subject to the requirements of this subpart, as required by § 219.609;
- (5) Name, address, and contact information for the railroad's Designated Employer Representative (DER) and any back-ups (if applicable);
- (6) Name, address, and contact information for any service providers, including the railroad's Medical Review Officer (MRO), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Substance Abuse Professional(s) (SAPs), and C/TPA or collection site management companies. Individual collection sites do not have to be identified;

(7) Number of random testing pools and the proposed general pool entry assignments for each pool. If using a C/TPA, a railroad must identify whether its regulated employees are combined into one pool, contained in separate pools, or combined in a larger pool with other FRA and/or other DOT agency regulated employees.

(8) Target random testing rates;

(9) Method used to make random selections, including a detailed description of the computer program or random number table selection process employed;

(10) Selection unit(s) for each random pool (e.g., employee name or ID number, job assignment, train symbol) and whether the individual selection unit(s) will be selected for drugs, alcohol, or both;

(11) If a railroad makes alternate selections, under what limited circumstances these alternate selections will be tested (see § 219.613);

(12) Frequency of random selections (e.g., monthly);

(13) Designated testing window. The designated testing window extends from the beginning to the end of the designated testing period established in the railroad's FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active (valid); and

(14) Description of how the railroad will notify a regulated employee that he or she has been selected for random testing.

§ 219.609 Inclusion of contractor employees and volunteers in random testing plans.

(a) A railroad's random testing plan must demonstrate that all of its regulated service contractor employees and volunteers are subject to random testing that meets the requirements of this subpart. A railroad can demonstrate that its regulated service contractor employees and volunteers are in compliance with this subpart by either:

- (1) Directly including regulated service contractor employees and volunteers in its own random testing plan and ensuring that they are tested according to that plan; or
- (2) Indicating in its random testing plan that its regulated service contractor employees and volunteers are part of a random testing program, compliant with the requirements of this subpart, conducted by a contractor or a service agent, such as a C/TPA ("non-railroad random testing program"). If a railroad chooses this option, the railroad must append to its own random testing plan

one or more addenda describing the method it will use to ensure that the non-railroad random testing program is testing its regulated service contractor employees and volunteers according to the requirements of this subpart. A railroad could comply with this requirement by appending either the non-railroad random testing program or a detailed description of the program and how it complies with this subpart.

(b) A railroad's random testing plan(s) and any addenda must contain sufficient detail to fully document that the railroad is meeting the requirements of this subpart for all personnel performing regulated service on its behalf.

(c) If a railroad chooses to use regulated service contractor employees and volunteers who are part of a non-railroad random testing program, the railroad remains responsible for ensuring that the non-railroad program is testing the regulated service contractor employees and volunteers according to the requirements of this subpart.

(d) FRA does not pre-approve contractor or service agent random testing plans, but may accept them as part of its approval process of a railroad's plan.

§ 219.611 Random alcohol and drug testing pools.

(a) *General.* A railroad must ensure that its random testing pools include all regulated employees who perform regulated service on its behalf, except that a railroad's random testing pools do not have to include regulated employees who are part of a non-railroad random testing program that is compliant with the requirements of this subpart and that has been accepted by the railroad.

(b) *Pool entries.* A railroad must clearly indicate who will be tested when a specific pool entry is selected.

(1) Pool entries may be either employee names or identification numbers, train symbols, or specific job assignments, although all the entries in a single pool must be of generally consistent sizes and types.

(2) Pool entries may not be constructed in a manner that permits a field manager or field supervisor to have discretion over which employee would be tested when an entry is selected.

(3) Pool entries must be constructed and maintained so that all regulated employees have an equal chance of being selected for random testing for each selection draw.

(c) *Minimum number of pool entries.* A railroad (including a service agent used by a railroad to carry out its responsibilities under this subpart) may

not maintain a random testing pool with fewer than four pool entries. No placeholder pool entries (entries that do not represent legitimate selections of regulated employees) are permitted. A railroad or contractor with fewer than four regulated employees can comply with this requirement by having its regulated employees incorporated into either a railroad or a non-railroad random testing pool containing more than four entries.

(d) *Pool construction.*

(1) An individual who is not subject to the random testing requirements of FRA or another DOT agency may not be mixed in the same pool as regulated employees.

(2) A railroad may not include a regulated employee in more than one random testing pool established under the regulations of a DOT agency.

(3) A regulated employee can be placed in a random testing pool with other employees subject to the random testing requirements of FRA or another DOT agency. However, all entries in a pool must be subject to testing at the highest minimum random testing rate required by the regulations of a DOT agency for any single member of that pool.

(4) A regulated employee does not need to be placed in separate pools for random drug and random alcohol testing selection.

(5) A regulated employee must be incorporated into a random testing pool as soon as possible after his or her hire or first transfer into regulated service.

(e) *Frequency of regulated service.* (1) A railroad may not place a person in a random testing pool for any selection period in which he or she is not expected to perform regulated service.

(2) Railroad employees who perform covered service on average less than once a quarter are considered a de minimis safety concern for random testing purposes, and a railroad is not required to include them in a random testing program. A railroad may choose to randomly test such de minimis employees, but only if they are placed in a separate random testing pool and not in a random testing pool with employees who perform regulated service on a regular basis (e.g., engineers, conductors, dispatchers, and signal maintainers).

(3) A railroad must make a good faith effort when determining the frequency of an employee's performance of regulated service and must evaluate an employee's likelihood of performing regulated service in each upcoming selection period.

(f) *Pool maintenance.* Pool entries must be updated at least monthly,

regardless of how often selections are made, and a railroad must ensure that each random testing pool is complete and does not contain outdated or inappropriate entries.

(g) *Multiple random testing pools.* A railroad may maintain more than one random testing pool if it can demonstrate that its random testing program is not adversely impacted by the number and types of pools or the construction of pool entries, and that selections from each pool will meet the requirements of this subpart.

§ 219.613 Random testing selections.

(a) *General.* A railroad must ensure that each regulated employee has an equal chance of being selected for random testing whenever selections are performed. A railroad may not increase or decrease an employee's chance of being selected by weighting an entry or pool.

(b) *Method of selection.* (1) A railroad must use a selection method that is acceptable to FRA and that meets the requirements of this subpart. Acceptable selection methods are a computer selection program, a method that makes proper use of a random number table, or an alternative method included in a railroad's random testing plan and approved by FRA.

(2) A selection method must be free of bias or apparent bias and employ objective, neutral criteria to ensure that every regulated employee has an equal statistical chance of being selected within a specified time frame. The selection method may not utilize subjective factors that permit a railroad to manipulate or control selections in an effort to either target or protect any employee, job, or operational unit from testing.

(3) The randomness of a selection method must be verifiable, and, as required by § 219.623, any records necessary to document the randomness of a selection must be retained for not less than two years from the date the designated testing window for that selection expired.

(c) *Minimum random testing rate.* (1) Sufficient selections must be made to ensure that each random testing pool meets the minimum annual random testing rates established by the Administrator according to § 219.625 and that random tests are reasonably distributed throughout the calendar year.

(2) A railroad must continually monitor changes in its workforce to ensure that the required number of selections and tests are conducted each year.

(3) To establish the total number of regulated employees eligible for random testing throughout the year and the number of tests which need to be conducted, a railroad must separately identify the total number of regulated employees (as defined by § 219.5) eligible for random testing during each random testing period for the year for each employee category for which the Administrator has established a separate random rate requirement. The railroad must then divide the subtotal by the number of random testing periods and apply the Administrator's random rate determination against this result. A railroad does not need to perform this calculation more than once per month even if the railroad conducts random testing selections more often than once per month (e.g., selecting every two weeks).

(d) *Selection frequency.* At least one entry must be selected from each random testing pool every three months (i.e., once every quarter). FRA considers a quarter to be a three month period.

(e) *Discarded selection draws.* Once a selection draw has been made, it must be used to identify which individuals will be subject to random testing. A selection draw cannot be discarded without an acceptable explanation (e.g., the pool from which the selection draw was made was incomplete or inaccurate). Records for all discarded selection draws, including the specific reason the selection draw was not used, must be documented and retained according to the requirements of § 219.623.

(f) *Increasing random selections.* If a railroad is not able to complete a collection for all selections during the designated testing period, as provided by §§ 219.615(f) or 219.617(a)(3), the railroad may increase the number of selections for a subsequent selection period to ensure that it is meeting the annual minimum random testing rate for the calendar year.

(g) *Selection snapshots.* A railroad must capture and maintain an electronic or hard copy snapshot of each random testing pool at the time it makes a testing selection. The pool entries must not be re-created from records after the time of the original selection. The railroad must maintain this snapshot for a period of two years, as required by subpart J of this part.

(h) *Multiple DOT agencies.* In accordance with § 219.601(a), if a regulated employee performs functions subject to the random testing requirements of more than one DOT agency, the railroad must ensure that the employee is subject to selection for random testing at or above the current

minimum annual testing rate set by the DOT agency that regulates more than 50 percent of the employee's DOT-regulated functions.

§ 219.615 Random testing collections.

(a) *Minimum random testing rates.* A railroad must complete a sufficient number of random alcohol and drug testing collections from each of its random testing pools to meet the minimum annual testing rates established by the Administrator in § 219.625.

(b) *Designated testing window.* A railroad must complete the collection for a selected pool entry within the designated testing window approved by FRA for that selection. Once a designated testing window is closed, selections for that window which have not been collected are no longer active (valid) and may not be subject to random testing.

(c) *Collection timing.* (1) A regulated employee may be subject to random testing only while on duty and subject to performing regulated service.

(2) Random alcohol and drug testing collections must be unannounced and their dates spread reasonably throughout the calendar year. Collections must also be distributed unpredictably throughout the designated testing window and must reasonably cover all operating days of the week (including operating weekends and holidays), shifts, and locations.

(3) Random alcohol test collections must be performed unpredictably and in sufficient numbers at either end of an operating shift to attain an acceptable level of deterrence throughout the entire shift. At a minimum, a railroad must perform 10% of its random alcohol tests at the beginning of shifts and 10% of its random alcohol tests at the end of a shift.

(4) If a regulated employee has been selected for both random drug and alcohol testing, the railroad may conduct these tests separately, so long as both required collections can be completed by the end of the employee's shift and the railroad does not inform the employee that an additional collection will occur later.

(d) *Collection scheduling.* While pool entries must be selected randomly, the scheduling of a random test collection during the designated testing window is within the discretion of the railroad according to its approved plan.

(1) A railroad may schedule a collection based on the availability of the selected pool entry, the logistics of performing the collection, and any other requirements of this subpart.

(2) When a selected pool entry involves changing personnel (i.e., train crews or job functions), a railroad may not use its scheduling discretion to deliberately target or protect a particular employee or work crew. Unless otherwise approved in a random testing plan, railroad field supervisors or field management personnel may not use discretion to choose or to change collection dates or times if that choice could intentionally alter who is to be tested.

(e) *Notification requirements.* (1) A railroad may not notify a regulated employee that he or she has been selected for random testing until the duty tour in which the collection is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the scheduled collection time and place.

(2) Collections must be conducted as soon as possible and commence no later than two hours after notification (unless there is an acceptable reason for the delay). An employee should be monitored after notification of selection for random testing and, whenever possible, immediately escorted by supervisory or management personnel to the collection location.

(3) Each time a regulated employee is notified that he or she has been selected for random testing, the employee must be informed that the selection was made on a random basis. Completion of the Federal Drug Testing Custody and Control Form (CCF) or the DOT Alcohol Testing Form (ATF) indicating the basis of the test satisfies this requirement, so long as the employee has been shown and directed to sign the CCF or ATF as required by §§ 40.73 and 40.241 of this title.

(f) *Incomplete collections.* A railroad must use due diligence to ensure that a random testing collection is completed for each selected pool entry, unless it has an acceptable explanation for not conducting the collection. All reasons for incomplete collections must be fully documented and are subject to inspection by FRA upon request.

(g) *Hours-of-service limitations.* (1) Except as provided by paragraph (g)(2) of this section, if a random testing collection is not completed within a covered employee's hours-of-service limitations, a railroad must immediately terminate the collection and may not reschedule it.

(2) When something during a random collection triggers a mandatory direct observation collection under § 40.67 of this title, a directly observed collection must immediately proceed until completed. A railroad must submit an excess service report, as required by part

228 of this chapter, if completion of the directly observed collection causes the covered employee to exceed his or her hours-of-service limitations.

§ 219.617 Participation in random alcohol and drug testing.

(a) *Railroad responsibility.* (1) A railroad must, under the conditions specified in this subpart and subpart H of this part, require a regulated employee selected for random testing to cooperate in alcohol and/or drug testing.

(2) A railroad must ensure that an employee who is performing regulated service at the time of the notification of selection for random testing shall, as soon as possible without adversely affecting safety, cease to perform regulated service and proceed to the testing site. A railroad must also ensure that the absence of an employee from his or her assigned duties to report for testing does not adversely affect safety.

(3) Once an employee has been notified that he or she has been selected for random testing, only a substantiated medical emergency involving the employee or an immediate family member (e.g. birth, death, or medical emergency) may excuse the selected employee from completing the collection or test. A medical emergency is defined in this part as an acute medical condition requiring immediate emergency care. To be eligible for exclusion from random testing, the selected employee must provide verifiable documentation from a credible outside professional (e.g. doctor, dentist, hospital, law enforcement officer, or school authority) substantiating the emergency situation within a reasonable period of time. A selected employee who has been excused from testing may not later be tested by the railroad under the same selection.

(b) *Employee responsibility.* (1) A regulated employee subject to the random testing requirements of this subpart must cooperate with the selection and testing process, and must proceed to the testing site upon notification that he or she has been selected for random testing.

(2) A notified employee must fully cooperate and comply with the urine drug collection and/or breath alcohol testing procedure required by subpart H of this part, provide the required specimen(s), and must, upon request, complete the required paperwork and certifications.

§ 219.619 Positive alcohol and drug test results and refusals; procedures.

Section 219.104 contains the procedures for administrative handling

by the railroad or contractor in the event a urine specimen provided under this subpart is reported as a verified positive by the Medical Review Officer, a breath alcohol specimen is reported at 0.04 or greater by the Breath Alcohol Technician, or there has been a refusal to test. The responsive action required in § 219.104 is not stayed pending the result of the testing of a split urine specimen or a challenge to any part of the testing process or procedure.

§ 219.621 Use of service agents.

(a) A railroad may use a service agent (such as a consortium/third party administrator (C/TPA)) to act as its agent to carry out any role in random testing specifically permitted under subpart Q of part 40 of this title, such as maintaining random pools, conducting random selections, and performing random urine drug collections and breath alcohol tests.

(b) A railroad may not use a service agent to notify regulated employees that they have been selected for random testing, unless that service agent is an authorized representative of the railroad approved by FRA in the railroad's random testing plan. A regulated employee who has been selected for random testing must otherwise be notified of the selection by his or her employer. Service agents may also not perform roles that are specifically reserved for an employer under § 40.355 of this title. For purposes of this subpart, only a railroad or a contractor performing railroad-accepted testing can be considered employers under § 40.355 of this title.

(c) Primary responsibility for compliance with random alcohol and drug testing rests with the railroad, but FRA reserves the right to bring an enforcement action for noncompliance against the railroad, its service agents, its contractors, and/or its employees.

(d) If a railroad conducts random drug and/or alcohol testing through a C/TPA, the number of employees required to be tested may be calculated for each individual railroad belonging to the C/TPA or may be based on the total number of regulated employees covered by the C/TPA in a larger combined railroad or DOT agency random pool. Selections from combined railroad random pools must meet or exceed the highest minimum annual percentage rate established under this subpart or any DOT agency drug testing rule that applies to any member of that pool.

§ 219.623 Records.

(a) As provided by § 219.901, railroads are required to maintain

records related to random testing for a minimum of two years.

(b) Contractors and service agents performing random testing responsibilities under this subpart must provide records required by this subpart whenever requested by the contracting railroad or by FRA. A railroad remains responsible for maintaining records demonstrating that it is in compliance with the requirements of this subpart.

§ 219.625 FRA Administrator's determination of random alcohol and drug testing rates.

(a) *Notice.* Each year, the FRA Administrator publishes a **Federal Register** notice announcing the minimum annual random alcohol and drug testing rates which take effect on January 1 of the following calendar year. These rates are based on the railroad industry's random testing violation rates for the preceding two consecutive calendar years, which are determined using annual railroad alcohol and drug program data required to be submitted to the FRA's Management Information System (MIS) under § 219.800.

(b) *Information.* Information used for this determination is drawn from the MIS reports required by § 219.800. In order to ensure reliability of the data, the Administrator may consider the quality and completeness of the reported data, obtain additional information or reports from railroads, or make appropriate modifications in calculating the industry positive rate.

(c) *Initial minimum annual random testing rates.* The Administrator has established an initial minimum annual random testing rate of 50 percent for drugs and 25 percent for alcohol for any new category of regulated employees added to those already being tested under this part.

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least 18 months of MIS data have been compiled for the new category of regulated employees.

(2) The Administrator will determine separate minimum annual random testing rates for each added category of regulated employees for a minimum of three calendar years after that category is incorporated into random testing under this part.

(3) The Administrator may move to combine categories of regulated employees requiring separate determinations into a single determination once the categories' testing rates are identical for two consecutive years.

(d) *Drug testing rate.* The Administrator may set the minimum annual random drug testing rate for the railroad industry at either 50 percent or 25 percent.

(1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower the rate to 25 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the reported random testing positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the MIS data for any calendar year show that the reported random testing positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

(e) *Alcohol testing rate.* The Administrator may set the minimum annual random alcohol testing rate for the railroad industry at 50 percent, 25 percent, or 10 percent.

(1) When the minimum annual percentage rate for random alcohol testing is 50 percent or 25 percent, the Administrator may lower this rate to 10 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the random testing violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower the rate to 25 percent if the Administrator determines that the MIS data for two consecutive calendar years show that the random testing violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(3) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the MIS data for that calendar year show that the random testing violation rate is equal to or greater than 0.5 percent but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent.

(4) When the minimum annual percentage rate for random alcohol testing is 10 percent or 25 percent, and the MIS data for any calendar year show that the random testing violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent.

Subpart H—Drug and Alcohol Testing Procedures

§ 219.701 [Amended]

- 31. Amend § 219.701 by:
 - a. In paragraphs (a) and (b), removing the phrase “B, D, F, and G” wherever it appears and adding, in its place, “B, D, E, F, G, and K (but only for co-worker or non-peer referrals that involve a violation of the prohibitions of this subpart)”; and
 - b. Removing paragraph (c).

Subpart I—Annual Report

- 32. In § 219.800, revise the last sentence of paragraph (b) and the first sentence of paragraph (d) and add paragraph (f) to read as follows:

§ 219.800 Annual reports.

* * * * *

(b) * * * For information on where to submit MIS forms and for the electronic version of the form, see: <http://www.fra.dot.gov/eLib/details/L02639>.

* * * * *

(d) As a railroad, if you have a regulated employee who performs multi-DOT agency functions (e.g., an employee drives a commercial motor vehicle and performs switchman duties for you), count the employee only on the MIS report for the DOT agency under which he or she is random tested.

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(f) A railroad required to submit an MIS report under this section must submit separate reports for covered employees and MOW employees.

Subpart J—Recordkeeping Requirements

- 33. Revise § 219.901 to read as follows:

§ 219.901 Retention of alcohol and drug testing records.

(a) *General requirement.* (1) In addition to the records required to be kept by part 40 of this title, each railroad must maintain alcohol and drug misuse prevention program records in a secure location with controlled access as set out in this section.

(2) FRA requires certain records to be maintained for two years, rather than one year as provided for by § 40.333(a)(4) of this title. Railroads may maintain legible and accessible scanned or electronic copies of these records for the second year that they are required to be maintained by FRA.

(b) *Records maintained for a minimum of five years.* Each railroad must maintain the following records for a minimum of five years:

(1) A summary record or the individual files of each regulated employee's test results; and

(2) A copy of the annual report summarizing the results of its alcohol and drug misuse prevention program (if required to submit the report under § 219.801(a)).

(c) *Records maintained for a minimum of two years.* Each railroad must maintain the following records for a minimum of two years:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process, including the railroad's approved random testing plan and FRA's approval letter for that plan.

(iii) Documents generated in connection with decisions to administer Federal reasonable suspicion or reasonable cause alcohol or drug tests.

(iv) Documents generated in connection with decisions on post-accident testing.

(v) Documents verifying the existence of a medical explanation for the inability of a regulated employee to provide an adequate specimen.

(2) Records related to test results:

(i) The railroad's copy of the alcohol test form, including the results of the test.

(ii) The railroad's copy of the drug test custody and control form, including the results of the test.

(iii) Documents related to the refusal of any regulated employee to submit to an alcohol or drug test required by this part.

(iv) Documents presented by a regulated employee to dispute the result of an alcohol or drug test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to employee training:

(i) Materials on alcohol and drug abuse awareness, including a copy of the railroad's policy on alcohol and drug abuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training (including attendance records and training materials) provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for reasonable suspicion or post-accident alcohol and drug testing.

(iv) Documentation of training (including attendance records and training materials), required under § 219.103(b)(2) and (b)(3), provided to regulated employees regarding the use of prescription and over-the-counter drugs.

- 34. Revise § 219.903 to read as follows:

§ 219.903 Access to facilities and records.

(a) Release of regulated employee information contained in records required to be maintained under § 219.901 must be in accordance with part 40 of this title and with this section. (For purposes of this section only, urine drug testing records are considered equivalent to breath alcohol testing records.)

(b) Each railroad must permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, United States Department of Transportation, or any DOT agency with regulatory authority over the railroad or any of its regulated employees.

(c) Each railroad must make available copies of all results for its alcohol and drug testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or regulated employee.

§ 219.905 [Removed and Reserved]

- 35. Remove and reserve § 219.905.
- 36. Add subpart K to read as follows:

Subpart K—Peer Support Programs

Sec.

219.1001 Requirement for peer support programs.

219.1003 Peer support program requirements.

219.1005 Optional provisions.

219.1007 Alternate peer support programs.

Subpart K—Peer Support Programs

§ 219.1001 Requirement for peer support programs.

(a) The purpose of this subpart is to help prevent the adverse effects of alcohol misuse and drug use in connection with regulated employees through the implementation of peer referral and support programs.

(b) Each railroad must adopt, publish, and implement a peer support program policy that meets the requirements of this subpart. The policy must be designed to encourage and facilitate the referral and rehabilitative support of regulated employees who abuse alcohol or drugs. The policy must also support and augment this part, as well as parts 40, 240, and 242 of this title.

(c) A railroad may comply with this subpart by adopting, publishing, and implementing policies meeting the specific requirements of § 219.1003 and/or by complying with § 219.1007.

(d) Nothing in this subpart may be construed to:

(1) Require payment of compensation for any period a regulated employee is restricted from regulated service under a railroad's peer support programs;

(2) Require a railroad to adhere to a peer support program policy when the referral is made for the purpose, or with the effect, of anticipating or avoiding the imminent and probable detection of a rule violation by a supervising employee;

(3) Interfere with the subpart D requirement for Federal reasonable suspicion testing when a regulated employee is on-duty and a supervisor trained in accordance § 219.11(g) determines that the employee is exhibiting signs and symptoms of alcohol and/or drug use;

(4) Interfere with the requirements in § 219.104(d) for responsive action when a violation of §§ 219.101 or 219.102 is substantiated; or

(5) Limit the discretion of a railroad to dismiss or otherwise discipline a regulated employee for specific rule violations or criminal offenses, except as specifically provided by this subpart.

§ 219.1003 Peer support program requirements.

(a) *Scope.* This section prescribes the minimum requirements and standards for peer support programs required under this subpart. Individuals involved in the implementation of any program subject to this subpart must comply with the program's policies and implementation procedures.

(b) *Referral policies.* Except as provided in § 219.1007, each railroad must publish and implement a peer support program that meets the requirements of this section and which contains, at a minimum, the following types of policies:

(1) A self-referral policy that must provide regulated employees with an opportunity to obtain referral, education, counseling, and/or treatment through a qualified Employee Assistance Program (EAP) Counselor or Drug and Alcohol Counselor (DAC) before an employee's alcohol or substance use problem manifests itself in an accident, injury, or is otherwise detected as a violation of this part;

(2) A co-worker referral policy that must be designed to encourage and facilitate employee participation in preventing violations of this part; and

(3) As negotiated between a railroad and its collective bargaining organizations (if applicable), a non-peer referral policy that must specify whether the program permits referrals from non-peers, such as supervisors,

representatives of an employee's collective bargaining organization, or family members.

(c) *Referral conditions.* The referral policies required by paragraph (b) of this section must specify the conditions under which a self-referral, co-worker referral, or non-peer referral can occur, including:

(1) For a self-referral that does not involve a violation of this part, identification of a designated EAP Counselor or DAC (including telephone number and email (if available)) and any expectations regarding when the referral is allowed to take place (e.g., only during non-duty hours and/or while the employee is unimpaired, as permitted by § 219.1005);

(2) Whether non-peer referrals (e.g., referrals from supervisors, labor organizations, or family members) are permitted and what the allowances, conditions, and procedures of such referrals are;

(3) For a co-worker referral or a non-peer referral (as permitted by the railroad's policy), a railroad may accept a referral under this subpart only if the referral is based on an allegation that the regulated employee was apparently unsafe to work with or appeared to be in violation of this part or the railroad's alcohol and drug rules; and

(4) For a co-worker referral or a non-peer referral (as permitted by the railroad's policy), a railroad may remove a regulated employee from service only if a railroad representative who has been trained in accordance with the requirements of § 219.11(g) confirms that the employee is unsafe to work with or in violation of this part or the railroad's alcohol and drug rules.

(d) *Employment maintained.* A regulated employee who is affected by an alcohol or drug use problem may maintain an employment relationship with the railroad if:

(1) The employee seeks assistance through a railroad's peer support program for the employee's alcohol or drug use problem or is referred for such assistance by either a co-worker or a non-peer (as permitted by the railroad's policy); and

(2) The employee successfully completes the education, counseling, or treatment program specified by a Counselor under this section.

(e) *Employment action.* If the employee does not choose to seek assistance through a peer support program, or fails to cooperate with the prescribed program, the disposition of the employee's relationship with the railroad is subject to normal employment action.

(f) *Evaluation by a qualified EAP Counselor, DAC, or SAP.* (1)(i) A regulated employee entering a peer support program through a self-referral must be evaluated by an EAP Counselor or DAC acceptable to the railroad.

(ii) A regulated employee entering a peer support program through a co-worker or non-peer referral must be evaluated by a SAP acceptable to the railroad (according to the standards of part 40 of this title) if the co-worker or non-peer referral involves a substantiated violation of § 219.101 or § 219.102.

(iii) If a co-worker or non-peer referral involves a situation where the regulated employee was not in violation of § 219.101 or § 219.102, but was determined to be unsafe to work with or in violation of only the railroad's alcohol and drug rules, the referred individual must be evaluated by an EAP or DAC.

(2) Organizations employing Counselors and personnel supporting peer programs under this subpart must meet any applicable state standards and comply with this subpart.

(3) The Counselor (defined by § 219.5 to include an EAP Counselor, DAC, or SAP) must determine the appropriate level of care (including, but not limited to, education, counseling, and/or treatment) necessary to resolve any identified substance abuse problem involving a regulated employee. If the evaluation establishes that the employee has an active substance abuse disorder (such as, but not limited to, substance dependency) requiring education, counseling and/or treatment education, the Counselor must refer the employee to an appropriately qualified rehabilitation program in the community when possible. An employee's failure to fully cooperate with the evaluation, referral process, or aftercare is grounds for dismissal from the railroad's peer support program, and will subject the employee to the railroad's normal employment action.

(g) *Removal from regulated service.* A peer support program policy must stipulate that a regulated employee who has been evaluated by a Counselor and found to have an active substance abuse disorder must be removed from regulated service until the Counselor reports that the employee's identified problem is no longer reasonably expected to adversely affect the safety of railroad operations.

(h) *Confidentiality maintained.* Except as provided under paragraph (l) of this section, the railroad's peer support program policy must treat an employee's referral and subsequent handling (including evaluation,

education, counseling, and/or treatment) as confidential. Only personnel who administer the railroad's peer support program may have access to the identities of the individuals in the program.

(i) *Leave of absence.* The railroad must grant a regulated employee a leave of absence for the period necessary to complete at least the primary education/counseling/treatment program recommended by the Counselor. The leave of absence must also cover a period sufficient for the employee to establish control over his or her alcohol or drug problem to the extent that the evaluating Counselor determines that he or she is now at a low risk to return to substance abuse.

(j) *Return to regulated service.* (1) Except as may be provided under §§ 219.1001(d)(4) and 219.1005, a railroad must return a regulated employee to regulated service on the recommendation of the Counselor when the employee has established control over his or her substance abuse problem, is assessed by the Counselor as being a low risk to return to substance abuse, and has complied with any return-to-service requirements recommended by the Counselor (such as a negative alcohol and/or drug test performed under Federal or company authority, whichever is appropriate).

(2) The Counselor determines the appropriate number and frequency of required follow-up tests. The railroad determines the dates of testing.

(3) An employee's return to regulated service may be conditioned upon successful completion of a return-to-service medical evaluation, as directed by the railroad.

(4) Approval to return to regulated service may not be unreasonably withheld. The railroad must return an employee to regulated service within five working days of the Counselor's notification to the railroad that the employee is fit to return to regulated service (i.e., the employee is at a low risk to return to substance abuse).

(k) *Rehabilitation plan.* No person or entity—whether an employing railroad, managed care provider, service agent, or any entity other than the Counselor who conducted the initial evaluation—may change in any way the Counselor's evaluation or recommendation for assistance. The Counselor who made the initial evaluation may modify his or her initial evaluation and follow-up recommendations based on new or additional information.

(l) *Locomotive engineers and conductors.* As provided by § 240.119(e) or § 242.115(g) of this chapter, with respect to a certified locomotive

engineer, certified conductor, or a candidate for engineer or conductor certification, the peer support program policy must state that confidentiality is waived (to the extent that the railroad receives official notice of the active substance abuse disorder from a Counselor, and suspends or revokes the certification, as appropriate) if an employee at any time refuses to cooperate in a recommended course of counseling or treatment. The treating Counselor is not required to provide this notice if the locomotive engineer or conductor is medically restricted from regulated service and the Counselor is working with the locomotive engineer or conductor to correct a reoccurring active substance abuse disorder. If a locomotive engineer or conductor with an active substance abuse disorder fails to make the needed rehabilitative progress during a period of medical restriction, the Counselor must provide official notice to the railroad.

(m) *Contacting a SAP.* If the identification of the regulated employee was due to co-worker or non-peer referral for a substantiated violation of § 219.101 or § 219.102, the regulated employee must contact the SAP in a reasonable time (as specified by the railroad's policy). If the employee does not contact the SAP within the railroad's specified time limit, the railroad may begin an investigation to assess the employee's cooperation and compliance with its peer support policy.

(n) *Time requirements for Counselor evaluations.* Once a regulated employee has contacted the designated Counselor, the evaluation must be completed within 10 working days. If the employee needs more than one evaluation, the evaluations must be completed within 20 working days.

(o) *Regulated employee agreement.* A railroad's peer support policy must require a regulated employee to agree to undertake and successfully complete a course of prescribed care and any follow-up care (including appropriate railroad-administered follow-up testing) deemed appropriate by the Counselor. Any follow-up treatment, care, and/or testing established for this program cannot exceed 24 months beyond the regulated employee's initial removal from regulated service, unless the regulated employee entered the peer prevention program through a co-worker or non-peer referral that involved a substantiated part 219 violation.

§ 219.1005 Optional provisions.

A railroad's peer support program policy may include any of the following provisions at the option of the railroad

and with the approval of the labor organization(s) affected:

(a) The policy may provide for a mark-off provision under which a regulated employee who is concerned that he or she may not be safe to work due to alcohol or prescription medication use may choose to refuse an assignment.

(b) The policy may provide that the rule of confidentiality is waived if:

(1) The regulated employee at any time refuses to cooperate in a course of education, counseling, or treatment recommended by an Counselor; or

(2) The regulated employee is later determined, after investigation, to have been involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct.

(c) The policy may require successful completion of a return-to-service medical examination as a further condition of reinstatement in regulated service.

(d) The policy may provide that it does not apply to a regulated employee who has previously been assisted by the railroad under a policy or program substantially consistent with this section.

(e) The policy may provide that, in order to invoke its benefits, the regulated employee must report to the contact designated by the railroad either:

(i) During non-duty hours (i.e., at a time when the regulated employee is off duty); or

(ii) While unimpaired and otherwise in compliance with the railroad's alcohol and drug rules consistent with this subpart.

§ 219.1007 Alternate peer support programs.

(a) In lieu of peer support programs under § 219.1003, railroads are permitted to develop, publish, and implement an alternate program or policy which meets the standards established in § 219.1003. Such programs or policies must have the written concurrence of the recognized representatives of the regulated employees. Nothing in this subpart restricts a railroad or labor organization from adopting, publishing and implementing peer support policies that afford more favorable conditions to regulated employees troubled by alcohol or drug abuse problems, consistent with a railroad's responsibility to prevent violations of §§ 219.101 and 219.102.

(b) The concurrence of the recognized representatives of the regulated employees in an alternate program may be evidenced by a collective bargaining agreement or any other document

describing the class or craft of employees to which the alternate program applies. The agreement or other document must make express reference to this subpart and to the intention of the railroad and employee representatives that the alternate program applies in lieu of the program required by this subpart.

(c) The railroad must file the agreement or other document described

in paragraph (b) of this section along with the requested alternate program being submitted for approval with the FRA Drug and Alcohol Program Manager. Approval will be based on FRA review to ascertain whether the alternative program meets the § 219.1003 objectives. The alternative program does not have to include each § 219.1003 component, but must meet the general standards and intent of

§ 219.1003. If an approved alternate policy is amended or revoked, the railroad must file a notice with FRA of such

Issued in Washington, DC, on July 15, 2014.

Joseph C. Szabo,
Administrator.

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