

FEDERAL RAILROAD ADMINISTRATION
ALCOHOL AND DRUG REGULATIONS (49 CFR Part 219)
Foreign Railroads' Foreign-Based Employees Who Perform Train or
Dispatching Service in the United States

SUPPORTING JUSTIFICATION

- 1. EXPLAIN THE CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY. IDENTIFY ANY LEGAL OR ADMINISTRATIVE REQUIREMENTS THAT NECESSITATE THE COLLECTION. ATTACH A COPY OF THE APPROPRIATE SECTION OF EACH STATUTE AND REGULATION MANDATING OR AUTHORIZING THE COLLECTION OF INFORMATION.**

This collection of information is a request for an extension of a currently approved submission. FRA has revised the information in this collection – where appropriate and necessary – to reflect the most current data, and FRA’s experience over the past three years in implementing the requirements of Part 216.

Background

Railroads incorporated in a place outside the United States (“foreign railroads”) have been subject to portions of FRA’s regulations on the control of alcohol and drug use (49 CFR Part 219) since 1986 (51 FR 3973; Jan. 31, 1986). In 1991, Congress determined that alcohol abuse and illegal drug use posed significant dangers to the safety of railroad operations, and passed the Omnibus Transportation Employee Testing Act of 1991, Public Law No. 102-143 (“Omnibus Act” or “Act”). The Omnibus Act mandated FRA, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA, whose Office of Motor Carrier Safety is now part of the Federal Motor Carrier Safety Administration (FMSCSA)), and the Federal Transit Administration (FTA) add new alcohol and drug program requirements for their respective regulated industries in order to eliminate the abuse of alcohol and use of drugs by covered individuals. Part 219 implements the requirements of the Omnibus Act and FRA’s general rulemaking authority under 49 U.S.C 20103. FRA subsequently fulfilled the Act’s mandates by adding pre-employment testing and random alcohol testing to an already comprehensive drug and alcohol program that included random drug testing (59 FR 7613, February 15, 1994).

The Omnibus Act also mandated each agency to act consistent with the international obligations of the United States and to take foreign countries’ laws and regulations into account in fulfilling the Act’s regulatory requirements. 49 U.S.C. 20140(e). In 1992, FRA published an advance notice of proposed rulemaking (ANPRM) asking for comment on international application of its alcohol and drug regulations to foreign

railroad foreign-based railroad employees who cross into the United States to work. FRA received no comments and terminated its rulemaking in 1994.

FAA, which had simultaneously published a similar ANPRM with respect to its alcohol and drug rule, terminated its international application rulemaking in 2000, citing the many technical and legal issues raised by the potential application of its regulations to foreign-based flight personnel from the approximately 180 nations with airline operations to and from the United States. In part because of the complexity of these issues, FAA decided that application of its regulations to foreign-based flight personnel would be better handled through safety standards negotiated within the International Civil Aviation Organization (ICAO) (a specialized United Nations agency responsible for setting global standards for international civil aviation) than through a rulemaking.

FHWA (now FCMSA), which had also published a similar ANPRM, took a different approach and in 1995 issued a final rule applying all of its alcohol and drug regulations (including pre-employment and random drug testing) to truck and bus drivers who operate in the United States, regardless of domicile.

On December 11, 2001, FRA proposed to amend its regulation on the control of alcohol and drug use to narrow the scope of its existing exceptions for Foreign Railroads' Foreign Based (FRFB) employees. (See 66 FR 64000). FRA also invited comments on whether it should expand the scope of events that trigger post-accident testing (subpart C) and reasonable suspicion testing (subpart D) to include events that occur outside the United States, and FRA raised for comment several practical issues associated with the extraterritorial application of part 219.

Currently, an FRFB employee who enters the United States to perform train, dispatching, or signal service is subject only to the provisions on general conditions, prohibitions, post-accident testing, reasonable suspicion testing (accident/incident testing and rule violation testing are authorized, but not required, for both FRFB and domestic rail employees), testing procedures, annual report, and recordkeeping of FRA's alcohol and drug rules (respectively, all of subparts A, B, C) and § 219.300 (reasonable suspicion testing) in subpart D, and subparts H, I, and J of Part 219 under paragraph (c) of § 219.3. In the NPRM, FRA proposed to apply subparts E (identification of troubled employees), F (pre-employment testing), and G (random testing) to FRFB train and dispatching service employees who had previously been excepted from these requirements, unless their employer qualified as a small railroad under the proposed § 219.3(b). FRA's proposal to narrow the current exceptions for FRFB employees arose from its concerns about the projected steady increase in the number and extent of cross-border train operations due to the continuing consolidation of North American railroads. Under this proposal, only FRFB signal service employees, who are currently few in number, would continue to be excepted from the requirements of subparts E, F, and G.

The most controversial part of the NPRM was its proposal to include random alcohol and drug testing as part of a more comprehensive testing program for FRFB employees who

perform train or dispatching service in the United States. As noted in the preamble to the NPRM, alcohol or drug use has resulted in serious accidents in the United States (e.g., marijuana use was implicated in a 1987 collision between two trains at Chase, Maryland, which killed 16 people and injured 174). FRA believes that random alcohol and drug testing is an effective and necessary deterrent to substance abuse by road train crews and road switching crews, who normally work independently of supervisory monitoring, and to dispatching service employees, who are critical to rail safety because they determine the movements and speed of trains. Train employees, in general, including engineers, conductors, switchmen, trainmen, brakemen, and hostlers, pose a significant safety risk to themselves and others if their judgment and motor skills are impaired by the use of alcohol or drugs.

FRA's experience with administering part 219 has shown that random alcohol and drug testing helps to deter alcohol and drug usage and to identify individuals who have a substance abuse problem. Since mandatory FRA random drug testing began in 1989, the positive drug rate for the United States rail industry has declined from 1.04 percent in 1990 to 0.77 percent in 2001. A positive drug test result can indicate on-duty impairment if the test was conducted shortly after the employee's ingestion of an illegal substance (since random testing may be conducted only when an employee is on duty). However, even if a test were conducted some time after the employee's ingestion, a positive result still provides valuable safety information since it establishes that the employee has a history of drug use. Use of controlled substances is typically compulsive behavior that is likely to be repeated, and the chronic and withdrawal effects of drugs are frequently as serious as the acute effects.

For purposes of Part 219 generally, the term "FRFB train or dispatching service employee" refers to an individual who meets all of the following three criteria: (1) The individual must be employed by a foreign railroad or by contractor to a foreign railroad; (2) The individual's primary place of service for rail transportation services ("home terminal") must be located outside the United States; and (3) The individual must either (a) in the case of a train service employee, "be engaged in or connected with the movement of a train, including a hostler" (49 U.S.C. 21101(5)) or (b) in the case of a dispatching service employee, "report, transmit, receive, or deliver orders related to or affecting train movements" (49 U.S.C. 21101(2)) in the United States during a duty tour or be assigned to perform such train service or dispatching service in the United States during a duty tour. For purposes of pre-employment testing only, a "train or dispatching service employee" is a "final applicant for employment" in train or dispatching service or an employee "seeking to transfer for the first time from non-covered service to duties involving covered service" as a train or dispatching service employee. See § 219.501(b). FRFB employees who perform, or who are assigned to perform, such train and dispatching service in the United States are already subject to Subparts A (general requirements and definitions), B (prohibitions), C (post-accident toxicological testing), D (testing for cause), H (testing procedures), I (annual report), and J (recordkeeping procedures) when operating in the United States unless their employer qualifies as a small railroad under § 219.3(b).

In the NPRM, FRA also proposed to amend paragraphs (b)(2) and (3) of § 219.3 to take into account a railroad's operations outside the United States in determining its size for two exceptions. Currently, § 219.3(b)(2) provides relief from subparts D, E, F, and G for certain small railroads. A small railroad is defined as one that (1) does not operate on the track of another railroad or otherwise engage in joint operations with another railroad except for purposes of interchange and (2) has 15 or fewer employees whose duties are covered by the hours of service laws. The other exception, at § 219.3(b)(3), provides relief from subpart I (annual reports) for a railroad with fewer than 400,000 employee-hours. FRA proposed to reduce the scope of the two exceptions at §§ 219.3(b)(2) and 219.3(b)(3) to provide relief only to relatively small railroads, as originally intended, by taking into account a railroad's operations outside the United States in determining the size of the railroad for purposes of those exceptions. FRA proposed the exemption at § 219.3(c) to be limited to FRFB signal employees.

To comply with these proposed requirements, foreign railroads that use FRFB train or dispatching service employees to conduct train operations in the U.S. would be required to conduct pre-employment drug tests (Subpart F) and submit random alcohol and drug testing plans for approval by FRA (Subpart G) for these employees. To meet the same requirements already applicable to railroads with United States-based train and dispatching service employees and to United States railroads with foreign-based train and dispatching service employees, FRA would also require foreign railroads employing or contracting for the services of FRFB train or dispatching service employees operating in the U.S. to comply with Subpart E by providing self-referral and co-worker report programs that comply with Part 219 and Part 40 procedures. In addition, even though broadly speaking, Subparts H, I, and J currently apply to FRFB train crews and dispatching service employees and their employers, some specific requirements in those subparts do not by their terms apply to operations by these employees because the requirements are partly or wholly triggered only if the employer is required to do pre-employment or random testing. By making pre-employment and random testing requirements applicable to such employees and employers, the proposed amendments would, for example, trigger these additional annual reporting requirements in Subpart I, increase the scope of the foreign railroad's activities subject to the testing procedure requirements in Subpart H (and 49 CFR Part 40 testing safeguards and procedures incorporated in Subpart H by reference), and require the keeping of additional records under Subpart J.

2. INDICATE HOW, BY WHOM, AND FOR WHAT PURPOSE THE INFORMATION IS TO BE USED. EXCEPT FOR A NEW COLLECTION, INDICATE THE ACTUAL USE THE AGENCY HAS MADE OF THE INFORMATION RECEIVED FROM THE CURRENT COLLECTION.

The information collection requirements contained in this rule (FRA's alcohol and drug regulations) is used by FRA to determine compliance by FRFB train and dispatching service employees and their employers with the prohibition against the abuse of alcohol and controlled substances. Because of the increase in cross-border train operations, and

the increased risk posed to the safety of train operations in the United States, FRA is now applying all of the requirements of Part 219 to FRFB train and dispatching service employees. The basic information – evidence of unauthorized use of drugs and alcohol – is used to help prevent accidents/incidents by screening FRFB personnel who perform safety-sensitive functions for unauthorized drug or alcohol use, and is also used to deter other FRFB train and dispatching service employees from unauthorized drug or alcohol use. The ancillary information is used by the railroad, the employee, or the prospective employee and FRA.

The information collected is used by FRA to determine whether it is safe and in the public interest to recognize a foreign railroad's workplace testing program as a compatible alternative to the return-to-service requirements in Subpart B of this Part and the requirements of Subpart E, F, and G of this Part with respect to its employees whose primary reporting point is outside the United States but who enter this country to perform train or dispatching service. FRA reviews each petition for recognition of a foreign workplace testing program to ensure that it contains the following required information so that FRA can make an informed decision: (1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition; (2) The requirements of the foreign railroad workplace testing program to be considered for recognition; (3) Appropriate data or records, or both, for FRA to consider in determining whether the foreign railroad's workplace testing program is equivalent to the minimum standards contained in this Part and provides at least an equivalent level of safety. To be recognized as compatible, the foreign railroad's program must include equivalents to FRA's provisions, and use testing procedures, criteria, and assays reasonably comparable in effectiveness to those in DOT's procedures for drug and alcohol workplace testing programs (49 CFR Part 40; incorporated by reference in Subpart H of this Part) in its equivalent provisions to the return-to-service requirements in Subpart B and Subparts E, F, and G of this Part. FRA also reviews comments about such petitions for recognition in order to take into account the views of both the public and regulated communities before rendering a decision.

FRA reviews foreign railroads' voluntary referral and co-worker report policies to ensure that they meet the same agency standards set forth in Part 219 for domestic railroads. Foreign railroads' are required to adopt, publish, and implement voluntary referral and co-worker report policies. Additionally, FRA's review of these policies aims to ensure that affected foreign railroads intend to retain employees should an alleged violation come to the attention of the railroad as a result of a report by a co-worker that the employee was unsafe to work with or was, or appeared to be, in violation of this rule or the railroad's alcohol and drug rules and that these employees be given adequate leave of absence to facilitate treatment under an employee assistance program. FRA reviews evaluation reports by Substance Abuse Professionals (SAPs) to monitor compliance with the requirements of this Part, in particular to ensure that FRFB employees with a drug or alcohol problem have such professional services available to them and to verify that such employees are referred for treatment under this type of program. FRA seeks to ensure that FRFB employees who have refused to take an

alcohol/drug test not perform train or dispatching service in the United States (for a minimum period of nine (9) months) as impairment by abuse of alcohol or use of drugs unauthorized by a medical professional could seriously jeopardize rail safety.

Under Subpart G (Random Alcohol and Drug Testing), each foreign railroad is required to perform FRA alcohol and drug testing that complies with the requirements of this Part. FRA reviews foreign railroads' programs to confirm that foreign railroads meet the same stringent standards that American railroads do. FRA believes that random testing is very effective in determining whether employees are misusing/abusing controlled substances. Prior to the adoption of Part 219, FRA identified multiple accidents, fatalities, injuries, and property damage that resulted from the errors of alcohol-impaired and drug-impaired railroad employees. Some of these accidents involved the release of hazardous material and, in one case, the release required the evacuation of an entire Louisiana community. These findings led FRA to promulgate the initial version of Part 219 in 1985. FRA notes that the rate of positive drug testing results decreased significantly when domestic railroad employees became subject to FRA's random drug testing requirements.

The information collected is also used by the employees of foreign railroads. Specifically, under § 219.601(b)(4) and § 219.601(d), foreign railroads must provide a written notice to each of their covered employees no later than 45 days prior to the commencement of their random drug testing. This notice must state the following: (1) The date for commencement of the program; (2) The selection of employees for testing will be on a strictly random basis; (3) The consequences of a determination that the employee has violated FRA's program or any applicable railroad rule; and (4) The employee's rights under Subpart E of FRA's regulation. Copies of this notice must be provided to each new covered employee on or before the employee's initial date of service. Moreover, each foreign railroad is required to notify the employee of his/her selection for testing on the day of the test to ensure the employee's presence at the time and place set for testing.

The collection of information is used by FRA to ensure that railroad supervisors receive proper training in recognizing the signs and symptoms of alcohol and drug influence, intoxication, and misuse. Furthermore, the collection of information is used to ensure that railroads provide educational materials to all covered employees that explain the requirements of Part 219 and that articulate their policies and procedures with respect to meeting those requirements. Finally, the collection of information is used by FRA to ensure that tests required under Subpart C are promptly administered.

3. **DESCRIBE WHETHER, AND TO WHAT EXTENT, THE COLLECTION OF INFORMATION INVOLVES THE USE OF AUTOMATED, ELECTRONIC, MECHANICAL, OR OTHER TECHNOLOGICAL COLLECTION TECHNIQUES OR OTHER FORMS OF INFORMATION TECHNOLOGY, E.G. PERMITTING ELECTRONIC SUBMISSION OF RESPONSES, AND THE BASIS FOR THE DECISION FOR ADOPTING THIS MEANS OF COLLECTION.**

ALSO DESCRIBE ANY CONSIDERATION OF USING INFORMATION TECHNOLOGY TO REDUCE BURDEN.

FRA highly encourages and strongly endorses the use of advanced information, wherever possible, to reduce burden on respondents. Comments and related material by the public or the railroad community pertaining to a foreign railroad's workplace testing program (under § 219.4) may be submitted electronically, either to the DOT electronic docket or the Federal eRulemaking Portal, or by fax.

It should be noted, however, that the burden for this collection of information is extremely minimal.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION. SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSES DESCRIBED IN ITEM 2 ABOVE.

The collection of information under Subparts E, F, and G of Part 219 and certain provisions of Subparts H, and J for FRFB train and dispatching service employees is new. Neither FRA nor any other U.S. government agency has routinely collected this type of information for FRFB train and dispatching service employees, and the information collected is time specific (e.g., blood alcohol content on a specific day). The source of the information collection requirements is unique for each separate occurrence; therefore, there is no known duplication of this material.

The information to be submitted or collected for recordkeeping purposes is unique, and no other existing effort can be used or modified for these purposes.

Similar data are not available from any other source.

5. IF THE COLLECTION OF INFORMATION IMPACTS SMALL BUSINESSES OR OTHER SMALL ENTITIES (ITEM 5 OF OMB FORM 83-I), DESCRIBE ANY METHODS USED TO MINIMIZE BURDEN.

Most of the proposed requirements apply only to foreign railroads which employ FRFB personnel who perform train operations or dispatching service in the United States and to railroad contractors who use FRFB train and dispatching service employees. Consequently, the collection of information has no direct impact on small units of governments, business, or other organizations. Nearly all of the accidents that would require toxicological testing and more detailed reporting are most likely occur on the large railroads. Moreover, the rule contains several provisions to minimize the burden on foreign railroads. For example, under the rule, tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system are not subject to this Part. Also, FRFB employees are allowed to enter the United States for a distance of up to 10 miles (up to 20 miles round trip) without being subject to Subparts E, F, and G of Part

219, which include the employee assistance program, pre-employment testing, and random alcohol and drug testing requirements, respectively. Setting the fringe border's limits at 10 route miles or less allows FRA to except most of the current Canadian cross-border railroad operations and all of the current Mexican ones.

Additionally, § 219.3(b)(2) excepts from Subparts D (mandatory reasonable suspicion testing; the other types of for cause testing, namely accident/incident and rule violation testing, are authorized but not required), E (self-referral and co-worker report programs), F (pre-employment testing), and G (random testing) a railroad that meets the following two criteria for the *small railroad exception*: the railroad must (1) utilize 15 or fewer employees who are subject to the hours of service laws, and (2) not operate on the track of another railroad or engage in other joint operations with another railroad except for the purposes of interchange. Thus, railroads operating within a distinct enclave connected to the general system of transportation solely to receive or offer its own shipments, e.g., mining railroads, chemical and manufacturing plants, and military bases, are excepted. By excepting only railroads which in their entirety comprise 15 or fewer employees who are or would be subject to the hours of service laws, FRA is effectuating the original intent of this subsection, namely to lessen the economic impact of Part 219 on those small entities that have both limited resources and a minimal impact on safety.

Finally, the rule allows FRA's Associate Administrator for Safety to recognize a foreign railroad's substance abuse program promulgated under the laws of its home country as a compatible alternative to the return-to-service requirements of Subparts E, F, and G of Part 219 if the program includes the equivalents to these FRA provisions, and testing procedures, criteria, and assays are reasonably comparable in effectiveness to all applicable provisions of DOT's procedures for workplace drug and alcohol testing programs (49 CFR Part 40).

As noted previously, the burden for this information collection is extremely minimal.

6. DESCRIBE THE CONSEQUENCE TO FEDERAL PROGRAM OR POLICY ACTIVITIES IF THE COLLECTION IS NOT CONDUCTED OR IS CONDUCTED LESS FREQUENTLY, AS WELL AS ANY TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN.

If this collection of information were not conducted, or conducted less frequently, FRA's ability to maintain rail safety in the United States might be seriously jeopardized. In 1997, approximately 38,000 trains crossed into the United States from Canada and Mexico (as reported by the U.S. Customs Service). For the year May 2001 to April 2002, a total of 41,000 trains entered the United States from Canada and Mexico, almost an eight (8) percent increase. Additionally, from April 1993 through December 2002, the total value of United States-Mexico merchandise trade by rail increased (in current dollars) from about \$8 billion to \$31 billion. The trend of increasing cross-border traffic is expected to continue. Furthermore, another structural change in the marketplace has been the increasing consolidation of North American railroads. Canadian railroads have

acquired several large U.S. railroads, and U.S. railroads have cooperated financially and logistically with Mexican railroads. In 1999 and 2002, Canadian National Railway Company (CN) merged with Illinois Central and Wisconsin Central. CN currently has a proceeding pending before the Surface Transportation Board (STB) in which CN is seeking authority to acquire three small U.S. railroads (the Duluth, Missabe, and Iron Range Railway Company, the Bessemer and Lake Erie Railroad Company, and the Pittsburgh and Conneaut Dock Company). Increased consolidation is likely lead to more cross-border operations.

FRA is particularly concerned about trains carrying hazardous materials that operate in the United States with FRFB employees. Consequently, if railroads do not have effective alcohol and drug misuse prevention programs and if these programs are not carefully monitored, FRFB train and dispatching service employees working in safety-sensitive positions might abuse alcohol and drugs while on-duty, or just prior to coming on-duty. Moreover, without the required alcohol and drug training programs, supervisors would not be able to spot these employees and immediately remove them from service. The net result would be an increased risk of rail accident/incidents, such as derailments and collisions, with corresponding injuries and fatalities to train crews, and other railroad workers (perhaps the general public as well) in cross-border train operations. In a worst case scenario, a catastrophic accident could occur with high casualties, extensive property damage, and/or severe damage to the environment.

The collection of information is designed to help FRA monitor railroad alcohol and drug misuse prevention programs to ensure that railroads educate their employees on the hazards of alcohol and drug abuse, and offer information on available treatment facilities. Without this collection of information, FRA would be denied an extremely important and helpful resource both to combat alcohol and drug abuse in the railroad industry and to investigate the cause(s) of train accidents/incidents involving FRFB train crews or dispatchers.

To be effective, a safety program requires timely information. Collection of this information less frequently would render the information obsolete and meaningless, and would impair FRA's safety program. This collection of information aids FRA's primary mission, which is to assure the safety of rail transportation within the borders of the United States.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES THAT WOULD CAUSE AN INFORMATION COLLECTION TO BE CONDUCTED IN A MANNER:

-REQUIRING RESPONDENTS TO REPORT INFORMATION TO THE AGENCY MORE OFTEN THAN QUARTERLY;

-REQUIRING RESPONDENTS TO PREPARE A WRITTEN RESPONSE TO A COLLECTION OF INFORMATION IN FEWER THAN 30 DAYS AFTER RECEIPT OF IT;

-REQUIRING RESPONDENTS TO SUBMIT MORE THAN AN ORIGINAL AND TWO COPIES OF ANY DOCUMENT;

-REQUIRING RESPONDENTS TO RETAIN RECORDS, OTHER THAN HEALTH, MEDICAL, GOVERNMENT CONTRACT, GRANT-IN-AID, OR TAX RECORDS FOR MORE THAN THREE YEARS;

-IN CONNECTION WITH A STATISTICAL SURVEY, THAT IS NOT DESIGNED TO PRODUCE VALID AND RELIABLE RESULTS THAT CAN BE GENERALIZED TO THE UNIVERSE OF STUDY;

-REQUIRING THE USE OF A STATISTICAL DATA CLASSIFICATION THAT HAS NOT BEEN REVIEWED AND APPROVED BY OMB;

-THAT INCLUDES A PLEDGE OF CONFIDENTIALITY THAT IS NOT SUPPORTED BY AUTHORITY ESTABLISHED IN STATUE OR REGULATION, THAT IS NOT SUPPORTED BY DISCLOSURE AND DATA SECURITY POLICIES THAT ARE CONSISTENT WITH THE PLEDGE, OR WHICH UNNECESSARILY IMPEDES SHARING OF DATA WITH OTHER AGENCIES FOR COMPATIBLE CONFIDENTIAL USE; OR

-REQUIRING RESPONDENTS TO SUBMIT PROPRIETARY TRADE SECRET, OR OTHER CONFIDENTIAL INFORMATION UNLESS THE AGENCY CAN DEMONSTRATE THAT IT HAS INSTITUTED PROCEDURES TO PROTECT THE INFORMATION'S CONFIDENTIALITY TO THE EXTENT PERMITTED BY LAW.

Under §§ 219.901 and 219.903, railroads are required to maintain alcohol testing records and urine drug testing records for five (5) years. FRA requires these records to be kept for this time period in case of litigation.

All other reporting and recordkeeping requirements are within the above guidelines.

- 8. IF APPLICABLE, PROVIDE A COPY AND IDENTIFY THE DATE AND PAGE NUMBER OF PUBLICATION IN THE FEDERAL REGISTER OF THE AGENCY'S NOTICE, REQUIRED BY 5 CFR 1320.8(d), SOLICITING COMMENTS ON THE INFORMATION COLLECTION PRIOR TO SUBMISSION TO OMB. SUMMARIZE PUBLIC COMMENTS RECEIVED IN RESPONSE TO THAT NOTICE AND DESCRIBE ACTIONS TAKEN BY THE AGENCY IN RESPONSE TO THOSE COMMENTS. SPECIFICALLY ADDRESS COMMENTS RECEIVED ON COST AND HOUR BURDEN.**

DESCRIBE EFFORTS TO CONSULT WITH PERSONS OUTSIDE THE AGENCY TO OBTAIN THEIR VIEWS ON THE AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, THE CLARITY OF INSTRUCTIONS AND RECORDKEEPING, DISCLOSURE, OR REPORTING FORMAT (IF ANY), AND ON THE DATA ELEMENTS TO BE RECORDED, DISCLOSED, OR REPORTED.

CONSULTATION WITH REPRESENTATIVES OF THOSE FROM WHOM INFORMATION IS TO BE OBTAINED OR THOSE WHO MUST COMPILE RECORDS SHOULD OCCUR AT LEAST ONCE EVERY 3 YEARS--EVEN IF THE COLLECTION OF INFORMATION ACTIVITY IS THE SAME AS IN PRIOR PERIODS. THERE MAY BE CIRCUMSTANCES THAT MAY PRECLUDE CONSULTATION IN A SPECIFIC SITUATION. THESE CIRCUMSTANCES SHOULD BE EXPLAINED.

In accordance with the Paperwork Reduction Act of 1995, Pub.L. No.104-13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. §§ 3501-3520), and its implementing regulations, 5 CFR 1320, FRA published a notice in the Federal Register on February 12, 2007, soliciting public comments on these information collection requirements. *See* 72 FR 6656. FRA received no comments in response to this notice.

Background

The Notice of Proposed Rulemaking (NPRM) was published in the Federal Register on December 11, 2001. *See* 66 FR 64000. There were no comments related to the agency estimates for the paperwork burden hours or burden costs.

In response to the NPRM, there were comments about cost related to the rule's regulatory evaluation. Specifically, some commenters asserted that the proposed rule is not cost beneficial. These commenters, most notably the Canadian Pacific Railway Company (CP), asserted that the NPRM's regulatory evaluation underestimated the costs associated with the proposal, including the following: (1) The likelihood of an increase in the pool of employees who would be subject to the proposed requirements; (2) The train delays associated with the crews' refusal to submit to random drug testing; (3) The litigation expenses of defending challenges to random drug testing; (4) The need to make reasonable accommodations for persons with substance abuse problems (who are considered disabled under Canadian law); and (5) The back pay and other compensation paid to employees out of work due to positive drug test results or treatment for abuse. FRA believes that the costs may have been understated in the initial regulatory evaluation but has not established the extent to which the additional factors cited by the commenters would raise the overall costs of the NPRM since FRA is proposing to exempt most existing cross-border operations from the application of Subparts E, F, and G of Part 219. FRA can not verify or dispute Canadian Pacific's estimate, since it failed to provide a complete justification of the costs and benefits used to develop it.

Additional Background

On December 11, 2001, FRA proposed to amend its regulation on the control of alcohol and drug use to narrow the scope of its existing exceptions for FRFB employees. FRA also invited comment on whether it should expand the scope of events that trigger post-accident testing (Subpart C) and reasonable suspicion testing (Subpart D) to include events that occur outside the United States, and FRA raised for comment several practical issues associated with extraterritorial application of Part 219.

In a separate notice published in the Federal Register on January 23, 2002, FRA announced a public hearing on the NPRM. *See* 67 FR 3183. At the February 14, 2002 hearing, FRA heard testimony from representatives of the Canadian National Railway Company (CN), Canadian Pacific Railway Company (CP), and two Canadian counterparts of American railroad unions, namely the Brotherhood of Locomotive Engineers (BLE-Can.), and the United Transportation Union (UTU-Can.). At the hearing, FRA also extended the comment period 30 days to allow interested parties time to supplement the record.

On July 10, 2002, several months after the comment period had closed, the Canadian Human Rights Commission (CHRC) issued a Policy Statement on Alcohol and Drug Testing (CHRC Policy). To consider the implications of this major statement, FRA published a notice on December 10, 2002 (see 67 FR 75996), inviting comment on the CHRC Policy, and extended comment on the NPRM until further notice in order to enable the agency to consult further with the Governments of Canada and Mexico.

FRA has since consulted with both Canada and Mexico on this rulemaking and other issues. In a notice that it published in the Federal Register on July 28, 2003 (see 68 FR 44276), FRA outlined the likely revisions to the NPRM, based on these consultations and consideration of public comments. FRA also announced that the comment period on this rulemaking would close on August 27, 2003, and invited comments on changes to the NPRM that the agency was considering. The changes in the final rule reflect FRA's careful evaluation of the comments it received and the consultations that it engaged in.

9. EXPLAIN ANY DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS, OTHER THAN ENUMERATION OF CONTRACTORS OR GRANTEES.

No payment or gift of any kind is made to respondents.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS AND THE BASIS FOR THE ASSURANCE IN STATUTE, REGULATION, OR AGENCY POLICY.

No assurances of confidentiality have been provided to affected respondents. FRA maintains a set of accident investigation files. FRA does not maintain a system of records that will permit the identification of records by an individual name. FRA does hold in confidence information concerning medically authorized use of controlled substances, pursuant to 5 U.S.C. 552 (b)(6), except where the information is deemed material to determination of accident causation. The random testing programs for alcohol and drugs require that results of random tests and related medical information be held in confidence except as necessary to effect discipline and/or referral for rehabilitation.

11. **PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE, SUCH AS SEXUAL BEHAVIOR AND ATTITUDES, RELIGIOUS BELIEFS, AND OTHER MATTERS THAT ARE COMMONLY CONSIDERED PRIVATE. THIS JUSTIFICATION SHOULD INCLUDE THE REASONS WHY THE AGENCY CONSIDERS THE QUESTIONS NECESSARY, THE SPECIFIC USES TO BE MADE OF THE INFORMATION, THE EXPLANATION TO BE GIVEN TO PERSONS FROM WHOM THE INFORMATION IS REQUESTED, AND ANY STEPS TO BE TAKEN TO OBTAIN THEIR CONSENT.**

No information of this nature is sought or collected.

12. **PROVIDE ESTIMATES OF THE HOUR BURDEN OF THE COLLECTION OF INFORMATION. THE STATEMENT SHOULD:**

-INDICATE THE NUMBER OF RESPONDENTS, FREQUENCY OF RESPONSE, ANNUAL HOUR BURDEN, AND AN EXPLANATION OF HOW THE BURDEN WAS ESTIMATED. UNLESS DIRECTED TO DO SO, AGENCIES SHOULD NOT CONDUCT SPECIAL SURVEYS TO OBTAIN INFORMATION ON WHICH TO BASE HOUR BURDEN ESTIMATES. CONSULTATION WITH A SAMPLE (FEWER THAN 10) OF POTENTIAL RESPONDENTS IS DESIRABLE. IF THE HOUR BURDEN ON RESPONDENTS IS EXPECTED TO VARY WIDELY BECAUSE OF DIFFERENCES IN ACTIVITY, SIZE, OR COMPLEXITY, SHOW THE RANGE OF ESTIMATED HOUR BURDEN, AND EXPLAIN THE REASONS FOR THE VARIANCE. GENERALLY, ESTIMATES SHOULD NOT INCLUDE BURDEN HOURS FOR CUSTOMARY AND USUAL BUSINESS PRACTICES

-IF THIS REQUEST FOR APPROVAL COVERS MORE THAN ONE FORM, PROVIDE SEPARATE HOUR BURDEN ESTIMATES FOR EACH FORM AND AGGREGATE THE HOUR BURDENS IN ITEM 13 OF OMB FORM 83-I.

-PROVIDE ESTIMATES OF ANNUALIZED COST TO RESPONDENTS FOR THE HOUR BURDENS FOR COLLECTIONS OF INFORMATION,

IDENTIFYING AND USING APPROPRIATE WAGE RATE CATEGORIES. THE COST OF CONTRACTING OUT OR PAYING OUTSIDE PARTIES FOR INFORMATION COLLECTION ACTIVITIES SHOULD NOT BE INCLUDED HERE. INSTEAD, THIS COST SHOULD BE INCLUDED IN ITEM 14.

Note: Information available to FRA indicates that Canadian train crew labor rates are comparable to those of U.S. train crews. Consequently, AAR labor rates are used in this analysis. Based on the Association of American Railroads (AAR) 2006 edition of Railroad Facts, FRA has used the following labor rates for railroad hourly wages in its cost calculations: \$73 per hour for executives/other officials; \$43 per hour for professional/administrative staff; \$49 per hour for covered railroad employees; and \$18 per hour for clerical workers. Wage rates are burdened 40% to include fringe benefits and overhead.

Also, it should be noted that Subparts A, B, C, D, H, and parts of J of Part 219 previously applied to FRFB employees and their employers. Consequently, the burden hours for the requirements of these subparts are already included under OMB No. 2130-0526.

Respondent universe is two Canadian railroads – Canadian National, and St. Lawrence and Atlantic – for this final rule.

Recognition of a Foreign Railroad’s Workplace Testing Program [219.4]

- A. A foreign railroad may petition the FRA Associate Administrator for Safety for recognition of a workplace testing program promulgated under the laws of its home country as a compatible alternative to the return-to-service requirements in subpart B of this part and the requirements of subparts E, F, and G of this part with respect to its employees whose primary reporting point is outside the United States but who enter the United States to perform train or dispatching service and with respect to its final applicants for, or its employees seeking to transfer for the first time to, duties involving such service.

To be so considered, the petition must document that the foreign railroad’s workplace testing program contains the equivalents to subparts B, E, F, and G of this Part: (i) Pre-employment drug testing; (ii) A policy dealing with co-worker and self-reporting of alcohol and drug abuse problems; (iii) Random drug and alcohol drug testing; (iv) Return-to-duty testing; and (v) Testing procedures and safeguards reasonably comparable in effectiveness to all applicable provisions of the United States Department of Transportation Procedures for Workplace and Alcohol Testing Programs (Part 40 of this Title). In approving a program under this section, the FRA Associate Administrator for Safety may impose conditions deemed necessary.

Each petition for recognition of a foreign workplace testing program must contain:

- (1) The name, title, address, and telephone number of the primary person to be contacted

with regard to review of the petition; (2) The requirements of the foreign railroad workplace testing program to be considered for recognition; (3) Appropriate data or records, or both, for FRA to consider in determining whether the foreign railroad workplace testing program is equivalent to the minimum standards contained in this Part and provides at least an equivalent level of safety.

FRA estimates that approximately one (1) petition will be sent to the FRA Associate Administrator for Safety each year under the above requirement. It is estimated that it will take a foreign railroad approximately 10 hours to compose the petition, gather the necessary data/records that its workplace testing program contains the equivalents to subparts B, E, F, and G of this Part, and submit all this information to FRA. Total annual burden for this requirement is 10 hours.

Respondent Universe:

2
railroads

Burden time per response:

10
hours

Frequency of Response:

On occasion

Annual number of Responses: 1 petition (with required data/records)

Annual Burden: 10 hours

Annual Cost: \$430

Calculation: 1 petition (with required documents) x 10 hrs.= 10 hours
10 hrs. x \$43 = \$430

- B. **Comments.** Not later than 30 days from the date of publication of the notice in the **Federal Register** concerning a petition under paragraph (c) of this section, any person may comment on the petition. A comment must set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding. Any comment on a petition should reference the FRA docket and notice numbers. A commenter may submit a comment and related material by only one of the following methods:

- *Web Site:* <http://dms.dot.gov>. (Follow the instructions for submitting comments to the DOT electronic docket site.)

- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, S.W., Nassif Building, Room PL-401, Washington, D.C. 20590-001.
- *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, S.W., Washington, D.C., between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. (Follow the online instructions for submitting comments.)

The commenter must certify that a copy of the comment was served on the petitioner.

FRA estimates that approximately two (2) comments will be received under the above requirement. It is estimated that it will take approximately two (2) hours to complete each comment, send the comment to FRA, and send a copy to the petitioner as required. Total annual burden for this requirement is four (4) hours.

Respondent Universe:

2
railroads/public

Burden time per response: 2 hours

Frequency of Response: On occasion

Annual number of Responses: 2 comments + 2 comment copies
 Annual Burden: 4 hours
 Annual Cost: \$172

Calculation: 2 comments (+ 2 comment copies) x 2 hrs. = 4 hours
 4 hrs. x \$43 = \$172

- C. Program Recognition. If its program has been recognized, the foreign railroad must maintain a letter on file indicating that it has elected to extend specified elements of the recognized program to its operations in the United States. Once granted, program

recognition remains valid so long as the program retains these elements and the foreign railroad complies with the program requirements.

Since FRA anticipates that no foreign railroad's workplace testing program will be comparable to the return-to-service requirements in Subpart B of this Part and the requirements of Subparts E, F, and G of this Part with respect to its employees whose primary reporting point is outside the United States but who enter the U.S. to perform train or dispatching service, it does not anticipate recognizing/approving any alternative programs. Consequently, no letters will be filed, and there is no paperwork burden associated with this requirement.

Total annual burden for this entire requirement is 14 hours (10 + 4).

Waivers [219.7]

- A. A person subject to a requirement of this part may petition the FRA for a waiver of compliance with such requirement.

Each petition for waiver under this section must be filed in a manner and contain the information required by Part 211 of this chapter. A petition for waiver of the Part 40 prohibition against stand down of an employee before the Medical Review Officer has completed the verification must also comply with § 40.21 of this title.

Special dispensation for employees performing train or dispatching service on existing cross-border operations. If a foreign railroad requests a waiver not later than August 10, 2004, for an existing cross-border operation, subparts E, F, and G of this part shall not apply to train or dispatching service on that operation in the United States performed by an employee of a foreign railroad whose primary reporting point is outside the United States, until the railroad's waiver request is acted upon by FRA.

FRA estimates that it will receive zero (0) waiver requests under the above requirement. Consequently, there is no burden associated with it.

- B. *Waiver requests for employees performing train or dispatching service on new or expanded cross-border operations.* A foreign railroad seeking a waiver from subparts E, F, and G of this part for its employees performing train or dispatching service on a new cross-border operation that proceeds more than 10 route miles into the United States, or a formerly excepted cross-border operation that expands beyond the 10 mile limited haul exception in paragraph (d) of this section, must file a petition not later than 90 days before commencing the subject operation. FRA will attempt to decide such petitions within 90 days. If no action is taken on the petition within 90 days, the petition remains pending for decision and the cross-border crew assignments on the operation covered by the petition will be subject to subparts E, F, and G until FRA grants the petition should the petitioner commence the proposed operation.

FRA estimates that it will receive zero (0) waiver petitions under the above requirement. Consequently, there is no burden associated with this provision.

Subpart E - Identification of Troubled Employees

Voluntary referral and Co-worker report Policies [219.401, 219.403, 219.405]

Railroads are required to adopt, publish, and implement voluntary referral and co-worker report policies. Specifically, each railroad must adopt, publish and implement – (1) A policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before those problems manifest themselves in detected violations of this part (hereafter "voluntary referral policy"); and (2) A policy designed to foster employee participation in preventing violations of this subpart and encourage co-worker participation in the direct enforcement of this part (hereafter "co-worker report policy").

A railroad may comply with this subpart by adopting, publishing and implementing policies meeting the specific requirements of §§ 219.403 and 219.405 or by complying with § 219.407.

If a railroad complies with this part by adopting, publishing and implementing policies consistent with §§ 219.403 and 219.405, the railroad must make such policies, and publications announcing such policies, available for inspection and copying by FRA.

Affected employees would maintain an employment relationship with the railroad and be given adequate leave of absence to facilitate treatment under an employee assistance program.

This is a one-time requirement that has already been fulfilled. Consequently, there is no additional burden associated with this requirement.

Evaluation by Substance Abuse Professional (SAP) [219.403, 219.405]

Railroads must make available the services of a Substance Abuse Professional (SAP) to help employees with substance abuse problems. The Substance Abuse Professional must schedule necessary interviews with the employee and complete an evaluation within 10 calendar days of the date on which the employee contacts the professional with a request for evaluation under the policy, unless it becomes necessary to refer the employee for further evaluation. In each case, all necessary evaluations must be completed within 20 days of the date on which the employee contacts the professional.

FRA estimates that approximately three (3) employees will be referred for treatment under this program. FRA estimates that it will take approximately 90 minutes for a Substance Abuse Professional (SAP) to conduct an interview, and another 30 minutes to prepare an evaluation report. Total annual burden for this requirement is six (6) hours. (Note: FRA estimates that the cost for SAP services is approximately \$300 per referral.)

Respondent Universe:

2
railroads

Burden time per response:

2 hours
(90 min. + 30 min.)

Frequency of Response:

On occasion

Annual number of Responses:

3 reports/referrals

Annual Burden:

6 hours

Annual Cost:

\$900

Calculation: 3 reports/referrals x 2 hrs. = 6 hours
3 reports/referrals x \$300 = \$900

Report by a Co-worker [219.405(c)(1)]

Under the co-worker report policy, an alleged violation must come to the attention of the railroad as a result of a report by a co-worker that the employee was apparently unsafe to work with or was, or appeared to be, in violation of this rule or the railroad's alcohol and drug rules.

FRA estimates that approximately two (2) railroads will have a co-worker report policy in place on their railroads. It is estimated that these railroads will receive a total of approximately one (1) report a year that an employee is unsafe to work with or appeared to be in violation of this rule or the railroad's alcohol and drug rules. Such a report will take approximately five (5) minutes to complete, and most likely will be made anonymously by phone. Total annual burden for this requirement is five (5) minutes.

Respondent Universe:

2
railroads

Burden time per response: 5 minutes

Frequency of Response: On occasion

Annual number of Responses: 1 report
Annual Burden: 5 minutes
Annual Cost: \$3

Calculation: 1 reports x 5 min. = .08 hour
.08 hr. x \$43 = \$3

Alternate Policies [219.407]

In lieu of a policy under § 219.403 (voluntary referral) or § 219.405 (co-worker report), or both, a railroad may adopt, publish and implement, with respect to a particular class or craft of covered employees, an alternate policy or policies having as their purpose the prevention of alcohol or drug use in railroad operations, if such policy or policies have the written concurrence of the recognized representatives of such employees.

The written concurrence of recognized employee representatives in an alternate policy may be evidenced by a collective bargaining agreement, or any other document describing the class or craft of employees to which the alternate policy applies. The agreement or other document must make express reference to this part and to the intention of the railroad and employee representatives that the alternate policy applies in lieu of the policy required by § 219.403, § 219.405, or both.

The railroad must file the agreement or other document described in paragraph (b) of this section with the Associate Administrator for Safety, FRA. If the alternate policy is amended or revoked, the railroad must file a notice of such amendment or revocation at least 30 days prior to the effective date of such action.

FRA estimates that it will receive zero (0) alternate policies from foreign railroads under the above requirement. Consequently, there is no burden associated with this provision.

Subpart F - Pre-employment Tests

Each applicant who is given favorable consideration for a position with a railroad that involves the performance of covered service, and employees seeking to transfer for the first time from non-covered service to duties involving covered service must undergo a pre-employment test for drugs prior to being employed in covered service. The test must be accomplished through an analysis of urine samples.

The procedures for conducting and documenting urine collection are governed by DOT's regulation on Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR Part 40) and FRA's regulation at 49 CFR Part 219 Subpart H.

Notification; records [219.503]

The railroad must provide for medical review of urine drug test results under Subpart F as provided in Subpart H of this part. The railroad must notify the applicant of the results of the drug and alcohol test in the same manner as provided for employees in subpart H of this part. Records must be maintained confidentially and must 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 whose application for employment in covered service was denied.

The burden for notification of applicants required under Subpart F is included in section 219.707(c),(d), and the burden for records retention is included under section 219.703(a) and 49 CFR § 40.23. As previously noted, these two sections are contained in Subpart H. The burden hours for the requirements under Subpart H are included under OMB No. 2130-0526.

Subpart G - Random Alcohol and Drug Testing

Railroad Random Drug Testing Programs [219.601(a)]

1. Each covered railroad must submit for FRA approval a random testing program that complies with the requirements of this subpart (49 CFR Part 219 Subpart G). A railroad commencing operations must submit such a program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval by the FRA Administrator.

This is a one-time requirement that has already been fulfilled. Consequently, there is no additional burden associated with this requirement.

2. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A railroad already subject to this subpart that becomes subject to this subpart with respect to one or more additional employees must amend its program not later than 60 days after these employees become subject to this subpart and file with FRA a notice of such amendment at least 30 days prior to the intended effective

date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

FRA estimates that zero (0) amendments will be filed each year for the next three years under the above requirement. Consequently, there is no additional burden associated with this requirement.

Random Selection Procedures - Drug [219.601(b)(1)]

Random testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program: (1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular specimens were collected.

This requirement has already been fulfilled. Consequently, there is no additional burden associated with this requirement.

Notices to Employees [219.601(b)(4), 219.601(d)]

1. A respondent is required to provide each of its employees with a written notice no later than 45 days prior to commencement of its random drug testing program informing the employee that he or she will be subject to random drug testing. Such notice must: (1) state the date for commencement of the program; (2) state that the selection of employees for testing will be on a strictly random basis; (3) describe the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and (4) inform the employee of the employee's rights under Subpart E of this Part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service.

This requirement has already been fulfilled. Consequently, there is no additional burden associated with this requirement.

2. Notice of an employee's selection may not be provided until the duty tour in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing.

Each railroad is required to notify the employee of his/her selection for testing on the day of the test to ensure the employee's presence at the time and place set for testing.

FRA estimates that zero (0) notices will be issued under the above requirement. Consequently, there is no additional burden associated with this provision.

Random Selection Procedures - Drug [219.601(b)(7)]

Each time an employee is notified for random drug testing, the employee will be informed that selection was made on a random basis.

The burden for this requirement is included in section 219.601(b)(4) above. Thus, there is no burden associated with this requirement.

Administrator's determination of random drug and alcohol testing rate [219.602; 219.608]

The FRA Administrator's decision to increase or decrease the minimum annual percentage rate for random drug/alcohol testing is based on the reported positive (violation) rate for the entire railroad industry. All information used for the determination is drawn from the drug/alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive (violation) rate.

The burden for this requirement is now covered under the Department of Transportation's (DOT's) Part 40 Information Collection Submission (OMB No. 2105-0529). Consequently, there is no burden associated with the above provisions.

Specimen Security, Chain of Custody, and Transportation of Urine Specimens to Laboratory. [219.603(a)]

The procedures for the documentation of urine specimen collection are governed by DOT's regulation on Procedures for Transportation Workplace Testing Programs (49 CFR Part 40) and FRA's regulation at 49 CFR Part 219 Subpart H.

Notice by Employee Asking to be Excused from Urine Testing [219.603(a)]

Compliance by the employee may be excused only in the case of a documented medical or family emergency. Thus, FRA's regulation allows employees to be excused from providing an urine sample where they have provided the employer with documentation.

The burden for this requirement is now included under that of DOT's Part 40 Information Collection Submission. Consequently, there is no additional burden associated with this requirement.

Railroad Random Alcohol Testing Programs [49 CFR 219.607(a)]

1. Each railroad must submit for FRA approval a random alcohol testing program meeting the requirements of this subpart (49 CFR Part 219 Subpart G). A railroad commencing operations must submit a random alcohol testing program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval.

Since there are no new or additional railroads/respondents, this requirement has already been fulfilled. Consequently, there is no additional burden associated with this requirement.

2. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

FRA estimates that approximately zero (0) amendments will be filed each year under the above requirement. Consequently, there is no additional burden associated with this requirement.

Random Selection Procedures - Alcohol [219.607(b)(1)]

Random selection of covered employees for alcohol testing must be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected at the discretion of the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular samples were collected.

For most railroads, random selections for drug and alcohol testing are made at the same time. The burden, therefore, for this requirement is included in section 219.601(b)(1) and thus has already been fulfilled. Consequently, there is no additional burden associated with this requirement.

Notice to Employees [219.607(b)(5)]

An employee may be subject to testing only while on duty. Only employees who perform covered service for the railroad may be subject to testing under this part. In the case of employees who during some duty tours performs covered service and during others do not, the railroad's program may specify the extent to which, and the circumstances under which, the employee shall be subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad's program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

The burden for this requirement is included above under section 219.601(b)(4) above.

Notice to Employees [219.607(b)(7)]

Each time an employee is notified for random alcohol testing, the employee must be informed that selection was made on a random basis.

This requirement is covered in the Chain of Custody and Control Form (where a box is checked), and is accounted for in a separate submission by the Department of Health and Human Services (DHHS). Consequently, there is no burden associated with this requirement.

Notice to Employees [219.607(c)(1)]

No later than 45 days prior to commencement of random alcohol testing, the railroad must publish to each of its covered employees, individually, a written notice that the employee will be subject to random alcohol testing under this part. Such notice must state the date for commencement of the program, must state that the selection of employees for testing will be on a strictly random basis, must describe the consequences of a determination that the employee has violated § 219.101 or any applicable railroad rule, and must inform the employee of the employee's rights under subpart E of this Part. A copy of the notice must be provided to each new covered employee on or before the employee's initial date of service. This notice may be combined with the notice or policy statement required by § 219.23.

The notice for random drug and random alcohol testing is a single document. The burden for this requirement is included under section 219.601(b)(4) above.

Participation in Alcohol Testing [219.609]

A railroad must, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with § 219.101, and the employee must provide the required breath sample and complete the required paperwork and certifications.

In addition to the records required to be kept by part 40 of this title, each railroad must maintain alcohol misuse prevention program records in a secure location with controlled access as set out in this section. Records must be maintained in accordance with the following schedule:

-Five Years

- (1) A summary record of each covered employee's test results; and
- (2) A copy of the annual report summarizing the results of its alcohol misuse prevention programs (if required to submit the report under § 219.801(a)).

-Two years

Records related to the collection process: (1) Records related to the collection process: (i) Collection logbooks, if used; (ii) Documents relating to the random selection process; (iii) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests; (iv) Documents generated in connection with decisions on post-accident testing; (v) Documents verifying the existence of a medical explanation of the inability of a covered 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) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part; (iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part. (3) Records related to other violations of this Part. (4) Records related to employee training: (i) Materials on alcohol abuse awareness, including a copy of the railroad's policy on alcohol abuse; (ii) Documentation of compliance with the requirements of § 219.23; (iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion; (iv) Certification that any training conducted under this part complies with the requirements for such training.

B. Retention of urine drug testing records [219.903]

In addition to the records required to be kept by part 40 of this title, each railroad must maintain drug misuse prevention program records in a secure location with controlled access as set forth in this section. Retention period for these records is as follows:

-Five Years

- (i) A summary record of each covered employee's test results; and
- (ii) A copy of the annual report summarizing the results of its drug misuse prevention program (if required to submit under § 219.803(a)).

-Two years

- (1) Records related to the collection process: (i) Documents relating to the random selection process; (ii) Documents generated in connection with decisions to administer reasonable suspicion drug tests; (iii) Documents generated in connection with decisions on post-accident testing; (iv) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a specimen.
- (2) Records related to test results: (i) The railroad's copy of the drug test custody and control form, including the results of the test; (ii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.
- (3) Records related to other violations of this Part.
- (4) Records related to employee training: (i) Materials on drug abuse awareness, including a copy of the railroad's policy on drug abuse; (ii) Documentation of compliance with the requirements of § 219.23; (iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion; (iv) Certification that any training conducted under this part complies with the requirements for such training.

FRA estimates that approximately 80 records will have to be filed under these requirements annually. It is estimated that will take approximately five (5) minutes per record to prepare a file folder, and file the report and any related material. Total annual burden for the program is seven (7) hours. (Note: The labor rate of clerical staff is estimated at \$18 per hour.)

Respondent Universe:

2
railroads

Burden time per response:

5
minute
s

Frequency of Response: On
occasion

Annual number of Responses: 80 records
Annual Burden: 7 hours
Annual Cost: \$126

Calculation: 80 records x 5 min. = 7 hours
7 hrs. x \$18 = \$126

Total annual burden for the entire requirement is seven (7) hours.

Total Burden for this entire Information Collection is 28 hours.

13. **PROVIDE AN ESTIMATE OF THE TOTAL ANNUAL COST BURDEN TO RESPONDENTS OR RECORDKEEPERS RESULTING FROM THE COLLECTION OF INFORMATION. (DO NOT INCLUDE THE COSTS OF ANY HOUR BURDEN SHOWN IN ITEMS 12 AND 14).**

-THE COST ESTIMATES SHOULD BE SPLIT INTO TWO COMPONENTS: (A) A TOTAL CAPITAL AND START-UP COST COMPONENT (ANNUALIZED OVER ITS EXPECTED USEFUL LIFE); AND (B) A TOTAL OPERATION AND MAINTENANCE AND PURCHASE OF SERVICES COMPONENT. THE ESTIMATES SHOULD TAKE INTO ACCOUNT COSTS ASSOCIATED WITH GENERATING, MAINTAINING, AND DISCLOSING OR PROVIDING THE INFORMATION. INCLUDE DESCRIPTIONS OF METHODS USED TO ESTIMATE MAJOR COST FACTORS INCLUDING SYSTEM AND TECHNOLOGY ACQUISITION, EXPECTED USEFUL LIFE OF CAPITAL EQUIPMENT, THE DISCOUNT RATE(S), AND THE TIME PERIOD OVER WHICH COSTS WILL BE INCURRED. CAPITAL AND START-UP COSTS INCLUDE, AMONG OTHER ITEMS, PREPARATIONS FOR COLLECTING INFORMATION SUCH AS PURCHASING COMPUTERS AND SOFTWARE; MONITORING, SAMPLING, DRILLING AND TESTING EQUIPMENT; AND RECORD STORAGE FACILITIES.

-IF COST ESTIMATES ARE EXPECTED TO VARY WIDELY, AGENCIES SHOULD PRESENT RANGES OF COST BURDENS AND EXPLAIN THE REASONS FOR THE VARIANCE. THE COST OF PURCHASING OR CONTRACTING OUT INFORMATION COLLECTION SERVICES SHOULD BE A PART OF THIS COST BURDEN ESTIMATE. IN DEVELOPING COST BURDEN ESTIMATES, AGENCIES MAY CONSULT WITH A SAMPLE OF RESPONDENTS (FEWER THAN 10), UTILIZE THE 60-DAY PRE-OMB SUBMISSION PUBLIC COMMENT PROCESS AND USE EXISTING ECONOMIC OR REGULATORY IMPACT ANALYSIS ASSOCIATED WITH THE RULEMAKING CONTAINING THE INFORMATION COLLECTION, AS APPROPRIATE.

-GENERALLY, ESTIMATES SHOULD NOT INCLUDE PURCHASES OF EQUIPMENT OR SERVICES, OR PORTIONS THEREOF, MADE (1) PRIOR TO OCTOBER 1, 1995, (2) TO ACHIEVE REGULATORY COMPLIANCE WITH REQUIREMENTS NOT ASSOCIATED WITH THE INFORMATION COLLECTION, (3) FOR REASONS OTHER THAN TO PROVIDE INFORMATION OR KEEP RECORDS FOR THE GOVERNMENT, OR (4) AS PART OF CUSTOMARY AND USUAL BUSINESS OR PRIVATE PRACTICES.

There is no additional cost to respondents.

- 14. PROVIDE ESTIMATES OF ANNUALIZED COST TO THE FEDERAL GOVERNMENT. ALSO, PROVIDE A DESCRIPTION OF THE METHOD USED TO ESTIMATE COSTS, WHICH SHOULD INCLUDE QUANTIFICATION OF HOURS, OPERATIONAL EXPENSES SUCH AS EQUIPMENT, OVERHEAD, PRINTING, AND SUPPORT STAFF, AND ANY OTHER EXPENSE THAT WOULD NOT HAVE BEEN INCURRED WITHOUT THIS COLLECTION OF INFORMATION. AGENCIES ALSO MAY AGGREGATE COST ESTIMATES FROM ITEMS 12, 13, AND 14 IN A SINGLE TABLE.**

The cost to the Federal Government is already included in the salary for the FRA Alcohol and Drug Program Manager who is responsible for all of Part 219. Thus, there is no extra cost here to the Federal Government. The cost is fully stated in FRA's earlier submission for Part 219 (OMB No. 2130-0526).

- 15. EXPLAIN THE REASONS FOR ANY PROGRAM CHANGES OR ADJUSTMENTS REPORTED IN ITEMS 13 OR 14 OF THE OMB FORM 83-I.**

The burden for this information collection burden has decreased by 210 hours from the last submission. The change in burden is due solely to adjustments. The following requirements reflect **adjustments** (*decreases*) in burden estimates:

(1) Under § 219.401/403/405, respondent railroads already fulfilled the requirement to adopt, publish, and implement voluntary referral and co-worker report policies. Since the number of respondent railroads will stay the same, it is estimated that there will be zero (0) new policies adopted over the next three years. This change in estimate *decreased* the burden by *60 hours* (from 60 hours to zero (0) hours).

(2) Under § 219.601a (1), the requirement for submitting random drug testing programs was also fulfilled. Since the number of respondent railroads will stay the same, it is estimated that there will be zero (0) random drug testing programs submitted over the next three years. This change in estimate *decreased* the burden by *32 hours* (from 32 hours to zero (0) hours).

(3) Under § 219.601a (2), FRA estimates that there will be zero (0) drug testing program amendments submitted over the next three years. This change in estimate *decreased* the burden by *one (1) hour* (from one (1) hour to zero (0) hours).

(4) Under § 219.601(b)(1), the requirement for random drug procedures has already been fulfilled. Since the number of respondent railroads will stay the same, it is estimated that there will be zero (0) random drug procedure documents submitted over the next three years. This change in estimate *decreased* the burden by *96 hours* (from 96 hours to zero (0) hours).

(5) Under § 219.601(b)(4), the requirement railroads to provide notices to employees regarding its random drug testing program has already been fulfilled. Since the number of respondent railroads will stay the same, it is estimated that there will be zero (0) random drug procedure notices sent to employees over the next three years. This change in estimate *decreased* the burden by *20 hours* (from 20 hours to zero (0) hours).

(6) Under § 219.607a (2), since the number of respondent railroads will stay the same, FRA estimates that there will be zero (0) amendments to random alcohol testing programs over the next three years. This change in estimate *decreased* the burden by *one (1) hour* (from one (1) hour to zero (0) hours).

The current OMB inventory exhibits a burden total of 238 hours, while this revised submission shows a burden total of 28 hours. Hence, there is a burden decrease of *210 hours*.

The cost to respondents has decreased by \$2,000 rounded off (\$1,600 in actuality), since there will be no notices printed or mailed to foreign railroad employees over the next three years.

16. FOR COLLECTIONS OF INFORMATION WHOSE RESULTS WILL BE PUBLISHED, OUTLINE PLANS FOR TABULATION AND PUBLICATION. ADDRESS ANY COMPLEX ANALYTICAL TECHNIQUES THAT WILL BE USED. PROVIDE THE TIME SCHEDULE FOR THE ENTIRE PROJECT,

INCLUDING BEGINNING AND ENDING DATES OF THE COLLECTION OF INFORMATION, COMPLETION OF REPORT, PUBLICATION DATES, AND OTHER ACTIONS.

The information concerning impairment in an accident setting, which is already required by Part 219 of foreign railroads with foreign-based covered service employees who operate in the United States, will be published in a subset of data contained in FRA's annual Accident/Incident Bulletin. All of the remaining information obtained under these amendments is intended for use by the Office of Safety technical staff in its ongoing accident prevention activities or will be used by railroads in monitoring compliance by their employees with the prohibitions on alcohol and drug use.

17. IF SEEKING APPROVAL TO NOT DISPLAY THE EXPIRATION DATE FOR OMB APPROVAL OF THE INFORMATION COLLECTION, EXPLAIN THE REASONS THAT DISPLAY WOULD BE INAPPROPRIATE.

Once OMB approval is received, FRA will publish the approval number for these information collection requirements in the Federal Register.

18. EXPLAIN EACH EXCEPTION TO THE CERTIFICATION STATEMENT IDENTIFIED IN ITEM 19, "CERTIFICATION FOR PAPERWORK REDUCTION ACT SUBMISSIONS," OF OMB FORM 83-I.

No exceptions are taken at this time.

Meeting Department of Transportation (DOT) Strategic Goals

This information collection supports the top DOT strategic goal, namely transportation safety. Without this collection of information, FRA's ability to maintain rail safety in the U.S. would be seriously jeopardized. If railroads did not have effective alcohol and drug misuse prevention programs and if these programs were not carefully monitored, FRFB train and dispatching service employees working in safety-sensitive positions might abuse alcohol and drugs while on duty, or just prior to coming on duty. This could lead to a substantial increase in the number of accidents/incidents where both railroad workers and the general public are injured or killed. In a worst case scenario of a locomotive engineer abusing drugs or alcohol, a catastrophic accident could occur where hundreds of passengers are killed or injured, or where there is great damage to the environment as well as extensive property damage. A catastrophic accident is a particular concern with the advent and increasing use of high-speed trains. Without the required alcohol and drug training programs, supervisors would not be able to spot employees who are abusing alcohol or drugs, and immediately remove them from service. Not spotting these employees increases the risk of accidents/incidents.

The collection of information is designed to help FRA monitor railroad alcohol and drug misuse prevention programs to ensure that railroads educate their employees on the hazards of alcohol and drug abuse, and offer information on available treatment facilities. Also, the collection of information enhances rail safety by offering investigators records that might prove helpful in determining the cause of a rail accident/incident, knowledge that should prove useful in preventing future accident/incidents. In sum, the collection of information serves as another means to make transportation in the United States safe by reducing the likelihood that safety-sensitive workers will abuse alcohol or drugs while they are working.

In this information collection, as in all its information collection activities, FRA seeks to do its utmost to fulfill DOT Strategic Goals and to be an integral part of One DOT.

