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Federal Railroad Administration

49 CFR Part 219

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

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

[Docket No. FRA–2009–0039, Notice No. 3]

RIN 2130–AC10

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

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

**ACTION:** Final rule.

**SUMMARY:** In response to Congress' mandate in the Rail Safety Improvement Act of 2008 (RSIA), FRA is expanding the scope of its drug and alcohol regulation to cover MOW employees. This rule also codifies guidance from FRA compliance manuals, responds to National Transportation Safety Board (NTSB) recommendations, and adopts substantive amendments based upon FRA's regulatory review of 30 years of implementation of this part.

The final rule contains two significant differences from FRA's July 28, 2014 Notice of Proposed Rulemaking (NPRM). First, it adopts part 214's definition of "roadway worker" to define "MOW employee" under this part. Second, because FRA has withdrawn its proposed peer support requirements, subpart K contains a revised version of the troubled employee identification requirements previously in subpart E.

**DATES:** This rule is effective June 12, 2017. Petitions for reconsideration must be received on or before August 9, 2016. Petitions for reconsideration will be posted in the docket for this proceeding. Comments on any submitted petition for reconsideration must be received on or before September 13, 2016.

**ADDRESSES:** Petitions for Reconsideration related to Docket No. FRA–2009–0039 may be submitted by any of the following methods: Web site: 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. 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.

*Docket:* For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov) or to 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.

A complete version of part 219 as amended in this final rule 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 this rule affects part 219 as a whole.

**FOR FURTHER INFORMATION CONTACT:** Gerald Powers, Drug and Alcohol Program Manager, Office of Safety Enforcement, Federal Railroad Administration, 1200 New Jersey Avenue SE., Mail Stop 25, Washington, DC 20590 (telephone 202–493–6313), 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](mailto:patricia.sun@dot.gov); or 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](mailto:elizabeth.gross@dot.gov).

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**I. Executive Summary**

In the first major updating of its drug and alcohol regulation (49 CFR part 219) since its inception in 1985, FRA is expanding the scope of part 219 to cover Maintenance-of-Way (MOW) employees. Historically, FRA has conducted only post-mortem post-accident toxicological (PAT) testing of MOW employees, since an MOW employee, unlike a covered service employee, has been subject to part 219 testing only when he or she has died as the result of a reportable railroad accident or incident. Even in this comparatively small sample of post-mortem results, however, FRA found a disproportionately high level of positive test results among deceased MOW employees compared to the PAT testing and random testing results of covered employees who are already wholly subject to part 219.

Congress, in the Rail Safety Act of 2008 (RSIA), recognized the substance abuse problem among MOW employees by directing FRA to make them fully subject to the policies and protections of part 219. Partly in response to comments received, FRA is adopting the definition of roadway worker in part 214 of this chapter to define who is an MOW employee for purposes of part 219. FRA will introduce MOW employees to random drug and alcohol testing at the same initial minimum random testing rates it initially applied to covered employees. FRA is also adding a new definition, "regulated employee," to encompass both covered and MOW employees.

In this rule, FRA is making MOW employees subject to all part 219 testing, namely, random testing, PAT testing, reasonable suspicion testing, reasonable cause testing, pre-employment testing, return-to-duty testing, and follow-up testing. Because many MOW employees work for multiple contractors or contract for short-term jobs, FRA is addressing not only the roles and responsibilities of railroads with respect to those employees who directly

perform MOW activities for them, but also the roles and responsibilities of contractors and subcontractors who provide MOW services to railroads on a contract basis. As has been its practice, FRA is holding railroads, contractors, and subcontractors equally responsible for ensuring that their employees who perform MOW activities are in compliance with the requirements of this rule. FRA is also continuing its practice of counting only a railroad's total number of covered employees to determine whether that railroad qualifies for certain exceptions as a small entity.

In addition, FRA has used this lookback at part 219 to conduct a complete retrospective regulatory review of the rule. As a result, FRA has largely restructured and rewritten large sections of this rule and incorporated longstanding compliance guidance, to

make part 219's requirements easier to read, find, and implement. Finally, in response to widespread opposition from commenters, FRA is not adopting its proposal to require peer support programs. FRA is instead transferring part 219's requirements for troubled employee programs to a new subpart in a revised, expanded, and clarified format.

**Costs and Benefits of Final Rule**

The final rule will 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 \$24.3 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 will 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 final 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).

	Statutory	Discretionary	Total
<b>Costs (20 year)</b>			
PAT Testing—Adding MOW .....	\$ 52,000		\$ 52,000
PAT Testing—Impact Def + Xing .....		\$241,974	241,974
Reasonable Suspicion Testing .....	842,398		842,398
Pre-Employment Testing—Adding MOW .....	673,897		673,897
Pre-Employment Testing—Sm, RR .....		29,904	29,904
Random Testing .....	20,863,074		20,863,074
Annual Reporting .....	160,911		160,911
Recordkeeping Requirement .....	1,397,840		1,397,840
<b>Costs Subtotal .....</b>	<b>23,990,120</b>	<b>271,878</b>	<b>24,261,998</b>
<b>Benefits (20 year)</b>			
Accident Reduction .....	115,369,281		115,369,281
PAT Testing Threshold Reduction .....		388,295	388,295
<b>Benefits Subtotal .....</b>	<b>115,369,281</b>	<b>388,295</b>	<b>115,757,576</b>
<b>Net Benefit .....</b>	<b>91,379,161</b>	<b>116,417</b>	<b>91,495,578</b>

**II. Rulemaking Proceedings**

On July 28, 2014, in response to a Congressional mandate (see sec. 412 of the RSIA (Pub. L. 110-432, October 16, 2008)) and NTSB recommendation R-08-07, FRA published an NPRM (79 FR 48380) which proposed to expand the scope of part 219 to cover MOW employees. See 79 FR 43830. FRA also proposed to modify its post-accident toxicology (PAT) testing criteria and to replace its subpart E programs addressing troubled employees with a peer support program in new subpart K. The NPRM also proposed to adopt longstanding program guidance, and to clarify and restructure part 219 to make its requirements easier to understand and implement.

On September 15, 2014, in a jointly filed petition, the American Public Transportation Association (APTA), American Short Line and Regional Railroad Association (ASLRRA), Association of American Railroads (AAR), and National Railroad Construction and Maintenance Association, Inc. (NRCMA), requested a 60 day extension of the NPRM's comment period, which had been scheduled to close on September 26, 2014. FRA agreed to this request, and published a notice allowing commenters until November 25, 2014, to submit comments. (September 25, 2014, 79 FR 57495). FRA received 16 comments during this extended comment period, including an AAR/ASLRRA (hereinafter referred to as the "Associations") joint

submission, as well as comments from APTA, the NRCMA, the NTSB, SMART (the American Train Dispatchers Association, Brotherhood of Locomotive Engineers and Trainmen, Brotherhood of Maintenance of Way Employees Division, International Brotherhood of Electrical Workers; and Sheet Metal, Air, Rail and Transportation), Twin Cities & Western Railroad Company (TC&W), Drug Abuse Program Administrators Administration Worldwide (SAPAA), Pacific Southwest Railway Museum (PSRM), SAPlist.com, and Southeastern Pennsylvania Transportation Authority (SEPTA). Six individuals also submitted comments. (Although SMART had requested a public hearing in its November 28, 2014 comment, the deadline for filing such a request was 30 days after the

publication of the NPRM, or August 27, 2014).

In this final rule, FRA will not address comments that raised issues outside the scope of, or not specific to, the proposals in the NPRM, or comments submitted after the extended comment period had closed. In addition, the NPRM proposed to make this part more user-friendly, by reorganizing sections, re-designating paragraphs, updating terms, and amending language for consistency. Because FRA received no comment on these minor edits, FRA is not repeating the NPRM's discussion of them.

### III. Effective Date

FRA received only one comment concerning the rule's effective date. The Associations requested that the final rule become effective two years after its publication, to allow for the implementation of new testing policies and procedures, and for the creation of random testing pools for MOW employees. FRA notes, however, that many MOW employees are already subject to drug and alcohol testing under Federal authority, company authority, or both. For example, any MOW employee whose duties require the holding of a Commercial Driver's License (CDL) is subject to Federal Motor Carrier Safety Administration (FMCSA) testing requirements. MOW employees may also be subject to testing under company authority, often in a "look-alike" (a company testing program that mirrors FRA standards and procedures) program. This familiarity with drug and alcohol programs will facilitate the implementation of part 219 requirements for MOW employees.

Moreover, railroads have thirty years of experience implementing part 219 requirements for their covered service employees; while employers who are newly subject to part 219, such as contractors who provide MOW service to railroads, have service agents (e.g., random testing consortia and third party administrators) readily available to facilitate adoption and compliance with this part. Given the experience and resources railroads and contractors have to draw on, FRA believes a one year implementation window is reasonable for the requirements in this rule.

### IV. Maintenance-of-Way Employees and Contractors

#### A. Definitions

As proposed, FRA is expanding the scope of part 219 to cover employees and contractors who perform MOW activities. This rule also adopts FRA's proposal to define the term "employee"

to include employees, volunteers, and probationary employees of railroads and contractors (including subcontractors) to railroads, and to adopt the term "regulated service" to encompass both covered service and MOW activities. Performance of regulated service makes 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.

In the NPRM, FRA requested comment on who should be subject to the expanded scope of this part. As alternatives, FRA asked whether part 219's definition of MOW employee should: (1) Be identical to the roadway worker definition in part 214, Roadway Workplace Safety; (2) include all employees subject to disqualification under 49 CFR 209.303, as recommended by the NTSB; or (3) incorporate a modified version of part 214's definition of roadway worker which would include certain roadway worker functions but not others, as proposed in the NPRM. Of those who commented on FRA's proposed definition of MOW activities, SEPTA stated that the definition of MOW activities in part 219 should be consistent with the definition of roadway worker duties in part 214. While the Associations supported FRA's proposed exclusions from MOW activities, they agreed with SEPTA's view that part 219's definition of MOW activities and § 214.7's definition of roadway worker duties should be consistent. SMART, however, commented that FRA's proposed MOW activities definition was both too inclusive and too exclusive, while the NRCMA unqualifiedly supported the proposed definition.

In its comments, the NTSB continued to advocate for adoption of Recommendation R-08-07, which recommended that FRA expand the scope of part 219 to include all employees subject to § 209.303. No other commenter supported so wide an expansion. As noted in the NPRM, § 209.303 encompasses many employees besides those who perform covered service and MOW activities, no matter how such activities are defined. As examples, § 209.303 includes employees who conduct tests and training, and mechanics who maintain locomotives, and freight and passenger cars, among others.

In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), the Supreme Court held that an alcohol or drug test conducted under FRA authority is a Fourth Amendment search, and in its determination of who should be subject to part 219 testing, FRA must carefully balance public

safety interests against individual privacy rights. FRA has done so, and can find no overriding safety interest that would justify making every employee covered by § 209.303 subject to part 219 testing. In its comment to the NPRM, the NTSB cited no accidents or data to support adoption of R-08-07. To date, FRA has no data suggesting that the functions of testers, trainers, and mechanics are of such a safety-sensitive nature that employees who perform these functions should be subject to drug and alcohol testing. FRA therefore finds no compelling reason to expand the scope of part 219 to equal that of § 209.303.

Upon consideration of the other comments, however, FRA has reevaluated its proposed definition of MOW employee. Almost all commenters pointed out that an employee who performs activities on or near a railroad's roadbed or track is by definition one who performs work that could pose risks to the safety of both the employee and the public. As demonstrated by the high positive rate among MOW employee fatalities (detailed in the NPRM), the misuse of drugs or alcohol by these employees can have disastrous consequences. Congress determined when it enacted the RSIA, that an employee who performs MOW activities performs work that is sufficiently safety-sensitive to trigger FRA's drug and alcohol requirements. Adoption of the NPRM's proposed definition of MOW employee would have required railroads to maintain fine distinctions among MOW activities, since the performance of certain activities would make an employee subject to both parts 214 and 219, while the performance of others would make an employee subject only to part 214 or to part 219.

FRA's proposed MOW definition could have potentially required a railroad or contractor to establish three different categories of coverage, with the attendant administrative burdens necessary to sort and maintain such categories. In contrast, because the term "roadway worker" has been long established by part 214, the railroad industry is already familiar with its meaning and application. FRA is therefore adopting, for its definition of MOW employee, § 214.7's definition of roadway worker, which includes "any employee of a railroad or a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of roadway track; bridges, roadway, signal and communications systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track

or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.” By doing so, FRA is adopting the recommendation of the majority of commenters, who asserted that an individual subject to roadway worker protection under part 214 should also be a MOW employee subject to drug and alcohol testing under part 219.

#### *B. MOW Employees and the Small Railroad Exception*

Since the inception of its alcohol and drug program in 1985, FRA has counted 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. Historically, a small railroad, defined by FRA as one that has 15 or fewer covered employees and no joint operations with other railroads, has proven less likely to have a drug and alcohol-related accident than a larger railroad. Therefore, FRA has always required a larger railroad (defined as one that has 16 or more covered employees or is engaged in joint operations) to implement all of part 219, while § 219.3 previously excepted a small railroad from the requirements of subpart D (reasonable suspicion and reasonable cause testing), subpart E (previously identification of troubled employees), subpart F (pre-employment testing), and subpart G (random alcohol and drug testing); these exceptions lessened part 219’s regulatory burden on small railroads.

As proposed, FRA is continuing its longstanding approach of counting only a railroad’s covered employees for purposes of determining whether the railroad qualifies for the small railroad exception (the railroad also cannot participate in any joint operations) because FRA believes this is the best measure of the risks posed by the railroad’s operations. FRA received no objections to this proposal.

#### *C. MOW Contractors and the Small Railroad Exception*

With respect to a contractor who performs MOW activities for a railroad, FRA is amending § 219.3 to apply part 219 to an 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 will be determined by the size of the railroad for which it is performing regulated service, regardless of the size of the contractor itself. New language in the small railroad exception states that a contractor who performs

MOW activities exclusively for small railroads that are excepted from full compliance with part 219 will also be excepted from full compliance. For example, an MOW contractor with five employees who perform regulated service for a large railroad must implement a full part 219 program if the railroad for which it performs regulated service must do so, while an MOW contractor with 20 employees does 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 an MOW contractor may perform regulated service for multiple railroads, some of which may not be required to comply fully with part 219. To simplify application, FRA is adding new language to the small railroad exception requiring an 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. If an MOW contractor performs regulated service for at least one large railroad, it must incorporate all of its regulated employees into a full part 219 program, even if only some of these employees perform regulated service for large railroads, regardless of whether or not a particular employee is currently performing regulated service for a large or a small railroad. This approach allows an MOW contractor to flexibly allocate its employees between small and large railroads. To ensure that it does not encourage the hiring of MOW contractors in lieu of MOW employees, FRA is excluding both contractor employees who perform MOW activities and railroad employees who perform MOW activities, for purposes of the employee count to determine whether a railroad qualifies as a small railroad. Labor supported FRA’s decision.

#### *D. Railroad and Contractor Responsibility for Compliance*

FRA is adopting its proposal to hold both a railroad and its contractor(s) responsible for ensuring that any contractor employees who perform regulated service for the railroad are in compliance with part 219. In their comments, the Associations objected that the RSIA mandated that part 219 cover contractors who perform regulated service, but did not make railroads responsible for ensuring that compliance, and that a contractor who performs regulated service for more than one railroad would be required to comply with the drug and alcohol training requirements of multiple

railroads. The TC&W commented that FRA should audit the drug and alcohol compliance of contractors who perform regulated service.

FRA notes that making a railroad responsible for its contractor’s compliance, and making a contractor who performs regulated service responsible for its own compliance, are not new requirements, because existing § 219.9 makes every person—including a railroad, an independent contractor and an employee of an independent contractor—who violates or causes a violation of a part 219 requirement subject to a civil penalty. To avoid confusion, FRA is discussing a contractor’s options to ensure part 219 compliance for its regulated employees below, while the corresponding railroad options to ensure that its contractor employees who perform regulated service are in compliance will be discussed below in the section-by-section analysis of § 219.609.

A contractor who must establish a random testing program for its regulated service employees may do so through any of the following methods. As discussed in the NPRM, a contractor may choose to:

- Establish its own part 219 program and provide the railroad with documentation of its compliance with part 219. If a contractor chooses this option, FRA will not audit the contractor but will instead require the railroad to maintain the contractor’s 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 may 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 will 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 may 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 must then submit documentation of its membership in the consortium and its compliance with part 219 to the contracting railroad. As with the option described above, if the contractor’s documentation or program contains a deficiency or violation that the railroad could not have reasonably detected, FRA may use its enforcement discretion to take action only against the contractor. Upon request, FRA will

assist a railroad in reviewing the part 219 documentation of its regulated service contractors.

- Ensure that any employees who perform regulated service for a railroad are incorporated into the railroad's part 219 program.

To facilitate part 219 implementation for railroads and contractors, FRA has developed two sets of model drug and alcohol plans (including testing plans); a set for an entity subject to all of part 219 and another for an entity that qualifies for the small railroad exception. Both sets are currently available at FRA's Web site: <http://www.fra.dot.gov/Page/P0345>.

FRA had proposed an alternative two-pronged approach, which would require a contractor to provide a railroad with: (1) Written certification that all of its regulated employees are in compliance with part 219, and (2) a summary of its part 219 data at least every six months. The NRCMA commented that it was unnecessary to require certification of compliance with part 219, noting that railroad contracts routinely require a contractor to certify compliance with all relevant Federal, state, and local laws and regulations. The NCRMA also objected to providing summary data, commenting that this was both unnecessary and an undue administrative burden. FRA agrees, and has decided not to adopt these proposed requirements.

A railroad has the additional option of accepting a contractor's plan for random testing, regardless of whether that plan is managed by the contractor or by a consortium/third party administrator (C/TPA). If a railroad adopts this approach, the contractor must:

- Certify in writing to the railroad that all of its regulated employees are subject to part 219 (including, as applicable, random testing under subpart G, pre-employment drug testing under subpart F, and a previous employer background check as required by § 40.25); and

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

The railroad should review this summary data since it remains responsible for monitoring the contractor's compliance.

#### *E. Pre-Employment Drug Testing of MOW Employees*

As proposed, FRA is exempting all current MOW employees from subpart F pre-employment drug testing (with certain limitations, pre-employment alcohol testing is authorized but not required). Only MOW employees hired after the effective date of this rule must

have a negative DOT pre-employment drug test result before performing regulated service for the first time. As with its initial minimum random testing rates, FRA used a similar approach to exempt current covered employees from pre-employment drug testing in 1986. Although these employees do not have to be pre-employment drug tested, current MOW employees are subject to FRA's initial minimum random drug testing rate of 50%.

FRA realizes that a large percentage of MOW employees may already have a negative pre-employment drug test result under the alcohol and drug testing regulations of another DOT agency; usually these MOW employees are required by their employers to hold a Commercial Driver's License (CDL), and are therefore subject to the regulations of both FRA and FMCSA. To hold a CDL, an individual must have a negative FMCSA pre-employment drug test. See § 382.301. To ease the compliance burden on both employees and employers, an employing railroad may use a negative pre-employment drug test conducted under the rules and regulations of another DOT agency to satisfy FRA's pre-employment drug test requirements for employees initially transferring into regulated service after the effective date of this rule. This amendment adopts previous FRA guidance on pre-employment drug testing.

#### *F. Initial MOW Employee Random Testing Rates*

This rule makes MOW employees subject to FRA random testing, with the exception of those who perform regulated service solely for a small railroad. For covered employees, FRA has annually set minimum random drug and alcohol testing rates determined by the overall railroad random testing violation rates for covered employees. FRA determines this overall rate from program data that railroads submit to its Management Information System (MIS). See 49 CFR 219.602 and 219.608. When FRA first established minimum random testing rates for covered employees, it set the initial minimums for drugs and alcohol at the top end of their respective ranges, at 50 percent for drugs and 25 percent for alcohol. At that time, FRA had no rail industry random testing data because the MIS had been newly established. FRA later lowered both minimum annual random testing rates to the bottom of their ranges after MIS data showed consistently low overall random testing violation rates for covered employees. These minimum rates, which have been unchanged since

2000, are 25 percent for drugs and 10 percent for alcohol in 2016.

Similarly, because MOW employees are being introduced to random testing, FRA has no overall railroad random testing violation rate data for these employees. To develop this data, FRA is setting the initial minimum random testing rates for MOW employees at 50 percent for drugs and 25 percent for alcohol, as it initially did for covered employees. A railroad must therefore create and maintain a separate random testing pool for its MOW employees, both to allow these employees to be tested at their own minimum random testing rates and, from those railroads required to file an MIS report, to establish a separate database. As it did with covered employees, FRA could lower these minimum random testing rates in the future if the data for MOW employees show consistently low overall random testing violation rates.

#### *G. MOW Employee Minimum Random Testing Pool Size*

As proposed, to maintain the deterrent effect of random testing for very small railroads and contractors, FRA is requiring each individual random testing pool established under subpart G to select and randomly test at least one entry per quarter, even if fewer tests are needed to meet FRA's minimum random testing rates. Conversely, the requirement to conduct at least four tests throughout the year does not excuse a railroad (or contractor to a railroad, or a C/TPA) from complying with FRA's minimum random testing rates. For example, a railroad that maintains a pool of 16 MOW employees must conduct at least eight, not four, random drug tests in a year to comply with a minimum random drug testing rate of 50%.

### **V. Restructuring of Part 219**

#### *A. Division of Reasonable Suspicion and Reasonable Cause Testing Into Subparts D and E*

Previously, the requirements for both reasonable suspicion and reasonable cause testing were found in subpart D. Because of their similar names and their location in the same subpart, railroads and employees often confused the two types of testing, even though reasonable suspicion and reasonable cause testing have very different requirements. To clarify the substantive differences between the two, the requirements for reasonable suspicion testing will remain in subpart D, while the requirements for reasonable cause testing have been moved to subpart E, which formerly addressed voluntary referral and co-

worker report policies (“Identification of Troubled Employees,” now found in subpart K). This differentiation is important since small railroads are required to conduct reasonable suspicion testing, but not reasonable cause testing. FRA received no objections to its proposal to divide reasonable suspicion and reasonable cause testing into two distinct subparts.

#### *B. Transfer of Revised and Retitled Troubled Employee Requirements to Subpart K*

To accommodate the placement of reasonable cause testing into subpart E, FRA has transferred a revised and retitled version of the “Identification of Troubled Employees” requirements previously in subpart E to new subpart K. (As noted above, this is in lieu of FRA’s proposal to require peer support programs in subpart K, which, for the reasons discussed below, FRA is not adopting).

#### **VI. Section-by-Section Analysis**

As discussed earlier, throughout most of part 219 FRA is substituting “regulated employee” and “regulated service” where the terms “covered employee” and “covered service” formerly appeared. “Regulated employee” and “regulated service” are terms-of-art encompassing all individuals and duties subject to part 219, including both covered service and MOW activities. The terms “covered employee” and “covered service,” however, are retained where necessary, such as in § 219.12, which addresses issues of overlap between part 219 and the HOS laws that apply only to covered employees.

#### **Authority Citation**

The authority citation for part 219 adds a reference to Section 412 of the RSIA, 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*

This section now includes a reference to the new definition of “employee” in § 219.5, which includes any individual (including a volunteer or a probationary employee) who performs regulated activities for a railroad or a contractor to a railroad.

##### *Section 219.3—Application*

The small railroad exception in § 219.3(b)(2) has provided, 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 (both previously found in subpart D), identification of troubled employees (previously subpart E), pre-employment drug testing (subpart F), or random testing (subpart G).

FRA is modifying the small railroad exception so that small railroads are no longer excepted from the reasonable suspicion testing requirements of subpart D. Subpart D requires a railroad to conduct Federal reasonable suspicion testing whenever one or more trained supervisors reasonably suspects that an employee has violated an FRA prohibition against the use of alcohol or drugs. *See* § 219.300(a). FRA’s decision not to authorize small railroads to conduct FRA-authority reasonable cause testing (moved to subpart E of this rule) remains unchanged, however.

FRA is also amending the small railroad exception so that small railroads are no longer excepted from subpart F. As is already required for larger railroads, a small railroad must conduct a pre-employment drug test and obtain a negative result before allowing an individual to perform regulated service for the first time. *See* § 219.501(a). As with larger railroads, this requirement applies only to those regulated employees hired by a small railroad after the effective date of this final rule, because all regulated employees hired before the effective date of this rule are exempted from pre-employment drug testing.

FRA received no comments on the clarifications in this section, which are adopted without further comment.

#### *Section 219.5—Definitions*

As proposed, FRA is amending this section by adding, clarifying, and deleting definitions. Additional or clarified definitions include:

##### **Administrator**

FRA is defining “Administrator” to include the Administrator of the FRA or the Administrator’s delegate.

##### **Associate Administrator**

FRA is clarifying that “Associate Administrator” means both the FRA’s Associate Administrator for Railroad Safety and the Associate Administrator’s delegate.

##### **Contractor**

As proposed, FRA’s new definition of “contractor” includes both a contractor and a subcontractor performing functions for a railroad.

##### **DOT-Regulated Employee**

A “DOT-regulated employee” means a person who is subject to drug or alcohol testing, or both, under any DOT agency regulation, including an individual currently performing DOT safety-sensitive functions and an applicant for employment subject to DOT pre-employment drug testing.

##### **DOT Safety-Sensitive Duty or DOT Safety-Sensitive Function**

The performance of a “DOT safety-sensitive duty” or “DOT safety-sensitive function” makes a person subject to the drug testing and/or alcohol testing requirements of a DOT agency. The performance of regulated service is a DOT safety-sensitive duty or function under this part.

##### **Drug and Alcohol Counselor or DAC**

FRA is adopting this part’s definition for “Drug and Alcohol Counselor” or “DAC” from § 242.7 of its conductor certification rule.

##### **Employee**

An “employee” is any person, including a volunteer, and a probationary employee, who performs activities for a railroad or a contractor to a railroad.

##### **Evacuation**

Under § 219.201(a)(1)(ii)(A), one of the criteria for a “major train accident” requiring PAT testing is an evacuation. To qualify as an evacuation, an event must involve the relocation of at least one person who is not a railroad employee to a safe area to avoid exposure to a hazardous material release. This relocation would normally be ordered by local authorities and could be either mandatory or voluntary. This definition does not include the closure of public roadways for hazardous material spill containment purposes, unless that closure was accompanied by an evacuation order.

##### **Flagman or Flagger**

FRA is adopting its proposal to define a “flagman” (also known as a “flagger”) and “watchman/lookout” in § 219.5 as those terms are currently defined in § 214.7.

##### **Highway-Rail Grade Crossing**

FRA is adopting the definition of “highway-rail grade crossing” found in § 225.5 of its accident and incident reporting regulation, which includes all crossing locations within industry and rail yards, ports, and dock areas.

### Highway-Rail Grade Crossing Accident/ Incident

This definition is essentially identical to the description of highway-rail grade crossing impacts found in the definition for “accident/incident” in FRA’s accident and incident reporting regulation. See 49 CFR 225.5.

### Joint Operations

The phrase “rail operations” in this definition encompasses dispatching and other types of operations. As examples, even if Railroad A has fewer than sixteen covered employees, Railroad A is engaged in joint operations with Railroad B if it either dispatches trains for Railroad B and/or enters Railroad B’s yard to perform switching operations. Railroad A is also engaged in joint operations with Railroad B if they operate over the same track at different times of the day.

Railroad A is *not*, however, engaged in joint operations with Railroad B, if they operate over the same track but are physically separated (*e.g.*, through a split rail derail or the removal of a section of rail), since this separation prevents Railroad A’s operations from overlapping with those of Railroad B. FRA is also excluding from joint operations certain minimal operations on the same track for the purposes of interchange, so long as these operations: (1) Do not exceed 20 mph; (2) are conducted under restricted speed; (3) proceed no more than three miles; (4) and, if extending into another railroad’s yard(s), operate into another railroad’s yard(s) solely to set out or pick up cars on a designated interchange track. FRA is excluding these minimal operations from its new “joint operations” definition because of their comparatively lesser safety risk.

### On-Track or Fouling Equipment

This new definition includes any railroad equipment positioned on or over the rails or fouling a track.

### Other Impact Accident

An “other impact accident” includes 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 new definition also includes an impact in which a single car or cut of cars is damaged during operations involving switching, train makeup, setting out, etc.

### Person

As amended, this definition adopts the existing language in § 219.9 and

adds an independent contractor who provides goods or services to a railroad to the scope of whom or what is considered a “person” under this part (*e.g.*, a service agent such as a collection site or laboratory) See 49 CFR part 40, subpart Q—Roles and Responsibilities of Service Agents. Service agents are already required to comply with both part 219 and part 40, so this amendment is a clarification that makes no substantive changes.

### Plant Railroad

For clarification, FRA has added language defining when an entity’s operations do *not* qualify for plant railroad status.

### Raking Collision

As newly defined, 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. A collision that occurs at a turnout is not a raking collision.

### Regulated Employee and Regulated Service

A regulated employee is any employee subject to this part: a covered employee, an MOW employee, and an employee of a railroad or a contractor to a railroad who performs covered service or MOW activities. Correspondingly, regulated service is any duty which makes an employee subject to this part.

### Side Collision

A side collision occurs when one consist strikes the side of another consist at a turnout, including a collision at a switch or at a railroad crossing at grade.

### Tourist, Scenic, Historic, or Excursion Operation That Is Not Part of the General Railroad System of Transportation

To be considered not part of the general railroad system of transportation, a tourist, scenic, historic, or excursion operation must be 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).

### Watchman/Lookout

This definition is identical to that in § 214.7, subpart C of part 214, roadway worker protection.

Revised definitions include:

### Covered Employee

As revised, a “person” includes an employee, volunteer, and probationary

employee. FRA has also updated the reference to the hours of service laws (49 U.S.C. ch. 211). Neither change is substantive.

### Covered Service

FRA is adding examples of covered service and a reference to appendix A to 49 CFR part 228, Requirements of the Hours of Service Act: Statement of Agency Policy and Interpretation. No substantive changes are intended.

### FRA Representative

As proposed, the definition of “FRA representative” is amended to include the oversight contractor for FRA’s Drug and Alcohol Program and the staff of FRA’s Associate Administrator for Railroad Safety.

### Impact Accident

In its initial implementation of this part, FRA excepted derailment and raking collisions from its definition of “impact accident” because it formerly believed these types of collisions were not caused by human factors. (See 50 FR 31539 and 31542, Aug. 2, 1985 and 54 FR 39647, Sep. 27, 1989). FRA is removing these exceptions after learning that human factors such as fatigue and impairment can and do contribute to both derailment and raking collisions.

As additional clarification, FRA is excluding the impact of rail equipment with “naturally-occurring obstructions such as fallen trees, rock or snow slides, livestock, etc.” from its definition of an impact accident. FRA is also incorporating guidance stating 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 usually permanently placed at the end of a line, while derails can easily be moved from place to place.

### Medical Facility

As amended, a “medical facility” is an independent (*i.e.*, not maintained by the railroad) site which is able to collect blood and urine specimens for PAT testing and, if necessary, treat an employee who has been injured in a PAT testing event.

### Railroad Property Damage or Damage to Railroad Property

As proposed, the amended definition of “railroad property damage or damage to railroad property” means damage to railroad property, including damage to on-track equipment, signals, track, track structure, or roadbed; and labor costs, including hourly wages, transportation costs, and hotel expenses; but excluding damage to lading and the cost of



clearing a wreck; *except that* the cost of contractor services, of renting and operating machinery, and of any additional damage caused while clearing the wreck *is* included when calculating railroad property damage to determine whether PAT testing is required under FRA's regulations. These clarifications are meant to enable easier compliance with this part, and no substantive changes are intended.

#### Train Accident

As amended, the definition of "train accident" refers to rail equipment accidents under § 225.19(c) which include, but are not limited to, collisions, derailments, and other events involving the operation of on-track or fouling equipment.

#### Train Incident

As amended, a "train incident" is defined as an event involving the operation of on-track or fouling equipment that results in a casualty, but does not result in damage to railroad property exceeding the applicable reporting threshold.

#### Deleted Definitions

As proposed, FRA is deleting the definitions of "General Railroad System of Transportation," and "Train," since these terms have been superseded by newly added definitions and amendments in this rule. FRA received no comments on these deletions.

#### Section 219.11—General Conditions for Chemical Tests

In its comments, the NCRMA asked FRA to impose conditions on urine specimen collections conducted under this part (*e.g.*, that FRA require a railroad to transport an employee to a company owned or contracted facility, or that drinking water not be used during the urine specimen collection process). With the exception of its PAT testing program, which is discussed below, FRA is prohibited from doing so, because the Department's Procedures for Workplace Drug and Alcohol Testing Programs (49 CFR part 40 or part 40) control the procedures and facilities used in FRA (non-PAT) and other DOT agency testing. FRA is authorized to enforce railroad compliance with part 40 requirements, but may not impose new requirements of its own. Therefore, for example, FRA cannot specify that only non-drinking water sources be used during random testing, because part 40 already regulates collection site conditions.

Because it predates part 40, FRA PAT testing is exempt from part 40's requirements. FRA therefore has the

authority to set its own PAT testing protocols, which are found in appendix C to this part. PAT testing blood and urine specimens must be collected at an independent medical facility, such as a hospital or physician's office. By definition an independent medical facility cannot be railroad owned or controlled, and it meets the NCRMA's requests for privacy, heat, and sanitation during specimen collection.

New paragraph (a)(2) clarifies that a regulated employee who is 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 does not apply to pre-employment drug testing of applicants for regulated service positions.

#### Paragraph (b)

Paragraph (b)(1) clarifies 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.

As proposed, in paragraph (b)(2), FRA is replacing the phrase "has sustained a personal injury" with "is suffering a substantiated medical emergency," to allow treatment for medical emergencies that do not involve a personal injury (*e.g.*, a stroke) to take priority over required FRA testing. A medical emergency must be an acute medical condition requiring immediate medical care, and a railroad may require an employee to submit proof that that he or she had experienced one by providing, within a reasonable time period after, verifiable documentation of the emergency from a credible outside professional.

#### Paragraph (g)

In addition to the PAT testing requirements of subpart C and the signs and symptoms of drug and alcohol influence, intoxication, and misuse, paragraph (g) now requires a supervisor to be trained on the signs and symptoms of certain prescription drugs that can have acute behavioral and apparent physiological effects. To facilitate this training, FRA is developing a module for both supervisors and employees that will cover the required material and be made available on its Web site. In lieu of the previous minimum of three hours of training, FRA is requiring a supervisor to be able to demonstrate an understanding of the course material, usually through a written or oral examination at the end of the course.

#### PAT and Reasonable Suspicion Testing

Paragraph (a) adopts FRA's long-established guidance that a railroad may exceed employee HOS limitations if all three of the following conditions are met: (1) The excess service was necessary and solely caused by the railroad's completion of PAT or reasonable suspicion testing; (2) the railroad used due diligence to minimize the excess service; and (3) the railroad collected the PAT or reasonable suspicion specimens within the time limits of § 219.203(d) (for PAT testing) or § 219.305 (for reasonable suspicion testing). The railroad must still submit an excess service report, however.

#### Reasonable Cause Testing

Reasonable cause testing, like PAT and reasonable suspicion testing, is triggered by the occurrence of a specified but unpredictable event (in this case, 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). For this reason, FRA will not pursue an HOS violation if any excess service was caused solely by a railroad's decision to conduct reasonable cause testing, provided the railroad used reasonable due diligence to complete the test and did so within the time limitations of § 219.407 (*i.e.*, within eight hours of the observation, event or supervisory notification that was the basis for the test). However, because reasonable cause testing, unlike both PAT and reasonable suspicion testing, is authorized, but not required by part 219, paragraph (b) correspondingly authorizes, but does not require, a railroad to exceed HOS limitations to complete reasonable cause testing. As with mandatory PAT and reasonable suspicion testing, a railroad must file an excess service report if it decides to exceed HOS limitations to conduct optional reasonable cause testing.

#### Random Testing

As proposed, paragraph (c) adopts FRA's longstanding guidance that completion of a random test does *not* excuse compliance with a regulated employee's HOS limits, *unless* the circumstances of the employee's test require the employee to provide a directly observed urine specimen. A directly observed urine collection must be performed whenever an employee's previous test results or current behavior indicate the possibility of specimen tampering (see § 40.67). As with PAT, reasonable suspicion, and reasonable cause tests, the occurrence of such

circumstances is unpredictable. FRA will therefore not pursue an HOS violation provided the railroad conducts the random test with due diligence and files an excess service report.

Paragraph (d)

As proposed, paragraph (d) clarifies that because follow-up tests, like random tests, are scheduled by the railroad, follow-up testing must be completed within a covered employee's HOS limits. A railroad may place an employee on duty solely for the purpose of a follow-up *drug* test any time the employee is subject to being called for duty; a railroad may place an employee on duty for a follow-up *alcohol* test only if the employee's return-to-duty agreement requires total abstinence from alcohol use, since legitimate alcohol use is allowed so long as it is in compliance with the prohibitions of § 219.101. A railroad that chooses to place an employee on duty solely for the purpose of follow-up testing must document why it did so and provide the documentation to FRA upon request.

Paragraph (c)

As proposed, a railroad can make this part's required educational materials available to its regulated employees by posting them continuously in an easily visible location at a designated reporting place, provided the railroad also supplies a copy to each labor organization representing a class or craft of regulated employees (if applicable). Alternatively, a railroad can make these materials available by posting them on a Web site accessible to all regulated employees; any distribution method that can ensure the accessibility of these materials to all regulated employees is acceptable.

For MOW employees only, however, FRA is initially requiring distribution of individual hard copies of educational materials, since these employees are being introduced to the requirements of part 219. This individual distribution requirement applies for three years after the effective date of this final rule, although it does not apply to an applicant for a regulated service position who refuses a pre-employment test or has a pre-employment test result indicating a part 219 violation.

*Section 219.25—Previous Employer Drug and Alcohol Checks*

This new section reminds railroads and contractors that they must comply with § 40.25, which requires an employer to conduct a search (for non-negative test results, e.g., positives, substitutions, and adulterations) of a new hire's past two years of drug and

alcohol test records before that individual can perform any DOT safety-sensitive functions. This requirement applies only to the railroad or contractor's direct employees (e.g., a railroad has no responsibility to conduct a background check on a contractor's direct employees, since that responsibility belongs to the contractor). A railroad must also comply with the prior drug and alcohol conduct requirements of § 240.119(c) for certified locomotive engineers and § 242.115(e) for certified conductors.

**Subpart B—Prohibitions**

*Section 219.101—Alcohol and Drug Use Prohibited*

Paragraph (a)(1)

In the NPRM, FRA had asked for comment on whether it should remove part 219.101's prohibitions against the on-duty possession of alcohol and controlled substances. FRA modeled these prohibitions after those in Rule G, a longstanding railroad operating rule which originally prohibited the on-duty use and possession of alcohol, and was later amended to include controlled substances as well. See 49 FR 24266, June 12, 1984.

Many commonly prescribed drugs, such as muscle relaxants and pain relievers, are controlled substances. As strictly read, § 219.101 prohibits the on-duty possession of not only illicit drugs but many prescription drugs with legitimate medical uses (with the exception of any controlled substance prescribed in accordance with § 219.103). Similarly, because § 219.101 prohibits the on-duty possession of alcohol, if strictly read, this section also bans the on-duty possession of any over-the-counter cough and cold remedy that contains alcohol. In the NPRM, FRA asked for comment on whether it should remove § 219.101's prohibitions against on-duty possession of controlled substances and alcohol because they could be construed to prohibit the possession of legal drugs and remedies on railroad property. FRA noted that no other DOT agency prohibits the on-duty possession of both controlled substances and alcohol, and that a railroad remains free to impose discipline for such possession under its own authority.

Labor commented that FRA should clarify its policy on prescription use, as did the NTSB. The NTSB opposed FRA's proposal to remove 219.101's prohibitions against the on-duty possession of controlled substances and alcohol, without explanation.

As proposed, FRA is therefore retaining but clarifying this prohibition, which, as amended, prohibits the use or

possession of controlled substances and alcohol by a regulated employee while "on duty and subject to performing regulated service for a railroad." This prohibition applies not only when a regulated employee is actually performing regulated service, but also when the employee is subject to performing regulated service.

Paragraph (a)(4)

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. However, 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.

As proposed, FRA is adding 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 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. Although Labor opposed allowing a railroad to impose discipline under its own authority in this circumstance, this is not a substantive change, since FRA guidance has long allowed this narrow exception.

Paragraph (a)(5)

Paragraph (a)(5) states that a Federal test result with an alcohol concentration below 0.02 is a negative result that a railroad may not use as evidence of alcohol misuse, either as evidence in a company proceeding or as a basis for subsequent testing under company authority. A railroad may conduct additional company testing only if it has an independent basis for doing so.

As proposed, FRA is amending this paragraph to adopt its previously stated policy that a railroad has an independent basis for a subsequent company authority alcohol test only when an employee continues to exhibit signs and symptoms of alcohol use after having had a negative FRA reasonable suspicion alcohol test result. If a railroad has an independent basis to conduct a subsequent alcohol test under company authority, the company test result stands independent of the prior FRA test result.

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

In the NPRM, FRA asked railroads to submit comments on their 30 years of administering this section, which has been unchanged since the inception of part 219 in 1985. The NTSB, the sole responder, commented that this section did not adequately address the safety concerns raised by the use of prescription and over-the-counter (OTC) drugs, particularly diphenhydramine and other sedating antihistamines that could impair performance. In its comment, the NTSB reiterated R-13-01, in which it recommended that FRA address employees' underlying medical conditions by developing medical certification regulations, a recommendation that is beyond the scope of this rule.

In response to the NTSB's other concerns, however, FRA is developing a training module which will cover the more commonly used prescription and OTC drugs that could have adverse effects, including diphenhydramine. This module, which will be downloadable for free on FRA's Web site, will also contain general information on the best practices to follow when using prescription and OTC drugs. FRA will inform its regulated entities when this module is available for distribution.

### Section 219.104—Responsive Action

FRA is amending this section to clarify that: (1) With the exception of the right to a hearing, an applicant for regulated service who has refused to take a pre-employment test is entitled to all of the protections of this part; (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) a regulated employee is entitled to request a hearing under this section following an alleged violation of § 219.101 or § 219.102.

#### Paragraph (a)

Paragraph (a)(2) emphasizes that none of the requirements in this section apply to tests conducted under company authority. FRA is also removing the word "mandatory" because it is inaccurate, since neither reasonable cause nor pre-employment alcohol testing are mandated by part 219. If, however, a railroad does decide to conduct a reasonable cause or pre-employment alcohol test under FRA authority, a regulated employee or applicant for regulated service who refuses the test is subject to the consequences for refusals found in this section.

#### Paragraph (b)

Previously, paragraph (b) required a railroad, before "withdrawing" an employee from covered service, to provide notice to the employee of the reason for his or her withdrawal. This notice must be in writing, although a railroad may first notify an employee verbally, if the railroad provides written notice to the employee as soon as practicable. In its written removal notice, the railroad must include a statement prohibiting the employee from performing any DOT safety-sensitive functions until he or she has successfully completed the evaluation, referral, and treatment processes required for return-to-duty under part 40. FRA believes receipt of this information will discourage an employee from job hopping in an effort to avoid compliance with part 40's return-to-duty requirements. A railroad may use this notice to comply with § 40.287's requirement to provide each employee who violates a DOT drug and alcohol regulation with a listing of SAPs who are both readily available to the employee and acceptable to the railroad, by providing the contact information (name, address, telephone number, and, if applicable, email address) for each SAP on its list. (Of course, a railroad may also provide this information separately.)

#### Paragraph (c)

Previously, paragraph (c)(1) allowed an employee to request a hearing if the employee denied "that the test result is valid evidence of alcohol or drug use prohibited by this subpart." FRA has removed this phrase because 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). 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 is amending paragraph (c)(4) to clarify that its statement that part 219 does not limit any 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)

As stated above, FRA PAT testing pre-dates part 40 and has always been excepted from DOT's testing procedures. Because the primary purpose of FRA PAT testing is accident

investigation, FRA has always tested a wider variety of specimens (*i.e.*, blood, post-mortem tissue specimens) for a wider variety of substances (e.g., barbiturates and benzodiazepines) than part 40 testing does. A regulated employee can therefore have a PAT test with a positive result that would not be detectable or duplicable under DOT procedures (e.g., a positive PAT blood test result for benzodiazepines). With respect to responsive action, however, PAT testing follows part 40 requirements, by requiring a negative return-to-duty test and a minimum of six negative follow-up tests for the substance of the original positive in the first 12 months after returning to regulated service (certified locomotive engineers and conductors have different follow-up testing minimums, *see* §§ 240.119(d)(2) and 242.115(f)(2)).

To ensure that any regulated employee who has had a positive PAT test result is in compliance with FRA's return-to-duty and follow-up requirements, in addition to Part 40 tests, FRA is allowing company tests to fulfill these requirements where necessary. If and only if, the substance of the employee's original PAT positive is not a drug listed in § 40.5's definition of "Drug," a railroad may conduct return-to-duty and follow-up tests for that substance under its own authority, provided the railroad's procedures mirror those of part 40 and the substance is on the company test's panel. FRA is allowing company testing in this limited circumstance because of the important role return-to-duty and follow-up tests play in maintaining an employee's abstinence from substance abuse in the first year following the employee's return to performing regulated service.

#### Paragraph (e)

FRA is adding new paragraph (e) to clarify when § 219.104's requirements do *not* apply.

The language formerly in paragraph (a)(3)(i), which stated that the requirements of this section do not apply to actions based on alcohol or drug testing that is not conducted under part 219, can now be found in paragraph (e)(1).

Paragraph (e)(2) clarifies that this section's requirements do *not* apply to Federal alcohol tests with a result less than 0.04. As mentioned above in FRA's discussion of § 219.101(a)(4), a Federal test result that is .02 or greater but less than .04 proves that an employee has recently used alcohol, but not that the employee is impaired. Because an employee who has a test result in this range is not in violation of § 219.101,

the only consequence allowed under this part is the removal of the employee from regulated service for a minimum of eight hours. All other actions following an alcohol test result below .04, including the administration of return-to-duty or follow-up tests, must therefore be conducted under a railroad's own authority.

Paragraph (e)(3) clarifies that although parts 240 and 242 require a substance abuse evaluation for 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, an off-duty conviction or completed state action is not a violation of § 219.101 or § 219.102.

Paragraph (e)(4) clarifies that this section does not apply to an applicant who declines to participate in pre-employment testing before the test begins.

Similarly, paragraph (e)(5) clarifies 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.

In contrast, paragraph (e)(6) clarifies that an applicant who has tested positive or refused a DOT pre-employment test must complete the return-to-duty requirements in paragraph (d) before performing DOT safety-sensitive functions subject to the drug and alcohol regulation of any DOT agency. Section 40.25(j) prohibits an employee who has tested positive or refused a test from performing any DOT safety-sensitive functions until and unless the employee documents successful completion of part 40's return-to-duty process.

#### *Section 219.105—Railroad's Duty To Prevent Violations*

##### Paragraph (a)

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 clarifying that a railroad's "actual knowledge" of such a violation is limited to the knowledge of a railroad manager or supervisor in the employee's chain of command. A manager or supervisor is 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 does not by itself constitute actual knowledge);

(2) learns from a § 40.25 background check of a previous employer's drug and alcohol records that an employee had a § 219.101 or § 219.102 violation and did not complete

§ 219.104's return-to-duty requirements; or (3) receives an employee's admission of prohibited alcohol possession or misuse or drug abuse.

##### Paragraph (b)

FRA is not amending paragraph (b) of this section. Instead, as guidance FRA is reprinting the 1989 preamble discussion which, in proposing this section, explained its purpose as:

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. While this paragraph places an affirmative duty on a railroad to use due diligence to prevent violations of § 219.101 or § 219.102, a railroad that can show it has done so has only limited liability under this part for violations of its prohibitions by individual employees. Since what constitutes due diligence under this provision varies on a case-by-case basis, a railroad that is uncertain about its applicability in a given situation should contact FRA for guidance.

##### Paragraph (c)

New paragraph (c) prohibits the design and implementation of any railroad drug and/or alcohol education, prevention, identification, intervention, or rehabilitation program or policy that circumvents or otherwise undermines the requirements of part 219. A railroad must make all documents, data, or other records related to such programs or policies available to FRA upon request.

##### Paragraph (d)

##### Rule G Observations

In its guidance, FRA required a railroad's supervisors to make and record each quarter a total number of "Rule G" observations equivalent, at a minimum, to the railroad's total number of covered employees. Each Rule G observation should be made sufficiently close to an employee to enable the supervisor to determine whether the employee was displaying signs and symptoms of impairment requiring a reasonable suspicion test.

In the NPRM, FRA requested comment on whether § 219.105 should adopt this guidance by requiring a specific number of Rule G observations; FRA was particularly interested in the safety benefits versus the costs and paperwork burdens of such a requirement. In response, the Associations commented that FRA's requirement for each supervisor to be trained in signs and symptoms of drug and alcohol abuse already ensured that railroad supervisors were automatically aware of what to look for when observing an employee's demeanor and behavior. Therefore, according to the Associations, requiring a specific number of what were essentially constant supervisory observations to be systematically recorded would be a paperwork exercise that added nothing to safety.

Because reasonable suspicion and reasonable cause testing share the same check box on DOT's drug and alcohol chain of custody forms, FRA's MIS data does not distinguish between tests conducted under mandatory reasonable suspicion authority and tests conducted under discretionary reasonable cause. While there is no direct correlation showing that Rule G observations increase or result in reasonable suspicion tests, FRA believes that each year's consistently low total of reasonable suspicion tests indicates the continuing need to focus supervisory attention on the use and importance of reasonable suspicion testing as deterrence. To make Rule G observations both more meaningful and less burdensome, new paragraph (d) adopts FRA's previous guidance requirements but: (1) Decreases the minimum annual number of observations supervisors must make and record from four to two times a railroad's total number of covered employees, and (2) requires each observation to be sufficiently up close and personal to determine if a covered employee is displaying signs and symptoms indicative of a violation of the prohibitions in this part. The latter requirement is intended to ensure that supervisory observations are of individuals rather than collective sweeps of multiple employees.

#### *Section 219.107—Consequences of Refusal*

This section requires an employee who has refused to provide breath or body fluid specimens when required by part 219 to be disqualified from performing covered service for nine months. As suggested by SAPlist.com, FRA is deleting the word "unlawful" from the title of this section, since it

implies that there are “lawful” refusals. This is not a substantive change.

#### Paragraph (b)

Paragraph (b) requires a railroad, before withdrawing an employee from regulated service, to provide notice to the employee of the reason for the withdrawal and the procedures in § 219.104(c) under which the employee may request a hearing. As proposed, FRA is clarifying that this notice must be in writing, although a railroad may initially provide an employee with verbal notice if the railroad provides written notice to the employee as soon as practicable.

#### Paragraph (c)

This section prohibits a railroad with notice that an employee has been withdrawn from regulated service from authorizing or permitting the employee to perform any regulated service on its behalf. The railroad may, however, authorize or permit the employee to perform non-regulated service.

### Subpart C—Post-Accident Toxicological Testing

#### Section 219.201—Events for Which Testing Is Required

##### Paragraph (a)

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. As proposed, FRA is amending the definitions of these qualifying events and adding a new qualifying event that requires PAT testing, “Human-Factor Highway-rail Grade Crossing Accident/Incident.”

- Major Train Accidents

As proposed, FRA is clarifying that the fatality criteria for a major train accident is met by the death of “any person,” including an individual who is not an employee of the railroad.

Also as proposed, FRA is increasing the property damage threshold for major train accidents from \$1,000,000 to \$1,500,000 to account for inflation since January 1, 1995, when FRA last raised the damages threshold for major train accidents from \$500,000 to \$1,000,000. As noted by the AAR in its comment supporting this amendment, reducing the number of events qualifying as

major train accidents correspondingly reduces the number of employees subject to PAT testing, which reduces such railroad costs as lost opportunities and wages.

- Impact Accidents

See discussion in § 219.5 above.

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

In § 219.201(b), FRA prohibits PAT testing after a highway-rail grade crossing accident. FRA carved out this PAT testing exception after concluding that there was no justification for testing members of the train crew since they could not have played any role in the cause or severity of the highway-rail grade crossing accident. By the time a train crew spots a vehicle or other obstruction on the track, the weight and momentum of the train prevent the crew from stopping in time to avoid a collision.

FRA continues to believe that the members of a train crew should be excepted from PAT testing after the occurrence of a highway-rail grade crossing accident. As proposed, however, FRA is narrowing this blanket exception by adding a new qualifying event, “Human-factor highway-rail grade crossing accident/incident” in paragraph (a)(5), to allow the PAT testing of a signal maintainer, flagman, or other employee only if a railroad’s preliminary investigation indicates that the employee may have played a role in the cause or severity of the accident. This amendment responds to NTSB Recommendation R-01-17, in which the NTSB had 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.

New paragraph (a)(5)(i) contains the criteria for a “human-factor highway-rail grade crossing accident/incident.” This paragraph requires PAT testing after a highway-rail grade crossing accident/incident whenever there is reason to believe that a regulated employee has 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 in FRA’s grade crossing regulation (*see* 49 CFR 234.209), a grade crossing accident/incident involving a § 234.209

violation qualifies as a human-factor highway-rail grade crossing accident/incident for purposes of PAT testing.

Under paragraphs (a)(5)(ii) and (iii), PAT testing after a highway-rail grade crossing accident/incident is also required if the event involved violations of the flagging duties found in FRA’s grade crossing regulation. *See* 49 CFR 234.105(c), 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 paragraphs (a)(5)(ii) and (iii), an employee who fails to comply with this flagging requirement is subject to PAT testing if a highway-rail grade crossing accident/incident then occurs. Under paragraph (a)(5)(iv), FRA is further narrowing its PAT testing exception for highway-rail grade crossing accident/incidents by requiring PAT testing if a fatality of a regulated employee is involved. As with fatal train incidents, a deceased regulated employee is subject to post-mortem PAT testing regardless of whether the employee was at fault. For example, a regulated employee who died while operating an on-rail truck that collided with a motor vehicle at a highway-rail grade crossing is subject to post-mortem PAT testing regardless of who was at fault for the collision.

Similarly, paragraph (a)(5)(v) requires PAT testing after a highway-rail grade crossing accident/incident if a violation of an FRA regulation or railroad operating rule by a regulated employee may have played a role in the cause or severity of the accident/incident. While paragraphs (a)(5)(i)–(iv) of this section specify the circumstances under which PAT testing is required for highway-rail grade crossing accidents/incidents involving human-factor errors, paragraph (a)(5)(v) serves as a catch-all provision that requires 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)

As discussed above, FRA is narrowing this grade crossing exception to allow PAT testing for human-factor highway-rail grade crossing accident/incidents, and is amending the language in this paragraph accordingly.

SEPTA had asked FRA to clarify whether the contributing action of a

motor vehicle operator within a grade crossing could trigger the PAT testing of a MOW employee. Any employee involved in a highway-rail grade crossing accident is excepted from PAT testing *unless* a railroad's preliminary investigation indicates that the employee's actions may have contributed to the occurrence or severity of the accident; this general exception applies to all regulated employees and is not affected by the addition of MOW employees to this part.

*Section 219.203—Responsibilities of Railroads and Employees*

Paragraph (a)(1)

Paragraph (a)(1) requires 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) to 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, as required by FRA's amended PAT testing recall provisions in paragraph (e) of this section.

Paragraph (a)(2)

Paragraph (a)(2) specifies that the remains of an on-duty employee who has been fatally injured in a qualifying PAT testing event must undergo post-mortem PAT testing if the employee dies within 12 hours of the event. This requirement applies regardless of whether the employee was performing regulated service, was at fault, or was a direct employee, 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)

Paragraph (a)(3) specifies which regulated employees must be tested for major train accidents. In paragraph (a)(3)(i), FRA requires all crew members of *on-track equipment* involved in a major train accident to be PAT tested, regardless of fault—a requirement that already applies to all train crew members involved in a major train accident. *See* § 219.203(a)(3). In addition, paragraph (a)(3)(ii) requires 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)

In paragraph (a)(4), which applies specifically to fatal train incidents, FRA proposed that an individual must die

within 12 hours of the incident to qualify for post-mortem PAT testing. The NTSB suggested that FRA instead define a PAT testing fatality as one that occurred within 30 days of the incident, to match its own definition and that of FMCSA's. FRA's proposed 12-hour time limit applies to the post-mortem *testing* of a fatality, however, not to the *reporting* of its occurrence, as the NTSB and FMCSA time limits do. The result of a post-mortem PAT test conducted up to 30 days later would fail to indicate an individual's condition at the time of an incident, and would have no probative value because any alcohol and most controlled substances present in the individual when the accident occurred would have metabolized long before the test was conducted. FRA is therefore adopting its proposal that post-mortem PAT testing is required only if an individual dies within 12 hours of an incident.

Paragraph (a)(5)

Paragraph (a)(5) specifies which regulated employees must be PAT tested following human-factor highway-rail grade crossing accidents/incidents. 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 must be PAT tested. Paragraphs (a)(5)(ii) and (iii) clarify the testing requirements for human-factor highway-rail grade crossing accidents/incidents under § 219.201(a)(5)(ii) and (iii). If a grade crossing activation failure occurs, these paragraphs require PAT testing of a regulated employee responsible for flagging (either flagging highway traffic or acting as an appropriately equipped flagger as defined in § 234.5), if the employee either fails to flag or to ensure that the required flagging occurs, or if the employee contributes to the cause or severity of the accident/incident.

Paragraph (a)(5)(iv) states that only the remains of a fatally-injured regulated employee(s) involved in a human-factor highway-rail grade crossing accident/incident under § 219.201(a)(5)(iv) must be post-mortem PAT tested.

Paragraph (a)(5)(v) states that only a regulated employee who has violated an FRA regulation or railroad operating rule and whose actions may have contributed to the cause or severity of the event must be PAT tested in the event of a human-factor highway-rail grade crossing accident/incident.

Paragraph (a)(6)

Paragraph 219.203(a)(3) requires a railroad to 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 can immediately determine that the employee had no role in the cause or severity of the event. If a railroad determines that an event qualifies for PAT testing, the railroad must consider the same immediately available information to determine whether an employee should be subject to or excluded from PAT testing.

Correspondingly, paragraph (a)(6) requires a railroad to make a PAT testing determination when an employee survives a human-factor highway-rail grade crossing accident/incident. There is no determination to be made, however, when a regulated employee has been involved in a major train accident or an employee has been fatally injured in a qualifying event while on-duty; in these circumstances the employee must be post-mortem PAT tested, as specified in paragraphs (a)(6)(i) and (ii).

Paragraph (b)—Railroad Responsibility

Paragraph (b)(1) requires a railroad to take all practicable steps to ensure that each regulated employee subject to PAT testing provides the required specimens. This includes 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, since paragraph (e) of this section amends FRA's recall provisions to allow employee recall in such circumstances.

Paragraph (b)(3) adopts longstanding FRA guidance that FRA PAT testing takes precedence over any toxicological testing conducted by state or local law enforcement officials. *See* Interpretive Guidance Manual at 20.

Paragraph (c)—Alcohol Testing

Paragraph (c) allows a railroad to require a regulated employee who is subject to PAT testing to undergo additional PAT breath alcohol testing if the employee is still on, and has never left, railroad property.

Paragraph (d)—Timely Specimen Collection

New paragraph (d)(1) requires a railroad: (1) To make "every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident," and, (2) if the railroad was unable to collect specimens within four hours of the qualifying event, to prepare and maintain a record

stating why the test was not promptly administered (the railroad is still required to collect the specimens as soon thereafter as possible, however, under § 219.203(b)(1)).

Previously, § 219.209(c) required a railroad to notify FRA's Drug and Alcohol Program Manager immediately by phone whenever a specimen collection took longer than four hours, and to prepare a written explanation for any delay in specimen collection beyond four hours; submission of that report, however, was required only upon request by FRA. As amended in § 219.203(d)(1), FRA is reiterating most of the requirements formerly in § 219.209(c), but is now requiring a railroad to submit its written report within 30 days after expiration of the month during which the qualifying event occurred.

#### Paragraph (e)—Employee Recall

As proposed, FRA eliminated its previous requirement that a qualifying PAT event had to have occurred during the employee's duty tour.

FRA has simplified its employee recall provisions by requiring a regulated employee to be immediately recalled and placed on duty for PAT testing if only two conditions are met: (1) The railroad could not retain the employee in duty status because the employee went off duty under normal carrier procedures before the railroad instructed the employee to remain on duty pending its testing determination; *and* (2) the railroad's preliminary investigation indicates a clear probability that the employee played a role in the cause or severity of the accident/incident. An employee who has been transported to receive medical care is considered to be on-duty for purposes of PAT testing. A railroad may also PAT test an employee who has failed to remain available for PAT testing as required.

Paragraph (e)(3) requires an employee to be recalled regardless of whether the qualifying event occurred while the employee was on duty, although a railroad is prohibited from recalling an employee if more than 24 hours has passed since the event. An employee who has been recalled for PAT testing must be placed on duty before he or she is PAT tested.

Paragraph (e)(4) specifies that both urine and blood specimens must be collected from an employee who has been recalled for PAT testing. An employee who left railroad property before being recalled can be PAT tested for drugs only, since the employee could have legitimately used alcohol after leaving. For this reason, a recalled

employee can be PAT tested for alcohol only if the employee never left the railroad's property and the railroad completely prohibits the use of alcohol on its property.

Paragraph (e)(5) requires a railroad to document its attempts to contact an employee who has to be recalled for PAT testing. If a railroad cannot contact and obtain a specimen from an employee subject to mandatory recall within 24 hours of a qualifying event, the railroad must notify and submit a narrative report to FRA as required by paragraph (d)(1). In its report, 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.

#### Paragraph (f)—Place of Specimen Collection

Paragraph (f) states that an independent medical facility is required only for the mandatory collection of PAT urine and blood specimens since a breath alcohol PAT test (which is authorized, but not required) is not an invasive procedure. Section 219.203(c) authorizes a railroad to conduct FRA breath alcohol testing following a qualifying event, provided this testing does not interfere with the timely collection of urine and blood specimens (as specified in the PAT testing specimen collection procedures in appendix C to this part.

Although FRA still considers it a best practice for a railroad to pre-designate medical facilities for PAT testing, FRA has removed this requirement, which is impracticable for several reasons. First, because the prompt treatment of injured employees must take precedence over any railroad pre-designation, an emergency responder may take an injured employee to a closer but non-designated medical facility. Second, even if a railroad has pre-designated a medical facility, the facility's responding employees may not be aware of or honor this designation.

Paragraph (f)(1) states 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. (A qualified medical professional does not need to meet the requirements of part 40, since part 40 does not apply to FRA PAT testing.) A qualified railroad or hospital contracted collector may also collect or assist in the collection of specimens, provided the medical facility has no objections.

Paragraph (f)(2) clarifies that employees who are subject to

performing regulated service are deemed to have consented to PAT testing under § 219.11(a), just as employees who perform covered service already are. For PAT testing only, FRA allows urine to be collected from an injured regulated employee who has already been catheterized for medical purposes, regardless of whether the employee is conscious. PAT testing is not subject to part 40's prohibition against collecting urine from an unconscious person.

#### Paragraph (g)—Obtaining Cooperation of Facility

In the NPRM, FRA had proposed replacing 1-800-424-8801 with 1-800-424-8802 as the contact number for the National Response Center (NRC). A railroad must contact the NRC when a treating medical facility refuses to collect blood specimens because an employee is unable to provide consent. A commenter suggested that FRA instead replace both 1-800-424-8801 and 1-800-424-8802 with 1-800-424-0201, a toll-free phone number specific to FRA. As the commenter noted, listing 1-800-424-0201 as the contact number for the NRC would make this part consistent with §§ 229.17, 230.22 and 234.7 of this chapter (respectively, Locomotive Safety Standards, Steam Locomotive Inspection and Maintenance Standards, and Grade Crossing Safety). FRA agrees, and is listing 1-800-424-0201 as its sole NRC contact number, in this paragraph, and in §§ 219.207(b) and 219.209(a)(1) of this part.

#### Section 219.205—Specimen Collection and Handling

##### Paragraph (c)

A railroad may no longer order a PAT testing kit directly from the designated FRA PAT testing laboratory (the laboratory specified in appendix B to part 219); the railroad must instead contact FRA's Drug and Alcohol Program Manager to request an order form to obtain a PAT testing kit from the laboratory. FRA will continue to follow its standard practice of making fatality PAT testing kits available only to Class I, Class II, and commuter railroads. If 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.

As proposed, FRA is removing 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)

For greater flexibility, FRA has amended this paragraph to allow a railroad to use other shipment methods besides air freight, provided the 24-hour delivery requirement is met. FRA is also allowing a railroad to hold specimens in a secure refrigerator for a maximum of 72 hours if a specimen's delivery cannot be ensured within 24 hours due to a suspension in delivery services.

#### Paragraph (e)

To ensure greater specimen security, FRA is prohibiting a railroad or medical facility from opening a specimen kit or a transport box after it has been sealed, even if it is later discovered 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 transport box.

#### Section 219.207—Fatality

As discussed above, FRA is replacing 1-800-424-8801 and 1-800-424-8802, the phone numbers for the NRC previously listed in paragraph (b), with 1-800-424-0201. A railroad supervisor who is having difficulty obtaining post-mortem specimens from the local authority or custodian should call 1-800-424-0201 to notify the NRC duty officer.

In paragraph (d), FRA is clarifying that the information in "Appendix C to this part [which] specifies body fluid and tissue specimens for toxicological analysis in the case of a fatality," is also available in the "instructions included inside the shipping kits."

#### Section 219.209—Reports of Tests and Refusals

##### Paragraph (a)(1)

As discussed above, FRA is replacing 1-800-424-8802, the phone number previously listed in this paragraph for the NRC, with 1-800-424-0201. A railroad should call the latter number to notify the NRC of the occurrence of a qualifying post-accident event. The railroad must also notify the FRA Drug and Alcohol Manager; the contact number for doing so, 202-493-6313, is unchanged.

Previously, paragraph (a)(2)(v) of this section required a railroad reporting PAT tests and refusals to include the number, names, and occupations of the involved employees. To protect employee privacy interests and reduce

railroads, reporting burdens, FRA is requiring railroads to report only the number of employees tested.

Paragraph (b) required a railroad to provide a "concise narrative report" to FRA if, as a result of the non-cooperation of an employee or any other reason, the railroad was unable to obtain PAT testing specimens from an employee subject to PAT testing. As amended, a railroad must also notify FRA's Drug and Alcohol Program Manager immediately by phone of the failure. If a railroad representative is unable to speak directly to the FRA Drug and Alcohol Program Manager, the representative must leave a detailed voicemail explaining the circumstances and reasons for the railroad's failure to obtain PAT specimens. The purpose of this telephonic report is to assist both railroads and FRA in determining whether a refusal has occurred.

Paragraph (c) previously required a railroad to maintain records explaining why PAT testing was not performed within four hours of a qualifying event. FRA is deleting this requirement from § 219.209 because it is already addressed in § 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 amending paragraph (b) of this section to adopt part 40's prohibition on standing down (temporarily removing from service) an employee based solely upon a laboratory's confirmation of a non-negative test result, before the railroad's Medical Review Officer (MRO) has completed the result's verification. See § 40.21(a). As in part 40, a railroad may remove an employee from regulated service only after an MRO has verified that the employee has had a confirmed positive test, an adulterated test, or a substituted test.

As amended, paragraph (c) now provides the address of the FRA Associate Administrator for Railroad Safety.

For consistency throughout this part, in paragraph (e), FRA is substituting "Drug and Alcohol Program Manager" for "Alcohol/Drug Program Manager." Also, to enable employees to respond to their test results more easily, FRA is allowing responses to be sent by email.

Paragraph (g)(3) previously provided 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." As

clarification, FRA is adding that a railroad must have additional information regarding an employee's actions or inaction, independent of the employee's involvement in a qualifying event, to justify holding the employee out of service under company authority. As with paragraph (b)'s prohibition against standing down an employee based solely on a confirmed laboratory test result, reports, an employee's involvement in a PAT testing event is not in itself a basis for a railroad's holding the employee out of regulated service.

#### Section 219.213—Refusals; Consequences

Paragraph (b) now requires a railroad to provide *written* notice to an employee who is being withdrawn from service under this part for refusing to provide a specimen for PAT testing. As with § 219.107, FRA is adopting *SAPlist.com*'s suggestion to delete the term "unlawful" from this section's heading, since it implies that there are "lawful" refusals. This is not a substantive change.

#### Subpart D—Reasonable Suspicion Testing

As proposed, reasonable suspicion testing remains in subpart D while reasonable cause testing is now in subpart E; this division underscores the importance of the differences between these types of tests, despite their similarity in names. (To accommodate this restructuring, the Identification of Troubled Employees requirements previously in subpart E have been moved to new subpart K.)

#### Section 219.301—Mandatory Reasonable Suspicion Testing

Paragraph (a) clarifies that a reasonable suspicion alcohol test is not required to confirm an on-duty employee's possession of alcohol.

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

Paragraph (d) requires a regulated employee to undergo reasonable suspicion testing if the employee's condition has stabilized within eight hours.

#### Section 219.303—Reasonable Suspicion Observations

This section contains the requirements for reasonable suspicion observations that were formerly in § 219.300(b).



## Paragraph (b)

In paragraph (b), FRA clarifies 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 amendment incorporates long-standing FRA guidance, since two on-site trained supervisors are rarely available.

Before a reasonable suspicion drug test can take place, a trained on-site supervisor must describe the signs and symptoms that the on-site supervisor has observed of an employee's appearance and behavior to an off-site supervisor, who must confirm that these observations provide a reasonable basis to suspect the employee of drug abuse. Because of privacy concerns, this communication between supervisors may be made by telephone, but not by radio or email.

## Paragraph (c)

New paragraph (c) prohibits a railroad from holding a regulated employee out of service from the time of the employee's reasonable suspicion test to the time of the railroad's receipt of the employee's verified test result (a practice known as "stand down"). A railroad may, however, use its own authority to hold an employee out of service during this period if the railroad has an independent basis for doing so (e.g., the employee is continuing to exhibit signs and symptoms of alcohol use).

## Paragraph (d)

Paragraph (d) requires an on-site supervisor to document as soon as practicable the observed signs and symptoms that were the basis for the supervisor's decision to reasonable suspicion test a regulated employee. FRA is not adopting Labor's suggested alternate language, which essentially restates FRA's own without adding any clarification.

*Section 219.305—Prompt Specimen Collection; Time Limits*

## Paragraph (a)

Paragraph (a) reiterates language formerly in § 219.302(a), which states consistent with the need to protect life and property, reasonable suspicion testing must be promptly conducted following the observations upon which the reasonable suspicion determination was based.

## Paragraph (b)

Paragraph (b) requires a railroad to prepare and maintain a record

explaining the reasons for the delay whenever the railroad does not collect reasonable suspicion breath and/or urine specimens within two hours of the determination to test. If, however, a railroad has failed to collect 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. The eight-hour deadline is met when the railroad has delivered the employee to a collection site where a collector is present and asked the collector to begin specimen collection.

Paragraph (b) also requires a railroad to submit its reasonable suspicion testing records upon request of the FRA Drug and Alcohol Program Manager.

## Paragraph (c)

**Subpart E—Reasonable Cause Testing**

As discussed above, FRA is dividing reasonable suspicion and reasonable cause testing into separate subparts to emphasize that despite the similarity in names, the authority and criteria for mandatory reasonable suspicion testing is very different from that for discretionary reasonable cause testing. Formerly, reasonable suspicion and reasonable cause testing were both located in subpart D; reasonable suspicion testing remains in subpart D while reasonable cause testing is moved to subpart E. In addition, subpart E contains new rule violations tailored to the activities of MOW employees. FRA has re-designated the provisions of former subpart E as new subpart K.

*Section 219.401—Authorization for Reasonable Cause Testing*

Previously, a railroad had three options whenever the conditions for reasonable cause testing were met; the railroad could choose to: (1) Conduct a reasonable cause test under FRA authority, (2) conduct a reasonable cause test under its own (company) authority, or (3) not conduct a reasonable cause test. The railroad could switch among these choices without advance notice. For example, a railroad could conduct one employee's reasonable cause test under FRA authority, and another's under company authority, without any explanation. In many instances, an employee who had received a reasonable cause test was unsure as to what authority the test had been conducted under, while the lack of a consistency requirement led to frequent complaints about disparate treatment among employees.

FRA is now requiring a railroad to choose between using FRA authority or

company authority for reasonable cause testing. A railroad that chooses to use FRA authority must announce its choice to its employees and must use that FRA authority exclusively, by (1) providing notice of its selection of FRA authority in its educational materials; (2) specifying that FRA testing is authorized only after "train accidents" and "train incidents," as defined in § 219.5; and (3) adding new rule violations or other errors to § 219.403 as bases to test. Once a railroad has announced that it will be using FRA authority exclusively for reasonable cause testing, the railroad is prohibited from conducting reasonable cause tests under its own authority after an event listed in § 219.403. The railroad may always, however, use its own authority to test for events that are outside of the FRA criteria for reasonable cause testing listed in this subpart.

*Section 219.403—Requirements for Reasonable Cause Testing*

This section authorizes FRA reasonable cause testing after "train accidents" and "train incidents" as defined in § 219.5, but not after all part 225 reportable "accidents/incidents." As amended, railroads are authorized to conduct FRA 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.

## Paragraph (a)

Section 219.301(b)(2) previously authorized 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." In this rule, FRA is clarifying that the terms "accident/incident" and "accident or incident reportable under part 225" in § 219.301(b)(2) do not authorize FRA reasonable cause testing after all part 225 reportable accidents/incidents.

As defined in § 225.5, the term "accident/incident" includes employee injuries and illnesses that conform with OSHA's recordkeeping/reporting requirements, but do not otherwise fall within FRA's railroad safety jurisdiction. See Accident Reporting Guide at 1–2 ("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").

In its audits, FRA has found numerous instances where this confusion in terms has resulted in a railroad deciding to conduct an FRA reasonable cause test after every reportable injury, even if that injury was unconnected with the movement of on-track equipment (e.g., a slip, trip, or fall that was not related to the movement of on-track equipment where the railroad had no basis 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, the § 225.5 definition of "accident/incident" includes occupational illnesses, such as carpal tunnel syndrome, carbon monoxide poisoning, noise-induced hearing loss, and dust diseases of the lungs, as well as circumstances such as a suicide attempt made by an on-duty employee, that do not authorize FRA reasonable cause testing. See Accident Reporting Guide at 33, and at Appendix E-2 through E-5.

To correct this confusion, FRA is specifying in § 219.403(a) that 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 limit the circumstances under which FRA reasonable cause testing is authorized to a subset of part 225 reportable accident/incidents. (A railroad may, of course, perform a reasonable cause test under its own authority for an accident/incident that does not qualify as a train accident or train incident.)

For consistency with the remainder of this subpart, FRA is also substituting the term "responsible railroad supervisor" for "supervisory employee."

#### Paragraph (b)

Paragraph (b) contains a list of rule violations and other errors that are grounds for FRA reasonable cause testing whenever a regulated employee is directly involved. The rule violations and other errors previously in § 219.301(b)(3) can now be found in paragraphs (b)(1)–(4), (b)(6)–(8), and (b)(10) of this section, without any substantive amendments. Paragraphs (b)(5), (b)(9), (b)(11)–(12), and (b)(13)–(18) contain additional rule violations

and other errors that are new grounds for FRA reasonable cause testing, as discussed below.

#### • Additional Rule Violations or Other Errors Related to Railroad Operating Practices

In paragraphs (b)(5) and (9), FRA is adding 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. Many of these operating rule requirements for switches already provided bases for FRA reasonable cause testing, such as "[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, in paragraph (b)(5), FRA is authorizing reasonable cause testing if a regulated employee fails to restore and secure a main track switch when required.

Although § 218.99 requires a railroad to adopt specific operating rules governing shoving and pushing movements, FRA is authorizing reasonable cause testing only for § 218.99 violations that can pose significant safety concerns, as discussed below. For instance, a railroad is authorized to conduct FRA reasonable cause testing on a regulated employee who fails to provide point protection in accordance with § 218.99(b)(3), but is not authorized to do so if a regulated employee fails to conduct a job briefing.

#### • Additional Rule Violations or Other Errors Related to MOW Employees

Paragraphs (b)(13)–(17) authorize FRA reasonable cause testing for additional rules violations and errors related to the performance of MOW activities: Paragraph (b)(13) authorizes testing 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; paragraph (b)(14) authorizes testing for the failure of a roadway worker-in-charge to notify all affected employees when releasing working limits; paragraph (b)(15) authorizes testing for the failure of a flagman or

watchman/lookout to notify employees of an approaching train or other on-track equipment; paragraph (b)(16) authorizes testing for the failure to ascertain on-track safety before fouling a track; and paragraph (b)(17) authorizes testing for the improper use of individual train detection (ITD) in a manual interlocking or control point.

#### • Additional Rule Violations or Other Errors Related to Covered Service

As proposed, FRA is authorizing reasonable cause testing for three additional rule violations or other errors primarily addressing the actions of covered employees.

First, paragraph (b)(11) authorizes a railroad to conduct FRA 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 (e.g., by temporarily installing a jumper cable and failing to remove it after finishing repairs or testing). This includes the types of unlawful interference described in § 234.209 (grade crossing systems) and § 236.4 (signals).

Second, paragraph (b)(12) authorizes a railroad to conduct FRA reasonable cause testing if a regulated employee has failed to perform required stop-and-flag duties after a malfunction of a grade crossing signal system.

Third, paragraph (b)(18) authorizes a railroad to conduct FRA reasonable cause testing on a regulated employee whose 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.

A contracting company that performs regulated service for a railroad is authorized, but not required, to conduct FRA reasonable cause tests on its regulated employees. Conversely, a railroad is authorized to conduct FRA reasonable cause testing on its contractors when they are performing regulated service on the railroad's behalf.

#### Section 219.405—Documentation Requirements

Although reasonable cause testing remains discretionary, a railroad must create and maintain written documentation of the basis for a reasonable cause test if that test is conducted under FRA authority.

Accordingly, the railroad supervisor who made the determination that reasonable cause exists must promptly document the observations or facts (e.g., the amount of property damage, the rule that was violated, the role of the employee) that were the basis for this determination, although the documentation does not have to be completed before the FRA reasonable cause testing has been conducted.

#### Section 219.407—Prompt Specimen Collection; Time Limitations

This section clarifies that the eight-hour time period for conducting a reasonable cause test runs from the time a railroad supervisor is notified of the occurrence of the train accident, train incident, or rule violation that is the basis for the test.

#### Section 219.409—Limitations on Authority

##### Paragraph (a)

This paragraph contains an amended version of language that was previously in § 219.301(e). As amended, this paragraph states that: (1) 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 is removing the word “compulsory,” which misleadingly implies that FRA reasonable cause testing is required, when it is optional but authorized in certain situations. Third, FRA is removing the second sentence of § 219.301(e), which, in part, stated 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 testing, although such testing should be recorded on DOT’s alcohol custody and control form.

##### Paragraph (b)

For reasons similar to those discussed in § 219.211(b), paragraph (b) of this section prohibits a railroad from holding a regulated employee out of service pending the results of an FRA reasonable cause test. A railroad may, however, hold an employee out of service under its own authority.

##### Paragraph (c)

Paragraph (c) requires a supervisor to make a separate reasonable cause determination for each individual in a

train crew, rather than a collective decision to test the crew as a whole.

#### Subpart F—Pre-Employment Tests

##### Section 219.501—Pre-Employment Drug Testing

##### Paragraph (a)

A regulated railroad employee must have a negative Federal pre-employment drug test result for each railroad for which the employee performs regulated service. This requirement does not apply to contractor employees who perform regulated service for the railroad.

##### Paragraph (b)

As proposed, FRA is moving language previously in this paragraph to paragraph (e), where it will be discussed below.

Paragraph (b) now addresses the pre-employment drug testing requirements for contractor employees. In contrast to the pre-employment drug testing requirements for regulated employees discussed in paragraph (a) above, FRA is not requiring 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 only has 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 is required to have a new Federal pre-employment drug test if he or she switches direct employers by working for a different contractor who provides regulated service to railroads.

##### Paragraph (c)

A railroad is not required to conduct an FRA pre-employment drug test on an applicant or first-time transfer to regulated service if the railroad has already conducted a pre-employment drug test with a negative test result on the applicant or first-time transfer under the authority of another DOT agency. In most cases, this agency will be FMCSA, because railroads often require signal maintainers and MOW employees to hold a CDL as a condition of their employment, and a negative FMCSA pre-employment drug test result is one of the prerequisites to obtaining a CDL. See 49 CFR 382.301. This amendment increases a railroad’s hiring flexibility by allowing the railroad to transfer a CDL holder to first-time regulated service without having to conduct an FRA pre-employment drug test or having to wait for a negative test result (a railroad could, however, choose to

perform a new pre-employment drug test under its own authority). Since many MOW employees already hold CDLs because their jobs require the operation of railroad commercial motor vehicles, this limited exception will substantially lessen the number of pre-employment drug tests railroads will have to perform after the effective date of this final rule.

This exception applies, however, only when an applicant or first-time transfer’s negative DOT pre-employment drug test result is the result of a test conducted by the railroad itself. In other words, a CDL holder who performs regulated service for multiple railroads must have a separate negative pre-employment drug test result for each railroad. For example, a CDL holder who already has a negative DOT pre-employment drug test for Railroad A must still have a negative FRA pre-employment drug test result for Railroad B before he or she can begin performing regulated service for Railroad B.

##### Paragraph (d)

As proposed, new paragraph (d) specifies that an applicant must withdraw his or her application before the drug testing process begins if the applicant wants to decline a pre-employment drug test and have no record kept of that declination.

##### Paragraph (e)

In new paragraph (e), FRA exempts from pre-employment drug testing: (1) An employee who began performing MOW activities for a railroad before the effective date of this final rule; and (2) an employee who began performing regulated service for a small railroad (as defined in § 219.3(c)) before the effective date of this final rule. Both exemptions apply only so long as the employee continues to work for the same railroad that he or she was working for before the effective date of the final rule.

##### Section 219.502—Pre-Employment Alcohol Testing

This section addresses optional pre-employment alcohol testing.

##### Paragraph (a)(5)

Paragraph (a)(5) prohibits a railroad from permitting a regulated employee with an alcohol concentration of 0.04 or greater from performing regulated service until the employee has completed the return-to-duty process in § 219.104(d).

##### Paragraph (b)

Paragraph (b) of this section (addressing pre-employment alcohol

testing) previously contained language identical to § 219.501(b) (addressing pre-employment drug testing), which provides that, as used in subpart H, the term covered employee includes an applicant for pre-employment testing only. It also provided that no record may be maintained if an applicant declines to be tested and withdraws his or her application for employment. As discussed above in § 219.501(b), FRA has amended 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*

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 is amending both of these sentences to clarify that subpart H adopts the requirements found in part 40. FRA is also amending the second sentence to clarify that a railroad must provide written notice to an applicant who has had any type of non-negative FRA test result (*i.e.*, not just a positive, but also an adulteration, substitution, or refusal). A railroad is not required, however, to provide written notification to an applicant who has had a negative FRA pre-employment alcohol or drug test result.

FRA is also amending the third sentence of this section to clarify that a railroad must maintain a record of each application it denies because of the applicant’s non-negative FRA pre-employment test. A railroad must maintain a record for each individual who has had a non-negative test result on a FRA pre-employment test, even if the railroad denied the individual’s application for employment, because an individual who has had such a result must comply with the return-to-service and follow-up testing requirements of part 40 before he or she can begin performing DOT safety-sensitive functions for any employer regulated by a DOT agency. A railroad does not have to maintain a record, however, if an applicant withdraws his or her application to perform regulated service before the testing process begins.

#### *Section 219.505—Non-Negative Tests and Refusals*

Previously, this section prohibited an individual who “refuses” a pre-employment test from performing covered service based upon the application and examination with respect to which such refusal was made. As proposed, FRA has amended this section to specifically prohibit an individual who has refused or who had a non-negative (*i.e.*, a positive, adulterated, or substituted test result) pre-employment test result from performing DOT safety-sensitive functions for any DOT-regulated employer until the individual has completed the Federal return-to-duty process in § 219.104(d). As amended, this section conforms with § 40.25(e), which prohibits an employer who has information that an individual has violated a DOT agency drug or alcohol regulation from using that individual to perform DOT safety-sensitive functions until the employer receives information that the individual has complied with the return-to-duty requirements of part 40 or any DOT agency.

#### **Subpart G—Random Alcohol and Drug Testing Programs**

To achieve deterrence, a random testing program must ensure that each covered employee (including volunteers and probationary employees of a railroad or a contractor to a railroad), believes that he or she is subject to random testing without advance notice each time the employee is on duty and subject to performing covered service.

FRA received no objections to its proposal to subject an employee who performs MOW activities to the same random testing requirements as one who performs covered service. Accordingly, each railroad must submit for FRA approval a random testing plan that ensures each regulated employee believes he or she is subject to random testing without advance warning each time the employee is on-duty and subject to performing regulated service.

As proposed, FRA is revising and expanding subpart G, to clarify and consolidate requirements and to incorporate longstanding published FRA guidance. FRA received no comment on the majority of these changes, which are adopted as proposed without additional discussion.

#### **Subpart H—Drug and Alcohol Testing Procedures**

FRA received no comments on its minor editorial changes to this section, which are adopted as proposed.

#### **Subpart I—Annual Report**

##### *Section 219.800—Annual Reports*

FRA received no comments on its minor editorial changes to this section, which are adopted as proposed.

#### **Subpart J—Recordkeeping Requirements**

##### *Section 219.901—Retention of Alcohol and Drug Testing Records*

FRA received no comments on its proposals to ease recordkeeping burdens by consolidating requirements, removing others, and allowing still others to be maintained electronically. Accordingly, FRA is adopting these proposals without further discussion, except for proposed paragraph (c)(4)(iv), which contained an incorrect reference to prescription drug training records under § 219.103 and FRA has not adopted.

#### **Subpart K—Referral Programs**

For a variety of reasons, commenters found FRA’s proposal to replace its self-referral, co-worker report, and alternative policy requirements with peer support program requirements, to be both confusing and ill-advised. NCRMA and SMART (from this point forward collectively referred to as “Labor,” unless a comment was submitted by only one labor organization), in particular, raised objections and called for clarifications. As Labor noted, the concept of a voluntary peer referral program arose from “Operation Redblock,” a private rail industry initiative to address alcohol abuse. Labor expressed deep misgivings, both that FRA’s proposed peer support programs could harm these existing railroad programs, and that FRA’s proposal to audit each program would invade individual privacy and undermine employee trust in the program. Labor also criticized FRA’s proposal to allow an EAP counselor to function as an alternative to a trained drug and alcohol counselor, because an EAP counselor rarely has specific expertise in abuse and addiction issues. (Typically, an EAP program addresses a broad range of issues, such as marital or financial problems.) Similarly, Labor objected to using peer counselors, noting that a peer is usually a volunteer who provides empathy and advice based on his or her own drug and alcohol problems, without a counseling or medical degree.

The Associations suggested that FRA use the term “peer prevention” instead of “peer support” to emphasize that these programs should be proactive in nature. The Associations also warned

that FRA should audit and release aggregate program data only, because an employee could be discouraged from self-referring if the employee knew that his or her individual data would be subject to FRA examination. Like Labor, the Associations noted that a peer support group is usually composed of selected peers and volunteers rather than medical professionals; the Associations therefore supported allowing an employee who self-refers to have the option of receiving counseling and treatment from a Drug Abuse Counselor (DAC). Overall, the Associations found FRA's proposed subpart K flawed and redundant of the voluntary referral provisions already in § 219.403.

After consideration, FRA agrees that its proposal to mandate the establishment of peer support programs was unnecessary, since privately run railroad programs and FRA's own subpart E policies have both proven effective in identifying and helping employees with drug and alcohol abuse issues. FRA also agrees that its proposed peer support programs could interfere with, or possibly even be detrimental to, existing railroad self-referral programs. Therefore, instead of requiring the adoption of peer prevention programs, FRA is revising and moving its voluntary referral, co-worker report, and alternative policy requirements from subpart E (which has been revised to address reasonable cause testing) to new subpart K.

With the exception of its proposal for non-peer referral programs, which FRA is authorizing but not requiring under this rule, FRA is not adopting its proposal to require peer support programs. To correspond with this decision, FRA is retitling this subpart "Referral Programs" instead of the proposed "Peer Support Programs." As explained in the NPRM, FRA believes subpart E's previous title "Identification of Troubled Employees," to be outdated since the primary purpose of that subpart had always been to evaluate and treat, not merely identify, employees who have substance abuse issues. FRA is also, as proposed, substituting the more commonly used term "program" for "policy."

In addition, FRA is adopting the Associations' recommendation to simplify this rule by requiring all the evaluation, counseling, treatment, and recommendation required by this part to be performed by a DAC. As defined in 49 CFR 242.7, a DAC meets all the credentialing and qualifying requirements of a Substance Abuse Professional (SAP). Title 49 CFR 40.3 defines an SAP A SAP as an individual

who evaluates an employee who has violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare. By definition, therefore, a SAP cannot perform a role in a voluntary referral program. In contrast, a DAC can treat and evaluate an employee enrolled in a voluntary referral program, since the DAC's involvement is not triggered by an employee's drug or alcohol violation. With this caveat, a DAC serves the same function in part this part as a SAP does in part 40.

As mentioned above, FRA is adding an option for a "non-peer referral" program, which authorizes, but does not require, a railroad to accept referrals from family members, supervisors, labor representatives, and other individuals who are not co-workers but who have knowledge of an employee's drug abuse problems. FRA received no objections to its proposal of this additional referral program. To accommodate this third program, FRA is retitling its required "co-worker report" program as a "co-worker referral" program so that henceforth these three programs—voluntary, co-worker, and non-peer—will collectively be referred to as "referral programs."

With the addition of the option for a non-peer program, FRA is reprinting requirements formerly found in subpart E, in a format that breaks these requirements down to make them easier to understand and implement. Both partially excepted small railroads and contractors are excluded from subpart K. Class III railroads that do not qualify for the small railroad exception must comply, however.

#### *Section 219.1001—Requirements for Referral Programs*

##### Paragraph (b)

This paragraph generally outlines the purposes of mandatory voluntary referral and co-worker referral programs. The descriptions of these programs are reworded from those previously in subpart E, and no substantive changes are intended.

##### Paragraph (c)

This paragraph generally outlines the purposes of optional non-peer referral and alternative programs. The description of an alternate program is reworded from the one previously in subpart E, and no substantive change is intended.

##### Paragraph (c)(1)

Although FRA is not otherwise adopting its proposal to require "peer

support groups," FRA is authorizing a railroad to establish a "non-peer referral" program if it chooses to do so. A "non-peer" is an individual who is not considered to be an employee's co-worker, such as a trained supervisor, representative of an employee's collective bargaining organization, or family member.

##### Paragraphs (d)(1), (2), and (5)

These paragraphs restate general conditions for referral programs previously found in subpart E. No substantive changes are intended.

##### Paragraphs (d)(3)–(4)

These paragraphs prohibit referral programs from interfering with the return-to-duty requirements in subpart B and the reasonable suspicion testing requirements in subpart D.

#### *Section 219.1003—Referral Program Conditions*

With the exception of the paragraphs discussed below, the required allowances, conditions, and procedures in this section were previously contained in subpart E.

##### Paragraph (g)

As proposed, FRA is removing its previous minimum of 45 days leave of absence to allow the DAC to determine the period of time an employee needs.

##### Paragraph (h)(3)

Formerly, only co-worker referrals allowed railroads to condition an employee's return to regulated service upon successful completion of a return-to-service medical evaluation. As proposed, a railroad may impose this condition on self-referrals and non-peer referrals as well.

##### Paragraph (h)(4)

As proposed, a railroad must return an employee to regulated service within five working days of a DAC's recommendation that the employee is fit to return.

##### Paragraph (i)

As proposed, this paragraph prohibits a person or entity from changing a DAC's evaluation of an employee or recommendation for assistance. Only the DAC who made the initial evaluation may modify that evaluation and any follow-up recommendations based upon new or additional information.

##### Paragraph (j)

As proposed, the confidentiality conditions in this paragraph, which had previously applied only to candidates

for locomotive certification and locomotive engineers, have been expanded to cover candidates for conductor certification and conductors. Similarly, these requirements no longer apply only to voluntary referrals; co-worker and non-peer referrals are also covered.

#### Paragraph (k)

As proposed, a regulated employee who enters a co-worker or non-peer referral for a verified violation of § 219.101 or § 219.102 must contact a DAC within a reasonable period of time, as specified by the railroad's programs. If a regulated employee does not contact a DAC within this time period, the railroad may investigate the employee's cooperation and compliance with the referral program.

#### Paragraph (l)

As proposed, paragraph (l) requires a DAC to complete a regulated employee's evaluation within 10 working days of the employee's entering a referral program and contacting the DAC. If more than one evaluation is required, the DAC must complete these evaluations within 20 working days. These time frames, which had previously applied only to co-worker referrals, now apply to voluntary and non-peer referrals as well.

#### Paragraph (m)

As proposed, a referral program may not require follow-up treatment, care, or testing that exceeds 24 months beyond the regulated employee's removal from service, unless the regulated employee had committed a substantiated part 219 violation.

#### Section 219.1005—Optional Provisions

This section describes provisions that a railroad is authorized, but not required to, include in its referral program. The inclusion of any of these provisions may be conditioned on the agreement of an affected labor organization.

Paragraph (a) permits a referral program to waive confidentiality if a regulated employee refuses to cooperate in a course of education, counseling, or treatment recommended by a DAC 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 text was previously found in subpart E for voluntary referrals.

Paragraph (a) specifies that nothing in subpart K prevents a railroad or labor organization from adopting, publishing, and implementing referral program policies that offer 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 was previously found in subpart E.

Paragraph (b) requires an alternate program to have the concurrence of the recognized representatives of the regulated employees as shown by a collective bargaining agreement or other document describing the class or craft of employees to which the alternate program applies. This agreement must expressly reference subpart K and the intention of the railroad and the employee representatives that the alternate program applies in lieu of the programs required by subpart K. This language is similar to that previously found in subpart E.

Paragraph (c) requires a railroad to submit a copy of the agreement or other document described in paragraph (b), along with a copy of the alternate program described in paragraph (a), to the FRA Drug and Alcohol Program Manager for approval. FRA will review the program to see if it meets the general standards and intent of § 219.1003. If an alternate policy is amended or revoked, the railroad must notify FRA at least 30 days before the amendment or revocation's effective date. This last requirement was previously in subpart E.

Paragraph (d) specifies that § 219.1007 does not excuse a railroad from the requirement to adopt, publish, and implement § 219.1003 programs for any group of regulated employees not covered by an approved alternate program. A virtually identical provision was previously located in subpart E.

Paragraph (e) references § 219.105(c), which specifies that FRA has the authority to audit any railroad alcohol and/or drug use education, prevention, identification, and rehabilitation program (including, but not limited to, alternate referral programs), to ensure that the program is not designed or implemented to circumvent or otherwise undermine Federal requirements.

#### Appendix A

Appendix A to this part contains a schedule of civil penalties for use in enforcing this part's requirements. FRA has revised the penalty schedule to correspond to the restructuring of and addition of new sections to this part. Because such penalty schedules are statements of agency policy, notice and comment are not required before their issuance. See 5 U.S.C. 553(b)(3)(A). Nonetheless, FRA has revised the

penalty schedule consistent with the previous, public schedule.

#### VII. Regulatory Impact and Notices

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

This final 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 final 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 final rule. Overall, the final rule will result in safety benefits and potential business benefits for the railroad industry. It will 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 will 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 final rule over a 20-year period. It presents costs associated with the various types of drug and alcohol testing in the final rule 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), 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 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). The benefits include not only injury, fatality, and property damage avoidance (accident reduction benefits), but also the savings, or benefit, that will accrue from fewer

PAT tests being conducted due to FRA's increasing the property damage threshold for major train accidents.

For the 20-year period analyzed, the estimated quantified cost that will be imposed on industry totals approximately \$24.3 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).

	Statutory	Discretionary	Total
<b>Costs (20 year)</b>			
PAT Testing—Adding MOW .....	\$52,000		\$52,000
PAT Testing—Impact Def + Xing .....		\$241,974	241,974
Reasonable Suspicion Testing .....	842,398		842,398
Pre-Employment Testing—Adding MOW .....	673,897		673,897
Pre-Employment Testing—Sm, RR .....		29,904	29,904
Random Testing .....	20,863,074		20,863,074
Annual Reporting .....	160,911		160,911
Recordkeeping Requirement .....	1,397,840		1,397,840
<b>Costs Subtotal .....</b>	<b>23,990,120</b>	<b>271,878</b>	<b>24,261,998</b>
<b>Benefits (20 year)</b>			
Accident Reduction .....	115,369,281		115,369,281
PAT Testing Threshold Reduction .....		388,295	388,295
<b>Benefits Subtotal .....</b>	<b>115,369,281</b>	<b>388,295</b>	<b>115,757,576</b>
<b>Net Benefits .....</b>	<b>91,379,161</b>	<b>116,417</b>	<b>91,495,578</b>

Overall, the RIA demonstrates that the costs, both statutory and discretionary, associated with implementing the final 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 will 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 portion of the costs to incur over the next 20-years is \$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*

FRA developed the final rule in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) to ensure potential impacts of rules on small entities are properly considered. Furthermore, FRA invited all interested

parties to submit data and information regarding the Initial Regulatory Flexibility Analysis (IRFA) and did receive two comments about it during the public comment period.

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities.

The final rule will apply to all employees of railroad carriers, contractors, or subcontractors to railroad carriers who perform maintenance-of-way activities. Based on information available, FRA estimates that less than 14 percent of the total railroad costs associated with implementing the final rule will 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 were exempt from certain requirements of the prior rule, continue to be exempt from certain requirements of this final rule, and otherwise bear proportional burden for the requirements 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 final rule will be approximately \$24 million for the next 20 years for the railroad industry. There are 695 railroads that are considered small for purposes of this analysis, and together they comprise approximately 93 percent of the railroads impacted directly by this final regulation. The 14 percent of the burden will be spread amongst the 695 entities, based proportionally upon the number of employees each has. Thus, although a substantial number of small entities in this sector will likely be impacted, the economic impact on them will likely be insignificant. This RFA is not intended to be a stand-alone document. To get a better understanding of the total costs for the railroad industry (which form the basis for the estimates in this RFA), or more cost detail on any specific requirement, please see the RIA that FRA has placed in the docket for this rulemaking.

1. Description of Regulated Entities

The “universe” of the entities considered in an RFA generally includes only those small entities that can reasonably expect to be directly regulated by this final action. The types of small entities potentially affected by this final 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 STB’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 1,095 entities will be affected by the rule. FRA estimates that there are approximately 400 MOW contractor companies and 695 small railroads on the general system. 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 695 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 final 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 amending to the substantive criteria of classification, there should be no change in the number of partially excepted small railroads associated with the final rule.

All 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 have not needed 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 will 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 will get passed on from the contractor to the pertinent railroad. FRA has determined that there are approximately 400 MOW-related contractor companies who will be covered by the final 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 expects that some HOS small contractors will be impacted based upon the 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 rulemaking. Conversely, this final 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).

Consortia are companies that provide testing, random selection, collection, policy development, and training services to help employers stay compliant. Consortia 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 that have been covered under the regulation. It should also be noted that approximately 125 of the small railroads that will be impacted are subsidiaries of large short line holding companies with resources comparable to larger railroads. Additionally, many small railroads are members of ASLRRRA, which was consulted throughout the development of this regulation. ASLRRRA 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 RFA.

**Significant Economic Impact Criteria**

Previously, FRA sampled small railroads and found that revenue averaged approximately \$4.7 million (not discounted) in 2006. One percent of

that average annual revenue per small railroad is \$47,000. FRA realizes that some railroads will have lower revenue than \$4.7 million. However, FRA estimates that small railroads will not have any additional expenses over the next ten years to comply with the new requirements in this final regulation. Based on this, FRA concludes that the expected burden of this final rule will not have a significant impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

**Substantial Number Criteria**

This final rule will likely burden all small railroads that are not exempt from its scope or application (see 49 CFR 219.3). Thus, as noted above this final rule will impact a substantial number of small railroads.

**2. Certification**

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. FRA invited all interested parties to submit data and

information regarding the potential economic impact that will result from adoption of the proposals in the NPRM. FRA did receive comments concerning the initial regulatory flexibility analysis in the public comment process. The final rule addresses these concerns by continuing FRA's longstanding approach of counting only a railroad's covered employees for purposes of determining whether the railroad qualifies for the small railroad exception (the railroad also cannot participate in any joint operations) because FRA believes this is the best measure of the risks posed by the railroad's operations. FRA received no objections to this proposal and adopted in its final rule.

**C. Paperwork Reduction Act**

FRA is submitting the information collection requirements in this final rule for review and 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.	2 Railroads .....	2 petitions .....	40 hours .....	80
219.7—Waivers .....	722 railroads + 400 MOW contractors.	4 waivers .....	2 hours .....	8
219.9—Joint Operating Agreement between Railroads Assigning Responsibility for Compliance with this Part Amongst Themselves ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	525 agreements .....	30 minutes .....	263
—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 ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	2 requests/documents ..	1 hour .....	2
—Document by railroad/contractor delineating responsibility for Compliance with this part ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	10 documents .....	2 hours .....	20
219.11—Employee consent to participate in body fluid testing under subpart C.	722 railroads + 400 MOW contractors.	30 consent forms .....	2 minutes .....	1
—Notification to employees for testing ( <b>New Requirement</b> ).	142,000 employees .....	9,508 notices .....	5 seconds .....	13
—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 ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	722 modified Programs	1 hour .....	722
—Alcohol and Drug Programs —New RRs	5 railroads .....	5 programs .....	3 hours .....	15
—Training of Supervisory Employees in signs/symptoms of alcohol/drug influence.	722 railroads + 400 MOW contractors.	2,462 trained supervisors.	3 hours .....	7,386
219.12—RR Documentation on need to place employee on duty for follow-up tests ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	5 documents .....	30 minutes .....	3
219.23—Educational materials concerning the effects of alcohol/drug misuse on individual employees.	722 railroads + 400 MOW contractors.	1,098 revised educational documents.	1 hour .....	1,098
—Copies of educational materials to employees.	142,000 employees .....	142,000 copies of documents.	2 minutes .....	4,733

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.104—Removal of employee from regulated service ( <b>Rev. Requirement</b> ) Verbal Notice + Follow-up Written Letter.	722 railroads + 400 MOW contractors.	500 notices + 500 letters.	30 seconds + 2 minutes	21
—Request for Hearing by Employee who Denies Test Result or other Information is Valid Evidence of part 219 Violation.	722 railroads + 400 MOW contractors.	50 requests + 50 hearings.	2 minutes + ..... 4 hours .....	202
—Applicants Declining Pre-Employment Testing and Withdrawing Employment Application— Communications ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	60 notices/communications.	2 minutes .....	2
219.105— <b>Revised Requirements</b> RR Duty to prevent violation—Documents provided to FRA after agency request regarding RR's Alcohol and/or Drug Use Education/Prevention/ Etc.	722 railroads + 400 MOW contractors.	2 documents .....	5 minutes .....	.17
—RR Supervisor Rule G observations and records of regulated employees.	722 railroads/400 MOW contractors.	280,000 Rule G observations + 280,000 records.	2 seconds + 2 seconds	310
219.201(c)—Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing.	722 railroads + 400 MOW contractors.	2 reports .....	30 minutes .....	1
219.203/207—Major train accidents—Post Accident Toxicological Testing Forms				
—Completion of FRA F 6180.73 .....	142,000 employees .....	240 forms .....	10 minutes .....	40
—Determination by RR representative to test non-crew member regulated employees based on specific information ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	80 decisions/determinations.	15 minutes .....	20
—Determination by RR representative to exclude surviving crewmember from testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 decisions/determinations.	5 minutes .....	4
—Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours ( <b>New Requirement</b> ).	722 railroads + 400MOW contractors.	80 notifications + 80 reports.	2 minutes + 30 minutes	43
—RR determination after accident to make crew available for toxicological testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	25 decisions/determinations.	10 minutes .....	4
—RR call for train relief crew ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	25 calls .....	5 minutes .....	2
—Recall of employees for testing and Narrative Report Completion ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	4 calls + 4 reports .....	2 minutes + 30 minutes	2
—RR Reference to part 219 requirements and FRA's post-accident toxicological kit in seeking to obtain facility cooperation ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	80 references .....	15 minutes .....	20
—RR Notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent.	722 railroads + 400 MOW contractors.	2 phone calls .....	10 minutes .....	.33
219.205—Specimen Handling/Collection—Completion of Form FRA F 6180.74 by train crew members after accident.	722 railroads + 400 MOW contractors.	240 forms .....	15 minutes .....	60
—RR representative request to medical facility representative to complete remaining information on FRA F 6180.74.	722 railroads + 400 MOW contractors.	80 ph. requests .....	2 minutes .....	3
—RR representative completion of Form FRA F 6180.73.	722 railroads + 400 MOW contractors.	80 forms .....	10 minutes .....	13
—Request to FRA Alcohol and Drug Program Manager for order form for Standard Shipping Kits ( <b>new requirement</b> ).	722 railroads + 400 MOW contractors.	5 requests .....	2 minutes .....	.17
—Request to National Response Center (NRC) for Post-Mortem Shipping Kit ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	1 request .....	2 minutes .....	.03333
—RR Request to Medical Facility to Transfer Sealed Toxicology Kit.	722 railroads + 400 MOW contractors.	40 ph. requests .....	2 minutes .....	1
—Documentation of chain of custody of sealed toxicology kit from medical facility to lab delivery.	722 railroads + 400 MOW contractors.	40 documents .....	2 minutes .....	1
—RR/Medical Facility Record of Kit Error ( <b>New Requirement</b> ).	722 RRs + 400 contr. ..	20 written records .....	2 minutes .....	1

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.209(a)—Notification to NRC and FRA of Accident/Incident where Samples were Obtained.	722 railroads + 400 MOW contractors.	40 phone reports .....	2 minutes .....	1
219.209(c)—Record of Part 219 Test not Administered within 4 Hours Following Accident/Incident.	722 railroads + 400 MOW contractors.	40 records .....	30 minutes .....	20
219.211(b)—Results of post-accident toxicological testing to RR MRO and RR Employee.	722 railroads + 400 MOW contractors.	10 reports .....	15 minutes .....	3
(c)—MRO Report to FRA of positive test for alcohol/drugs of surviving employee.	722 railroads + 400 MOW contractors.	10 reports .....	15 minutes .....	3
219.303—Reasonable Suspicion Observations (Drug Test)				
—Communication between On-Site and Off-Site Supervisors regarding Reasonable Suspicion Observation.	722 railroads + 400 MOW contractors.	50 phone communications.	2 minutes .....	2
—RR Written Documentation of Observed Signs/Symptoms for Reasonable Suspicion Determination.	722 railroads + 400 MOW contractors.	30 documents .....	5 minutes .....	3
219.305—RR Written Record Stating Reasons Test was Not Promptly Administered ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	30 records .....	2 minutes .....	1
219.401—Notification to Employee regarding Reasonable Cause Testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 notifications .....	15 minutes .....	13
219.405—RR Documentation Describing Basis of Reasonable Cause Testing ( <b>New Requirements</b> ).	722 railroads + 400 MOW contractors.	50 documents .....	15 minutes .....	13
—RR Documentation of Rule/Part 225 Violation for Each Reasonable Cause Test ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	20 documents .....	15 minutes .....	5
219.407—Prompt specimen collection time limitation exceeded—Record ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	15 records .....	15 minutes .....	4
219.501—RR Documentation of Negative Pre-Employment Drug Tests ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	1,200 tests + 1,200 documents.	15 minutes + 5 minutes	400
219.605—Submission of random testing plan ( <b>Revised Requirement</b> ): Existing RRs.	5 railroads .....	5 plans .....	1 hour .....	5
—New Railroads submission of random testing plans ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	20 amendments .....	1 hour .....	20
—Amendments to Currently-Approved FRA Random Testing Plan ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	21 resubmitted plans ...	15 minutes .....	5
—Resubmitted random testing plans after notice of FRA disapproval ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 amendments .....	10 minutes .....	8
—Non-Substantive Amendment to an Approved Plan ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	20 random testing plans.	15 minutes .....	5
—New/Combined/Amended Random Testing Plans Incorporating New Categories of Regulated Employees ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	200 plans .....	1 hour .....	200
219.607—RR Requests to Contractor or Service Agent to Submit Part 219 Compliant Random Testing Plan on Its Behalf ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	50 requests .....	15 minutes .....	13
—Contractor Random Testing Plan ( <b>New Requirement</b> ).	722 MOW contractors ..	50 plans .....	1 hour .....	50
219.609—Inclusion of Regulated Service Contractor Employees/Volunteers in RR Random Testing Plan ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	15 plans .....	10 minutes .....	3
—Addenda to RR Random Testing Plan Describing Method Used to Test Contractor/Volunteer Employees in Non-Random Testing Plan ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	15 addenda .....	10 minutes .....	3
219.611—Random Alcohol and Drug Test Pools: Good Faith Determinations and Evaluations of Employee Likelihood of Performing Regulated Service ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	25,000 determinations + 25,000 evaluations.	30 seconds + 30 seconds.	417
—Random Testing Pool Updates ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	13,176 pool updates ...	5 minutes .....	1,098
—Documents on RR Multiple Random Testing Pools ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	96 documents .....	5 minutes .....	8

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
219.613—RR Identification of Total Number of Eligible Employees for Random Testing ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	2,196 IDs .....	2 minutes .....	73
—RR Records/Explanation of Discarded Selection Draws ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	10 records/e explanations.	2 minutes .....	.33
—Electronic or Hard Copy of RR Snapshot of Each Random Testing Pool ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	13,176 snapshots/records.	2 minutes .....	1,098
219.615—Incomplete Random Testing Collections—Documentation ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	2,000 documents .....	.5 minute .....	17
219.617—Employee Exclusion from Random alcohol/drug testing after providing verifiable evidence from credible outside professional ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	5 documents .....	1 hour .....	5
219.619—Report by MRO of Verified Positive Test or by Breath Alcohol Technician of Breath Alcohol Specimen of 0.04 or Greater ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	88 reports .....	5 minutes .....	7
219.623—Random Testing Records ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	40,000 records .....	1 minute .....	667
219.901—RR Alcohol and Drug Misuse Prevention Records for MOW Employees Kept by FRA—Two Year Maintenance ( <b>Revised Requirement</b> ).	722 railroads + 400 MOW contractors.	16,960 records .....	5 minutes .....	1,413
219.1001—RR Change of Service Provider or Policy for Referral Program.	722 railroads + 400 MOW contractors.	40 programs .....	3 hours .....	120
—New Railroads Adoption of Referral Program.	5 railroads .....	5 programs .....	3 hours .....	15
—Co-worker Report that Employee is Unsafe to work with/in Violation of Part 219 or Railroad’s Drug/Alcohol Rules.	722 railroads + 400 MOW contractors.	602 reports .....	5 minutes .....	50
219.1003—RR Designation of DAC and expectations when self-referral is allowed.	722 railroads + 400 MOW contractors.	40 designations/R RR expectations.	20 minutes .....	13
—RR Employee Self-Referral .....	722 railroads + 400 MOW contractors.	602 self-referrals .....	10 seconds .....	2
—Referral for treatment/evaluation of regulated employee by co-worker as unsafe to work with or in violation of part 219 or RR alcohol/drug rules.	722 railroads + 400 MOW contractors.	602 treatment referrals/evaluations.	30 minutes .....	301
—After non-per referral, removal of employee from service and confirmation by RR representative that employee is unsafe to work with or in violation of part 219 or RR drug/alcohol rule ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	3 removal confirmations	4 hours .....	12
—Regulated employee waiver of investigation on RR rule charge and contact of DAC within reasonable time period ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	3 waivers + 3 DAC contacts.	3 hours + 20 minutes ...	10
—Employee evaluation by qualified DAC after self-referral, co-worker referral, or non-peer referral.	722 railroads + 400 MOW contractors.	602 evaluations .....	2 hours .....	1,204
—DAC recommendation of leave of absence for regulated employee.	722 railroads + 400 MOW contractors.	602 mentions/rec-ommendation.	1 hour .....	602
—DAC Notification to RR that employee is fit to return to regulated service.	722 railroads + 400 MOW contractors.	602 notices .....	10 minutes .....	100
—DAC modification of initial evaluation of regulated employee.	722 railroads + 400 MOW contractors.	60 modified evaluations	10 minutes .....	10
219.1005—Referral Programs with Labor Organization Approvals that Include Optional Provisions ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	10 referral programs ....	20 hours .....	200
219.1007—Filing of Documents/Records with FRA of Labor Concurrences for Alternate Referral Programs ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	10 documents .....	1 hour .....	10
—Notice to FRA of Amendment or Revocation of FRA Approved Referral Program ( <b>New Requirement</b> ).	722 railroads + 400 MOW contractors.	1 notice/amended peer referral program.	1 hour .....	1
Appendix C—Completion of Form FRA F 6180.75 after rail accident/incident resulting in fatality.	722 railroads + 400 MOW contractors.	10 completed forms .....	20 minutes .....	3

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, FRA Office of Railroad Safety, Information Collection Clearance Officer, at 202-493-6292, or Ms. Kim Toone, FRA Office of Information Technology, Information Clearance Officer, at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should send them directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to the Office of Management and Budget at the following address: [oir\\_submissions@omb.eop.gov](mailto:oir_submissions@omb.eop.gov).

OMB is required to make a decision concerning the collection of information requirements contained in this final 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.

FRA cannot 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 before 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 final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the 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 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 rule complies with a statutory mandate and will 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 rule will 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 rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this 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 rule is not required.

#### E. Environmental Impact

FRA has evaluated this final rule in accordance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), other environmental statutes, related regulatory requirements, and its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999). FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's NEPA Procedures, "Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation." See 64 FR 28547, May 26, 1999. Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4.

In analyzing the applicability of a CE, the agency must also consider whether extraordinary circumstances are present that would warrant a more detailed environmental review through the preparation of an EA or EIS. *Id.* 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 regulation that might trigger the need for a more detailed environmental review. The purpose of this rulemaking is to expand the scope of FRA's drug and alcohol regulations to cover MOW workers as per Congress' mandate in the RSIA. Specifically, the rule adopts part 214's definition of "Roadway Worker" to define "MOW employee" under part 214, contains a revised version of the troubled employee identification requirements, and updates and restructures the rule to make it more user-friendly. FRA does not anticipate any environmental impacts from this or any other requirement of the final rule. FRA also finds that there are no extraordinary circumstances present in connection with this final rule.

#### F. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (91 FR 27534, May 10,

2012) require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and determined it will not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

#### *G. Executive Order 13175 (Tribal Consultation)*

FRA has evaluated this final rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The final rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

#### *H. 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 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.

#### *I. 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 rule will not result in the expenditure of more than \$100,000,000 (as adjusted annually for inflation) by the public sector in any one year, and thus preparation of such a statement is not required.

#### *J. 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 rule in accordance with Executive Order 13211, and determined that it will 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.

#### *K. Privacy Act Information*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See <http://www.regulations.gov/#!privacyNotice>

for the privacy notice of [www.regulations.gov](http://www.regulations.gov) or interested parties may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

#### **List of Subjects in 49 CFR Part 219**

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

#### **The Rule**

For the reasons stated above, FRA amends part 219 as follows:

#### **PART 219—CONTROL OF ALCOHOL AND DRUG USE**

- 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, Div. A, Pub. L. 110-432, 122 Stat. 4889 (49 U.S.C. 20140, note); 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 by alcohol or drugs.

\* \* \* \* \*

- 3. Revise § 219.3 to read as follows:

##### **§ 219.3 Application.**

(a) *General.* This part applies to all railroads and contractors, 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 of this part 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 and G 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. 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 and G of this part). A contractor is not excepted if it performs MOW activities for at least one or more railroads that does not qualify for the small railroad exception under this section.

(4) If a contractor is subject to all of part 219 of this chapter 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 and G of this part 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), (b)(1), and (b)(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 of this part and the requirements of subparts F, G, and K of this part, the foreign railroad must comply with either the specified provisions of § 219.4 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 paragraph (d) of this section), 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 new definitions of "Administrator", "Associate Administrator", "category of regulated employee", and "contractor" in alphabetical order;

■ c. Revising the definitions of "covered employee" and "covered service";

■ d. Adding new 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", "evacuation", "flagman or flagger" and "fouling a track" in alphabetical order;

■ e. Revising the definition of "FRA representative";

■ f. Removing the definition of "general railroad system of transportation";

■ g. Adding new definitions of "highway-rail grade crossing" and "highway-rail grade crossing accident/incident" in alphabetical order;

■ h. Revising the definition of "impact accident";

■ i. Adding new definitions of "joint operations" and "maintenance-of-way employee or MOW employee" in alphabetical order;

■ j. Revising the definition of "medical facility";

■ k. Adding new definitions of "non-peer", "on-track or fouling equipment", "other impact accident", "person", and "plant railroad" in alphabetical order;

■ l. Revising the definition of "railroad property damage or damage to railroad property";

■ m. Adding new 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” in alphabetical order; ■ n. Removing the definition of “train”; ■ o. Revising the definitions of “train accident” and “train incident”; and ■ p. Adding a new definition of “watchman/lookout” in alphabetical order.

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, 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.

\* \* \* \* \*

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. 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 as a train employee, a dispatching service employee, or a signal employee, as those terms are defined at 49 U.S.C. 21101, but does not include any period the employee is

relieved of all responsibilities and is free to come and go without restriction.

\* \* \* \* \*

DOT, The Department, or DOT agency means all DOT agencies, including, but not limited to, 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), the United States Coast Guard (USCG) (for purposes of part 40 coverage only), 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.

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 or Flagger 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 that crosses one or more railroad tracks at grade. 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, and all other modes of surface transportation motorized and un-motorized.

Impact accident, (1) Impact accident means a train accident, as defined in this section, consisting either of—

(i) A head-on or rear-end collision between on-track equipment;

(ii) A side collision, derailment collision, raking collision, switching collision, or “other impact accident,” as defined by this section;

(iii) Impact with a deliberately-placed obstruction, such as a bumping post (but not a derail); or

(iv) 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.

(2) 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 employee or MOW employee* means a roadway worker as defined in § 214.7 of this chapter.

*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.

\* \* \* \* \*

*Non-peer* means a supervisor (other than a co-worker), labor organization representative, or family member of a regulated employee.

*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.

\* \* \* \* \*

*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).

*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.

\* \* \* \* \*

*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 the 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) When 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 \$25,000 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 \$105,000 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. Amend § 219.11 by revising 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, F, 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 subparts 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 before the time specimens were taken by the medical facility or before 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. A regulated 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 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 a regulated 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 (h), all urine from a void constitutes a single specimen.

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■ 9. Add § 219.12 to read as follows:

**§ 219.12 Hours-of-service laws implications.**

(a) A railroad is 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) A railroad 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) A railroad 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, although the railroad must still report any excess service to FRA. 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) A railroad 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 the 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 before testing begins; 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 before testing begins.

(b) Use of the mandated DOT alcohol or drug testing forms for non-Federal

tests or mandatory post-accident toxicological testing under subpart C of this part 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)(i) 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; or

(ii) Providing a copy of the materials in some other manner that will ensure 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

(2) For a minimum of three years after June 12, 2017, also ensuring 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 regulated 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) the railroad designates 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 those

employees perform 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 regulated 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 used to test for the presence of alcohol and controlled substances, protect the regulated 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; and

(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, and the names, addresses, and telephone numbers of DACs 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), a railroad must conduct drug or alcohol testing under this part in compliance with part 40 of this title (except for post-accident toxicological testing under subpart C of this part). A railroad must therefore comply with § 40.25 of this title by checking the alcohol and drug testing record of any direct regulated employee (a regulated 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 before 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 this section 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.

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■ 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.* Before 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) 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.

(1) *Post-accident toxicology testing exception.* If a regulated employee has a post-accident toxicology test result under subpart C of this part that is positive for a drug not listed in § 40.5's definition of "Drugs," a railroad may conduct the employee's return-to-duty and follow-up tests under part 40, or may conduct the employee's return-to-duty and follow-up tests under its own authority to comply with the requirements of paragraph (d) of this section, so long as its testing procedures are otherwise identical to those of part 40, and include the specific drug for which the violation occurred, on an expanded drug testing panel.

(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, testing for cause 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 of less than 0.04.

(3) This section does not apply to a locomotive engineer or conductor who has 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 parts 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 before the test begins. The determination of when a drug or alcohol test begins 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 who 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 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.

(d) Each year, a railroad's supervisors must conduct and record a number of "Rule G" employee observations at a minimum equal to twice the railroad's total number of regulated employees. Each "Rule G" observation must be made sufficiently close to an individual regulated employee to determine whether the employee is displaying signs and symptoms indicative of a violation of the prohibitions of this part.

■ 16. Revise § 219.107 to read as follows:

**§ 219.107 Consequences of refusal.**

(a) A regulated employee who refuses to provide a breath or 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.* Before 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 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 stop due to 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) due to an activation failure, partial activation, or false activation of the grade crossing signal system, as provided by § 234.105(c)(1) and (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.

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■ 18. Revise § 219.203 to read as follows:

**§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* A regulated employee 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, a regulated employee 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.* For an accident or incident meeting the criteria of a major train accident in § 219.201(a)(1)—

(i) 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 stop due to 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 who 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 an employee 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 that are 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 section must not be construed to inhibit an employee who is 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) A regulated employee 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 before 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 paragraph (e)(2) 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 before 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 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), an employee 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 ask 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 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.

■ 19. 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.* Basic information concerning the accident/incident and any treatment administered after the accident/incident is necessary to process specimens, analyze the significance of laboratory findings, and notify railroads and employees of test results. 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 ask an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. A Form 6180.73 must be forwarded in the shipping kit

with each group of specimens. A Form 6180.74 must be forwarded in the shipping kit for each employee who provides specimens. A Form 6180.73 and either a Form 6180.74 or a 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 distributed a post-mortem shipping kit 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 ask 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 a secure chain of custody of the kit(s) from its release by the medical

facility to its 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 the introductory text of paragraph (b), 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), (a)(2)(v), and (b), and remove paragraph (c), to 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 additions 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 is taken under the railroad's own 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), add "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 limitations.

**Subpart D—Reasonable Suspicion Testing**

**§ 219.301 Mandatory reasonable suspicion testing.**

(a) Each 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) Each 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 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, provided it is consistent with the railroad's policy and taken under the railroad's own authority.

(d) The railroad must maintain written documentation that specifically describes the observed signs and symptoms upon which the 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 a 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) Each 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.**

Each 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.* A 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.* A 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 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) Each 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 the 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, a railroad 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 employee 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. However, 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 the action is taken under the railroad's own 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) Before an individual performs regulated service the first time for a railroad, the railroad must ensure that the individual 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 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) Each 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.

(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 before June 12, 2017. However, a grandfathered employee must have a negative pre-employment drug test before performing regulated service for a new employing railroad after June 12, 2017.

■ 27. In § 219.502, revise paragraph (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 an 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 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 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.**

Each 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 before 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). An applicant may also not perform DOT safety-sensitive functions for any other employer regulated by a DOT agency until he or she has 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 alcohol and drug testing pools.
- 219.613 Random testing selections.
- 219.615 Random testing collections.
- 219.617 Participation in random alcohol and drug testing.
- 219.619 Positive alcohol and drug test results and refusals; procedures.
- 219.621 Use of service agents.
- 219.623 Records.
- 219.625 FRA Administrator's determination of random alcohol and drug 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 regulated employees from misusing drugs and abusing alcohol.

(b) *Regulated employees.* Each railroad must ensure that a regulated employee is subject to being selected for random testing as required by this subpart whenever the employee performs regulated service on the railroad's behalf.

(c) *Contractor employees and volunteers.* A regulated 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:

(1) The contractor employee or volunteer is not already part of a random testing program that meets the requirements of this subpart and has been accepted by the railroad for which he or she performs regulated service (as described in § 219.609); or

(2) 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, each railroad must ensure that its FRA random testing program is designed and implemented so that each 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 through 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.* Each railroad must construct and maintain random testing pools in accordance with § 219.611.

(e) *Selections.* Each railroad must conduct random testing selections in accordance with § 219.613.

(f) *Collections.* Each railroad must perform random testing collections in accordance with § 219.615.

(g) *Cooperation.* Each railroad and its regulated employees must cooperate with and participate in random testing in accordance with § 219.617.

(h) *Responsive action.* Each railroad must handle positive random tests and verified refusals to test in accordance with § 219.619.

(i) *Service agents.* Each railroad may use a service agent to perform its random testing responsibilities in accordance with § 219.621.

(j) *Records.* Each 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 before its date of commencing operations. A railroad that must comply with this subpart 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 before 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 explanations of any required 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 a failure to submit a plan under this part.

(c) *Plan implementation.* Each railroad must implement its random testing plan no later than 30 days from the date of FRA approval.

(d) *Plan amendments.* (1) Each railroad must submit to FRA a substantive amendment to an approved plan at least 30 days before its intended effective date. A railroad may not implement any substantive amendment before FRA approval.

(2) Each railroad must provide a non-substantive amendment to an approved plan (such as the replacement or addition of service providers) to the FRA Drug and Alcohol Program Manager in writing (by letter or email) before its effective date. However, FRA pre-approval is not required.

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before June 12, 2017, unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (*i.e.*, maintenance-of-way employees) for FRA approval at least 30 days before June 12, 2017.

#### **§ 219.607 Requirements for random testing plans.**

(a) *General.* A random testing plan that a railroad submits 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

that submits 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.* Each random testing plan 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 alternates (if applicable);

(6) Name, address, and contact information for any service providers, including the railroad's Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (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 or other DOT agency regulated employees, or both.

(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. A 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) Each 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 which is compliant with the requirements of this subpart, *e.g.*, conducted by a contractor or 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 may comply with this requirement by appending the non-railroad random testing program or a detailed description of the program and how it complies with this subpart.

(b) Each 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.* Each 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.* Each railroad must clearly indicate who will be tested when a specific pool entry is selected.

(1) Pool entries may be 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 must not allow a field manager or field supervisor to have discretion over which employee is to 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 less than four pool entries. Placeholder pool entries (entries that do not represent legitimate selections of regulated employees) are not permitted. A railroad or contractor with less than four regulated employees can comply with this requirement by having its regulated employees incorporated into a railroad or non-railroad random testing pool that contains 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 placed in the same pool as a regulated employee.

(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 may be placed in a random testing pool with

employees subject to the random testing requirements of another DOT agency, only if all entries in the pool are subject to testing at the highest minimum random testing rate required by the regulations of a DOT agency for any single member in the pool.

(4) A regulated employee does not have 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) A railroad employee who performs regulated service on average less than once a quarter is a de minimis safety concern for random testing purposes, and does not have to be in a random testing program. A railroad that chooses to random test de minimis employees must place them in a separate random testing pool from 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 to determine the frequency of an employee's performance of regulated service and must evaluate the 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 of its random testing pools 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.* Each railroad must ensure that each regulated employee has an equal chance of being selected for random testing whenever selections are made. 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) Each railroad must use a selection method that is acceptable to FRA and meets the requirements of this subpart, such as a computer selection program, proper use

of a random number table, or an alternative method which FRA has approved as part of the railroad's random testing plan.

(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) Each railroad must distribute random tests reasonably throughout the calendar year and make sufficient selections to ensure that each random testing pool meets the Administrator's minimum annual random testing rates as established according to § 219.625.

(2) Each railroad must continually monitor changes in its workforce to ensure that the required number of selections and tests are conducted each year.

(d) *Selection frequency.* Each railroad must select at least one entry from each of its random testing pools every three months.

(e) *Discarded selection draws.* Each selection draw must identify who will be subject to random testing. A railroad cannot discard a selection draw without an acceptable explanation (e.g., the selection was drawn from an incomplete or inaccurate pool). A railroad must document and retain records for all discarded selection draws, including the specific reason the selection draw was not used, as required by § 219.623.

(f) *Increasing random selections.* A railroad that is unable to complete a collection for each selection made during a designated testing period may increase the number of selections in a subsequent selection period to ensure that it meets the annual minimum random testing rate for the calendar year.

(g) *Selection snapshots.* Each railroad must capture and maintain an electronic or hard copy snapshot of each random testing pool at the time it makes a testing selection. A railroad must not re-create pool entries 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.* Each railroad must ensure that each regulated employee who performs functions subject to the random testing requirements of more than one DOT agency is subject to random selection 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.* Each railroad must complete a sufficient number of random alcohol and drug testing collections from each of its random testing pools to meet the Administrator's minimum annual testing rates established in accordance with § 219.625.

(b) *Designated testing window.* Each railroad must complete the collection for a selected pool entry within the FRA-approved designated testing window for that selection. Once a designated testing window has closed, any selections not collected during that window are no longer 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) Each railroad's random alcohol and drug testing collections must be unannounced and 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 shifts.

(4) If a regulated employee has been selected for both random drug and alcohol testing, a 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, a railroad may schedule each random test collection during a designated testing window 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) If a selected pool entry does not identify the selection by name (*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 notify a regulated employee that he or she has been selected for random testing only during the duty tour in which the collection is to be conducted, and only so far in advance as is reasonably necessary to ensure the employee's presence at the scheduled collection time and place.

(2) A railroad must make collections as soon as possible. Each collection must begin within two hours after the railroad has notified the employee of his or her selection for random testing, unless the railroad has an acceptable reason for the delay. A railroad should monitor each employee after notification and, whenever possible, arrange for the employee to be immediately escorted by supervisory or management personnel to the collection location.

(3) A railroad must inform a regulated employee that he or she has been selected for random testing at the time the employee is notified. 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, a railroad must immediately terminate a random collection and may not reschedule it if the collection is not completed within a covered employee's hours-of-service limitations.

(2) If a random collection requires a direct observation collection under § 40.67 of this title, the 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) If an employee is performing regulated service at the time he or she is notified of his or her selection for random testing, the railroad must ensure that the employee immediately ceases to perform regulated service and proceeds to the collection site without adversely affecting safety. 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. Once an employee begins the testing process, he or she may not be returned to regulated service until the testing process is complete.

(3) A railroad may excuse an employee who has been notified of or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (*e.g.*, birth, death, or medical emergency) supersedes the requirement to complete the 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 employee must provide verifiable documentation of the emergency situation from a credible outside professional within a reasonable period of time (*e.g.*, a doctor, dentist, hospital, law enforcement officer, or school authority). A railroad may not test an employee who has been excused from testing under the same random 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 regulated employee must fully cooperate and comply with the urine collection and/or breath alcohol



testing procedures required by subpart H of this part, and 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 a refusal to test has occurred. 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 a regulated employee that he or she has been selected for random testing. A regulated employee who has been selected for random testing must otherwise be notified of the selection by his or her employer. A service agent may also not perform any role that § 40.355 of this title specifically reserves to an employer, which, for purposes of this subpart, is defined as a railroad or a contractor performing railroad-accepted testing.

(c) A railroad is primarily responsible for compliance with the random alcohol and drug testing of this subpart, 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, each railroad is 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 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.* Data from MIS reports provide the information used for this determination. 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 25 percent, and the MIS data for that calendar year show that the random testing violation rate for drugs 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 drug testing to 50 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. Revise § 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 a new 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.

\* \* \* \* \*

(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.* (1) In addition to the records part 40 of this title requires keeping, a railroad must also maintain alcohol and drug misuse prevention program records in a secure location with controlled access under this section's requirements.

(2) A railroad must maintain for two years, rather than one year, the records to which § 40.333(a)(4) of this title applies (i.e., records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02). A railroad may maintain legible and accessible scanned or electronic copies of these records for the second year.

(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 § 219.800(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; and
- (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 any regulated employee's refusal to submit to an alcohol or drug test required under this part; and

(iv) Documents a regulated employee presented to dispute the result of an alcohol or drug test administered under this part;

(3) Records related to other violations of this part; and

(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; and
- (iii) Documentation of training (including attendance records and training materials) the railroad 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.

■ 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 grant access to all facilities used to comply with 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 drug and alcohol 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 a new subpart K to read as follows:

## Subpart K—Referral Programs

Sec.

219.1001 Requirement for referral programs.

219.1003 Referral program conditions.

219.1005 Optional provisions.

219.1007 Alternate programs.

## Subpart K—Referral Programs

### § 219.1001 Requirement for referral programs.

(a) The purpose of this subpart is to help prevent the adverse effects of drug and alcohol abuse in connection with regulated employees.

(b) A railroad must adopt, publish, and implement the following programs:

(1) *Self-referral program.* A program designed to encourage and facilitate the identification of a regulated employee who abuses drugs or alcohol by providing the employee the opportunity to obtain counseling or treatment before the employee's drug or alcohol abuse manifests itself in a detected violation of this part; and

(2) *Co-worker referral program.* A program designed to encourage co-worker participation in preventing violations of this part.

(c) A railroad may adopt, publish, and implement the following programs:

(1) *Non-peer referral program.* A program designed to encourage non-peer participation in preventing violations of this part; and

(2) *Alternate program(s)*. An alternate program or programs meeting the specific requirements of § 219.1003 or complying with § 219.1007, or both.

(d) Nothing in this subpart may be construed to:

(1) Require payment of compensation for any period a regulated employee is restricted from performing regulated service under a voluntary, co-worker, or non-peer referral program;

(2) Require a railroad to adhere to a voluntary, co-worker, or non-peer referral program 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 determines 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 this subpart specifically provides.

#### **§ 219.1003 Referral program conditions.**

(a) *General*. A referral program must specify the allowances, conditions, and procedures under which a self-referral, co-worker referral, and, if adopted, a non-peer referral, can occur, as follows:

(1) For a self-referral, a railroad must identify one or more designated DAC contacts (including telephone number and email (if available)) and any expectations regarding when the referral is allowed to take place (such as during non-duty hours, or while the employee is unimpaired, or both, as § 219.1005 permits);

(2) For a co-worker referral, a railroad may accept a referral under this subpart only if it alleges that the regulated employee was apparently unsafe to work with or in violation of this part or the railroad's drug and alcohol abuse rules. The employee must waive investigation of the rule charge and must contact the DAC within a reasonable period of time;

(3) For a non-peer referral, a railroad may remove a regulated employee from service only if a railroad representative confirms that the employee is unsafe to work with or in violation of this part or the railroad's drug and alcohol abuse rules. The employee must waive investigation of the rule charge and

must contact the DAC within a reasonable period of time.

(b) *Employment maintained*. A regulated employee who is affected by a drug or alcohol abuse problem may maintain an employment relationship with a railroad if:

(1) The employee seeks assistance through the railroad's voluntary referral program for his or her drug or alcohol abuse problem or a co-worker or a non-peer refers the employee for such assistance; and

(2) The employee successfully completes the education, counseling, or treatment program a DAC specifies under this subpart.

(c) *Employment action*. If a regulated employee does not choose to seek assistance through a referral program, or fails to cooperate with a DAC's recommended program, the disposition of the employee's relationship with the railroad is subject to normal employment action.

(d) *Qualified DAC evaluation*. (1) A DAC acceptable to the railroad must evaluate a regulated employee entering a self-referral, co-worker referral, or non-peer referral program;

(2) The DAC must meet any applicable state standards and comply with this subpart; and

(3) The DAC must determine the appropriate level of care (education, counseling, or treatment, or all three) necessary to resolve any identified drug or alcohol abuse problems.

(e) *Removal from regulated service*. A referral program must stipulate that a regulated employee a DAC has evaluated as having an active drug abuse disorder may not perform regulated service until the DAC can report that safety is no longer affected.

(f) *Confidentiality maintained*. Except as provided under paragraph (l) of this section, a railroad must treat a regulated employee's referral and subsequent handling (including education, counseling, and treatment) as confidential. Only personnel who administer the railroad's referral programs may have access to the identities of the individuals in these programs.

(g) *Leave of absence*. A railroad must grant a regulated employee the minimum leave of absence the DAC recommends to complete a primary education, counseling, or treatment program and to establish control over the employee's drug or alcohol abuse problem.

(h) *Return to regulated service*. (1) Except as §§ 219.1001(d)(4) and 219.1005 may provide, a railroad must return a regulated employee to regulated service upon the DAC's

recommendation that the employee has established control over his or her drug or alcohol abuse problem, has a low risk to return to drug or alcohol abuse, and has complied with any recommended return-to-service requirements.

(2) The DAC determines the appropriate number and frequency of required follow-up tests. The railroad determines the dates of testing.

(3) The railroad may condition an employee's return to regulated service on successful completion of a return-to-service medical evaluation.

(4) A railroad must return an employee to regulated service within five working days of the DAC's notification to the railroad that the employee is fit to return to regulated service, unless the employee has a disqualifying medical condition. (*i.e.*, the employee is at a low risk to return to drug or alcohol abuse).

(i) *Rehabilitation plan*. No person—whether an employing railroad, managed care provider, service agent, individual, or any person other than the DAC who conducted the initial evaluation—may change in any way the DAC's evaluation or recommendations for assistance. The DAC who made the initial evaluation may modify the employee's initial evaluation and follow-up recommendation(s) based on new or additional information.

(j) *Locomotive engineers and conductors*. Consistent with §§ 240.119(e) and 242.115(g) of this chapter, for a certified locomotive engineer, certified conductor, or a candidate for engineer or conductor certification, the referral program must state that confidentiality is waived (to the extent the railroad receives from a DAC official notice of the active drug abuse disorder and suspends or revokes the certification, as appropriate) if the employee at any time refuses to cooperate in a recommended course of counseling or treatment.

(k) *Contacting a DAC*. If a regulated employee does not contact a DAC within the railroad's specified time limits, the railroad may begin an investigation to assess the employee's cooperation and compliance with its referral program.

(l) *Time requirements for DAC evaluations*. Once a regulated employee has contacted the designated DAC, the DAC's 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.

(m) *Time limitations on follow-up treatment, care, or testing*. Any follow-up treatment, care, or testing established under a referral program must not

exceed 24 months beyond a regulated employee's initial removal from regulated service, unless the regulated employee's entry into the program involved a substantiated part 219 violation.

**§ 219.1005 Optional provisions.**

A railroad's referral program 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 program may provide that the rule of confidentiality is waived if:

(1) The regulated employee at any time refuses to cooperate in a DAC's recommended course of education, counseling, or treatment; or

(2) The railroad determines, after investigation, that the regulated employee has been involved in a drug- or alcohol-related disciplinary offense growing out of subsequent conduct.

(b) The program may require successful completion of a return-to-service medical examination as a further condition of reinstatement in regulated service.

(c) The program may provide that it does not apply to a regulated employee whom the railroad has previously assisted under a program substantially consistent with this section.

(d) The program may provide that, in order to invoke its benefits, the regulated employee must report to the railroad's designated contact either:

(1) During non-duty hours (*i.e.*, at a time when the regulated employee is off duty); or

(2) While unimpaired and otherwise in compliance with the railroad's drug and alcohol rules consistent with this subpart.

**§ 219.1007 Alternate programs.**

(a) Instead of the referral programs required under § 219.1001, a railroad is permitted to develop, publish, and implement alternate programs that meet the standards established in § 219.1001. Such programs 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 programs that afford more favorable conditions to regulated employees troubled by drug or alcohol abuse problems, consistent with a railroad's responsibility to prevent violations of §§ 219.101, 219.102, and 219.103.

(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 instead 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 it

submits for approval with the FRA Drug and Alcohol Program Manager. FRA will base its approval on whether the alternative program meets the § 219.1001 objectives. The alternative program does not have to include each § 219.1001 component, but must meet the general standards and intent of § 219.1001. If a railroad amends or revokes an approved alternate policy, the railroad must file a notice with FRA of such amendment or revocation at least 30 days before the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing, and implementing the programs § 219.1001 requires for any group of regulated employees not falling within the coverage of an appropriate, approved alternate program.

(e) Consistent with § 219.105(c), FRA has the authority to inspect the aggregate data of any railroad alcohol and/or drug use education, prevention, identification, and rehabilitation program or policy, including 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.

■ 37. Revise appendix A to read as follows:

**Appendix A to Part 219—Schedule of Penalties**

The following chart lists the schedule of civil penalties:

**PENALTY SCHEDULE <sup>1</sup>**

Section <sup>2</sup>	Violation	Willful violation
<b>Subpart A—General</b>		
219.3 Application:		
(a) Railroad or contractor does not have required program .....	\$5,000	\$7,500
(c) Railroad or contractor improperly tests under subpart E or G of this part .....	2,500	5,000
219.9 Responsibility for compliance:		
(b)(1) Host railroad failed to take responsibility for compliance or other railroad or contractor did not take responsive action of direction of host railroad during joint operations .....	5,000	7,500
219.11 General conditions for chemical tests:		
(b)(1) Employee unlawfully refuses to participate in testing .....	2,500	5,000
(b)(2) Employer fails to give priority to medical treatment .....	3,000	8,000
(b)(3) Employee fails to remain available .....	2,500	5,000
(d) Employee unlawfully required to execute a waiver of rights .....	2,500	5,000
(e)(1) Failure to direct employee to proceed to collection site as soon as possible without affecting safety .....	2,500	5,000
(e)(3) Railroad used or authorized the use of coercion to obtain specimens .....	5,000	7,500
(g) Failure to meet supervisory training requirements or program of instruction not available or program not complete .....	2,500	5,000
(h) Urine or blood specimens provided for Federal testing were used for non-authorized testing .....	2,500	5,000
219.12 Hours-of-service laws implications:		
(a)–(d) Failure to exceed Hours of Service to conduct required testing or exceeding HOS when not authorized to conduct testing .....	2,500	5,000
219.23 Railroad policies:		
(a) Failure to provide written notice of FRA test .....	1,000	4,000
(a)(1) Failure to provide written notice of basis for FRA test .....	1,000	4,000

## PENALTY SCHEDULE 1—Continued

Section <sup>2</sup>	Violation	Willful violation
(a)(2) Use of a non-approved FRA form for mandatory post-accident toxicological testing .....	1,000	4,000
(b) Improper use of Federal drug or alcohol testing form or use of Subpart C form for other test .....	1,000	4,000
(c) Failure to make required educational materials available .....	2,500	5,000
(d) Failure to provide required minimum educational content .....	2,500	5,000
(e) Non-Federal provisions are not clearly described as independent authority .....	2,500	5,000
219.25 Previous employer drug and alcohol checks:		
(a)(1) Failure to conduct previous employer drug and alcohol check or failure to provide response to previous employer when requested .....	2,500	5,000
(a)(2) Failure to perform and complete FRA and DOT-required background checks in a timely manner .....	2,500	5,000
(a)(3) Failure to document due diligence in completing FRA and DOT-required background checks .....	2,500	5,000
(b) Failure to comply with § 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 .....	2,500	5,000
<b>Subpart B—Prohibitions</b>		
219.101 Alcohol and drug use prohibited:		
(a) Railroad with actual knowledge of use, possession or impairment from alcohol or controlled substances permits employee to go on duty or remain on duty .....		10,000
219.103 Prescribed and over-the-counter drugs:		
(a) Failure to train employee properly on requirements .....	2,500	5,000
219.104 Responsive action:		
(a) Failure to remove employee from regulated service immediately .....	5,000	7,500
(b) Failure to provide written notice for removal .....	2,500	5,000
(c) Failure to provide prompt hearing within 10 calendar days .....	2,500	5,000
(d) Employee improperly returned to regulated service .....	5,000	7,500
(e) Failure to ensure certified locomotive engineers and conductors received required follow-up testing minimums as per § 240.119(d)(2) and § 242.115(f)(2) of this chapter .....	2,500	5,000
219.105 Railroad's duty to prevent violations:		
(a) Employee improperly permitted to remain in regulated service .....	7,500	10,000
(b) Failure to exercise due diligence to assure compliance with prohibition .....	5,000	7,500
(d) Failure to conduct and record minimum number of Rule G observations .....	2,500	5,000
219.107 Consequences of unlawful refusal:		
(a) Failure to disqualify an employee for nine months following a refusal .....	5,000	7,500
(b) Fail to provide written notice of withdrawal to employee .....	2,500	5,000
(c) Employee unlawfully returned to service .....	5,000	7,500
<b>Subpart C—Post-Accident Toxicological Testing</b>		
219.201 Events for which testing is required:		
(a) Failure to test after qualifying event (each regulated employee not tested is a violation) .....	5,000	7,500
(c)(1)(i) Failure to make good faith determination .....	5,000	7,500
(c)(1)(ii) Failure to provide requested decision report to FRA .....	2,500	5,000
(c)(2) Testing performed after non-qualifying event .....	5,000	10,000
219.203 Responsibilities of railroads and employees:		
(a)(1)(i) and (a)(2)(i) Failure to properly test/exclude from testing .....	5,000	7,500
(a)(1)(ii) and (a)(2)(ii) Non-regulated service employee tested .....	5,000	7,500
(b)(1) Delay in obtaining specimens due to failure to make every reasonable effort .....	2,500	5,000
(c) Independent medical facility not utilized .....	2,500	5,000
(d) Failure to report event or contact FRA when intervention required .....	1,000	3,000
(d)(1) Failure to collect specimens in a timely manner .....	2,500	5,000
(e)(2) Failure to recall employee for testing when conditions met .....	2,500	5,000
(e)(5) Failure to document why employee could not be recalled .....	2,500	5,000
(f)(1) Specimen collection not completed at an independent medical facility .....	2,500	5,000
219.205 Specimen collection and handling:		
(a) Failure to observe requirements with respect to specimen collection, marking and handling .....	2,500	5,000
(b) Failure to provide properly prepared forms with specimens .....	2,500	5,000
(d) Failure to promptly or properly forward specimens .....	2,500	5,000
219.207 Fatality:		
(a) Failure to collect specimens .....	5,000	7,500
(a)(1) Failure to ensure timely collection and shipment of required specimens .....	2,500	5,000
(b) Failure to request assistance when necessary .....	2,500	5,000
219.209 Reports of tests and refusals:		
(a)(1) Failure to provide telephonic report .....	1,000	2,000
(b) Failure to provide written report of refusal to test .....	1,000	2,000
(c) Failure to maintain report explaining why test not conducted within 4 hours .....	1,000	2,000
219.211 Analysis and follow-up:		
(c) Failure of the MRO to report MRO downgrades and/or verified non-negative results to FRA in a timely manner .....	2,500	5,000
(g)(3) Unauthorized withholding of regulated employee out of regulated service pending receipt of PAT testing results .....	2,500	5,000

PENALTY SCHEDULE <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
<b>Subpart D—Reasonable Suspicion Testing</b>		
219.301 Mandatory reasonable suspicion testing:		
(a) Failure to conduct breath alcohol test when reasonable suspicion testing criteria met or conduct breath alcohol test under reasonable suspicion when criteria not met .....	5,000	7,500
(b) Failure to conduct drug test when reasonable suspicion testing criteria met or conduct drug test under reasonable suspicion when criteria not met .....	5,000	7,500
219.303 Testing when reasonable suspicion criteria not met:		
(a) Failure to use a trained supervisor when conducting a reasonable suspicion determination for alcohol .....	2,500	5,000
(b) Failure to use two supervisors, one of which must have been trained, when conducting a reasonable suspicion determination for drugs .....	2,500	5,000
(c) Improperly holding employee out of service .....	2,500	5,000
(d) Failure to provide adequate written documentation for the reasons for a reasonable suspicion test .....	2,500	5,000
219.305 Prompt specimen collections; time limitations:		
(a) Fail to promptly conduct test .....	2,500	5,000
(b) Failure to document why test not administered within time limits .....	2,500	5,000
(c) Improper recall of employee .....	2,500	5,000
<b>Subpart E—Reasonable Cause Testing</b>		
219.401 Authorization for reasonable cause testing:		
(a) Failure to declare which authority (Federal or company) is being used for reasonable cause testing .....	2,500	5,000
(b) Testing conducted after regulated employee is released from duty .....	2,500	5,000
219.403 Requirements for reasonable cause testing:		
(a) Testing when event did not meet the criteria for train accident or train incident .....	2,500	5,000
(b) Testing when event did not meet the criteria for rule violation .....	2,500	5,000
219.405 Documentation requirements:		
(a) Failure to provide adequate written documentation for the reasons for a reasonable cause test .....	1,000	2,500
(b) Failure to document specific type of rule violation and the involvement of each tested regulated employee .....	1,000	2,500
219.407 Prompt Specimen Collection; Time Limitations:		
(a) Failure to perform a test in a timely .....	2,500	5,000
(b) Failure to document why test not administered within time limits .....	1,000	2,500
(c) Improper recall of employee .....	2,500	5,000
219.409 Limitations on authority:		
(b) Improper withholding of regulated employee from regulated service pending test results .....	2,500	5,000
<b>Subpart F—Pre-Employment Tests</b>		
219.501 Pre-employment drug testing:		
(a) Failure to conduct a Federal pre-employment test before a final applicant or employee transfer performs regulated service .....	2,500	5,000
(b) Failure to conduct a Federal pre-employment test before an employee of a contractor performs regulated service .....	2,500	5,000
(e) Pre-employment testing of grandfathered regulated employee .....	1,000	2,500
219.502 Pre-employment alcohol testing:		
(a)(1) Failure to conduct alcohol testing of a regulated employee after choosing to perform Federal pre-employment alcohol testing .....	2,500	5,000
(a)(2) Failure to treat all regulated employees the same for purposes of Federal pre-employment alcohol testing .....	2,500	5,000
219.503 Notification; records:		
Failure to notify the applicant in writing of non-negative test results or refusal .....	1,000	2,500
<b>Subpart G—Random Alcohol and Drug Testing Programs</b>		
219.601 Purpose and scope of random testing programs:		
(b) Failure to ensure regulated employee is subject to random testing .....	2,500	5,000
(c) Contractor or volunteer not included in random testing while subject to performing regulated service .....	2,500	5,000
(d)(1) Regulated employee not subject to random testing at minimum rate set by agency covering more than 50% of employee's regulated functions .....	2,500	5,000
219.605 Submission and approval of random testing plans:		
(a)(1) Failure to obtain FRA approval of random testing program .....	2,500	5,000
(c) Failure to implement random testing plan within 30 days of notification of FRA approval .....	2,500	5,000
(d)(1) Failure to implement substantive plan amendment within 30 days of notification of FRA approval, or failure to obtain FRA approval before implementing substantive plan amendment before implementation .....	2,500	5,000
(d)(2) Failure to submit non-substantive plan amendment before implementation .....	2,500	5,000
219.607 Requirements for random testing plans:		
(a) Railroad implementation failed to comply with approved plan .....	2,500	5,000
(c) Failure to contain required plan elements .....	2,500	5,000
219.609 Inclusion of contractor employees and volunteers in random testing plans:		
(a) Failure to demonstrate that regulated service contractor employees and volunteers are subject to random testing .....	2,500	5,000

## PENALTY SCHEDULE 1—Continued

Section <sup>2</sup>	Violation	Willful violation
(c) Failure to ensure regulated service contractor and volunteers are tested in accordance with this subpart .....	2,500	5,000
219.611 Random drug and alcohol and drug testing pools:		
(a) Failure of railroad to ensure that all regulated employees including contractors and volunteers are included in random testing pools .....	2,500	5,000
(b)(2) Improper criteria for pool entries which allows for employer discretion over who is to be tested .....	2,500	5,000
(b)(3) Failure to construct and maintain pool entries that will ensure regulated employees have an equal chance of being selected randomly for each draw .....	2,500	5,000
(c) Maintaining a random testing pool with less than four pool entries .....	2,500	5,000
(d)(1) Failure to ensure that pools do not contain non-regulated employees .....	2,500	5,000
(d)(2) Regulated employee included in more than one DOT random pool .....	2,500	5,000
(d)(3) Failure to maintain pools and/or pool entries that meet FRA/DOT regulations .....	2,500	5,000
(d)(5) Failure to add or remove regulated employees to or from the proper random pool in a timely manner .....	2,500	5,000
(e)(2) Failure to remove employees who perform de minimis service from pools which include employees who perform regulated service on a regular basis .....	2,500	5,000
(f) Failure to have an effective mechanism to update and maintain pools .....	2,500	5,000
219.613 Random testing selections:		
(b)(1) Failure to use an FRA-acceptable selection procedure .....	2,500	5,000
(b)(2) Failure to ensure every regulated employee has an equal chance at being selected at each draw ...	2,500	5,000
(b)(3) Failure to have necessary documentation verifying the selection process for testing window .....	2,500	5,000
(c)(1) Failure to select pool entries at a rate which ensures compliance with FRA required random rates or fail to reasonably distribute selections throughout the selection year .....	2,500	5,000
(d) Railroad failed to select at least one entry from each of its random testing pools every three months ...	2,500	5,000
(e) Railroad discarded selection draws without an acceptable explanation .....	2,500	5,000
(g) Failure to capture and maintain electronic or hard copy snapshot of each random testing pool at the time it makes a testing selection .....	2,500	5,000
219.615 Random testing collections:		
(a) Failure to comply with minimum annual random collection testing rates .....	2,500	5,000
(b) Failure to test selections within the approved testing window .....	2,500	5,000
(c)(1) Testing a regulated employee while not on duty or testing a regulated employee not randomly selected or testing a non-regulated employee .....	2,500	5,000
(c)(2) Failure to distribute collections reasonably throughout all shifts, days of the week, weeks of the month, and months of the year .....	2,500	5,000
(c)(3) Failure to perform at least 10% of its random alcohol tests at the beginning of shifts and at least 10% of random alcohol tests at the end of shifts .....	2,500	5,000
(e)(1) Advance notification given to employees selected for testing .....	2,500	5,000
(e)(2) Fail to begin collection within two hours of notice of random selection without an acceptable reason for the delay .....	2,500	5,000
(f) Failure to test a selection without an FRA-acceptable reason .....	2,500	5,000
(g)(1) Fail to immediately terminate random collection due to hours of service expiration .....	2,500	5,000
219.617 Participation in random alcohol and drug testing:		
(a)(1) Failure to test regulated employee when properly selected for random test .....	2,500	5,000
(a)(2) Failure to restrict regulated employee from performing regulated service prior to completion of random testing .....	2,500	5,000
(a)(3) Improperly excused without substantiated medical emergency .....	2,500	5,000
219.621 Use of Service Agents:		
(g) Improper use a service agent to notify a regulated employee that they have been selected for random testing .....	2,500	5,000
219.623 Records		
(a) Failure of railroads to meet recordkeeping requirements .....	2,500	5,000
(g) Failure of contractors and service agents to provide required random testing records when requested by the contracting railroad or FRA .....	2,500	5,000
219.625 FRA Administrator's determination of random alcohol and drug rates		
(d) Failure to meet the required FRA random testing rate for drugs .....	2,500	5,000
(e) Failure to meet the required FRA random testing rate for alcohol .....	2,500	5,000

**Subpart H—Drug and Alcohol Testing Procedures**

219.701 Standards for drug and alcohol testing:		
(a) Failure to comply with part 40 procedures in subpart B, D, E, F, G and K testing .....	5,000	7,500

**Subpart I—Annual Report**

219.800 Annual Reports:		
(a) Failure to submit MIS report on time .....	2,500	5,000
(c) Failure to submit accurate MIS report .....	2,500	5,000
(d) Failure to include required data .....	2,500	5,000

**Subpart J—Recordkeeping Requirements**

219.901 Retention of alcohol and drug testing records:		
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PENALTY SCHEDULE <sup>1</sup>—Continued

Section <sup>2</sup>	Violation	Willful violation
(a) Failure to maintain records required to be kept by part 40 of this chapter .....	2,500	5,000
(b) Failure to maintain records required to be kept for five years .....	2,500	5,000
(c) Failure to maintain records required to be kept for two years .....	2,500	5,000
219.903 Access to facilities and records:		
(a) Failure to release records in this subpart in accordance with part 40 of this chapter .....	2,500	5,000
(b) Failure to permit access to facilities .....	2,500	5,000
(c) Failure to provide access to results of railroad alcohol and drug testing programs .....	2,500	5,000
<b>Subpart K—Referral Programs</b>		
219.1001 Requirement for referral programs:		
(b)(1) Failure to adopt or implement required self-referral program or alternate program that meets the requirements of this subpart .....	2,500	5,000
(b)(2) Failure to adopt or implement required co-worker referral program or alternate program that meets the requirements of subpart K of this part .....	2,500	5,000
(d) Violation of referral program prohibitions .....	2,500	5,000
219.1003 Referral program conditions:		
(a) Failure to comply with referral program conditions .....	2,500	5,000
(b) Failure to maintain employment .....	2,500	5,000
(c) Failure to disqualify regulated employee when referral conditions not met .....	2,500	5,000
(d) Use of unqualified DAC .....	2,500	5,000
(e) Allowing person evaluated as having active substance abuse disorder to perform regulated service .....	2,500	5,000
(f) Breach of confidentiality	2,500	5,000
(g) Failure to allow recommended leave of absence .....	2,500	5,000
(h)(1)–(3) Failure to meet return to service conditions .....	2,500	5,000
(h)(4) Failure to return to service when conditions met .....	2,500	5,000
(i) Improper modification to rehabilitation plan .....	2,500	5,000
(l) Failure to complete DAC evaluation within time limit .....	2,500	5,000
(m) Exceeding 24 month time limit on aftercare when not associated with a substantiated part 219 violation .....	2,500	5,000
219.1007 Alternate programs:		
(c) Failure to obtain FRA approval of alternate program .....	2,500	5,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The FRA Administrator reserves the right to assess a penalty of up to \$105,000 for any violation, including ones not listed in this penalty schedule, where circumstances warrant. See 49 CFR part 209, appendix A.

<sup>2</sup> The penalty schedule uses section numbers from 49 CFR part 219; and if more than one item is listed as a type of violation of a given section, each item is also designated by a “penalty code,” which is used to facilitate assessment of civil penalties. For convenience, penalty citations will cite the CFR section and the penalty code, if any. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation.

Issued in Washington, DC, on May 27, 2016.

**Amitabha Bose,**  
Acting Administrator.

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