

FEDERAL AVIATION ADMINISTRATION

14 CFR Parts 121 and 135

[Docket No. 25148; Notice No. 91-6]

RIN 2120-AC33

Anti-Drug Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: On November 14, 1988, the FAA issued a final rule requiring specified aviation employers and operators to submit and to implement anti-drug programs for personnel performing sensitive safety- and security-related functions. This notice proposes modifications to the scope of the final rule to exclude most entities conducting operations that do not require a part 121 or part 135 certificate from the coverage of the anti-drug rule.

DATES: Send or deliver comments by April 1, 1991.

ADDRESSES: Send or deliver comments on this notice, in duplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), room 915G, Docket No. 25148, 800 Independence Avenue SW., Washington, DC 20591. Comments must be marked "Docket No. 25148." Comments may be examined in the Rules Docket between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. William R. McAndrew, Office of Aviation Medicine, Drug Abatement Branch (AAM-220), Federal Aviation Administration, 460 Seventh Street, SW., Washington, DC 20590; telephone (202) 366-6710.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking

action on this proposed rulemaking. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with Federal Aviation Administration (FAA) personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a preaddressed, stamped postcard on which the following statement is made: "Comments to Docket No. 24158." The postcard will be dated and time stamped and mailed to the commenter.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the notice number identified in this final NPRM. Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

The rulemaking process that led to promulgation of the final anti-drug regulations began in late 1986. On December 4, 1986, the FAA issued an advance notice of proposed rulemaking (ANPRM) (51 FR 44432; December 9, 1986). The ANPRM invited comment from interested persons on drug and alcohol abuse by personnel in the aviation industry. The ANPRM also solicited comment on the options that the FAA should consider to protect and maintain aviation safety in light of any drug and alcohol use in the aviation industry.

On March 3, 1988, the FAA issued a notice of proposed rulemaking (NPRM) (53 FR 8368; March 14, 1988) that analyzed the comments submitted on the ANPRM and set forth proposed regulations for comment by interested persons. The FAA received over 900 comments in response to the ANPRM and the NPRM.

The FAA also held three public hearings across the country on the proposed regulations contained in the NPRM. Each hearing was recorded by a court reporter and the hearing transcript

was placed in the public docket for the rulemaking.

The FAA issued the final anti-drug rule on November 14, 1988 (53 FR 47024; November 21, 1988) requiring certain aviation employers and operators to develop and to implement an anti-drug program for employees performing sensitive safety- or security-related functions. After the final rule was issued, the FAA continued to review the implementation requirements contained in the final anti-drug rule and became aware that the timeframes for employers' submission of their anti-drug program plans for FAA approval were unrealistic. Consequently, on April 11, 1989, the FAA amended the final rule to extend certain compliance dates and make other minor revisions (54 FR 15148; April 14, 1989). Similarly, on December 11, 1989, the FAA amended the final rule to delay the compliance date for drug testing of covered employees located outside the territory of the United States (54 FR 53283; December 27, 1989).

The FAA amended the final rule on January 23, 1990, to allow employers increased flexibility concerning when they may conduct testing, as long as part 67 medical examinees are tested early in the implementation of the employer's anti-drug program (55 FR 3698; February 2, 1990).

As part of its responsibility to provide guidance to the industry on rule compliance, the FAA has continually reviewed the rule's implementation requirements. As a result, the FAA has become concerned about the scope of the final rule, particularly its inclusion of those aviation entities conducting operations otherwise excluded from the requirements of Parts 121 and 135. These operators (hereinafter "§ 135.1(c) operators") are included in the final anti-drug rule under the provisions of 14 CFR 135.1(c), which incorporates most of the operators conducting operations listed in 14 CFR 135.1(b). These operators conduct the following types of operations: Student instruction; nonstop sightseeing flights that take off and land at the same airport and are conducted within a 25-mile radius of that airport (sightseeing flights); ferry or training flights; aerial work operations; sightseeing flights in hot air balloons; nonstop flights within a 25-mile radius of the airport of takeoff for parachute jumps; certain limited helicopter flights conducted within a 25-mile radius of the airport of takeoff; and Federal election campaign flights conducted under FAR § 91.59.

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NPRM
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representatives of aviation organizations and employers subject to the final rule expressed serious concern about inclusion of § 135.1(c) operators. According to these representatives, such operations, although they involve compensation, do not require part 121 or part 135 certificates. Those concerned organizations and employers suggest that the final rule be modified in light of the anti-drug program's focus on commercial aviation conducted with operating authority granted under part 121 or part 135.

Comments were submitted concerning this issue by the Aircraft Owners and Pilots Association (AOPA) and the Air Safety Foundation (ASF), copies of which are available for review by interested persons in Docket No. 25148. AOPA suggested that the FAA reassess the reach of the final rule and eliminate or modify its inclusion of those who are not part 121 or part 135 certificate holders, and who do not engage in providing compensated air transportation of passengers. Comments submitted by ASF echo those of AOPA, and both specifically mention elimination of flight instructors from inclusion in the anti-drug program. Additionally, since the final rule was promulgated, several § 135.1(c) entities and the National Association of Flight Instructors have requested exemption from the rule. No exemptions have been granted, but the FAA has continued to evaluate the scope of the final rule.

Based on the concerns expressed by industry and arising from FAA's own evaluation, on March 15, 1990, the FAA extended the compliance deadlines for § 135.1(c) operators to permit further evaluation of the issue (55 FR 10759, March 22, 1990).

The amendment proposed in this notice addresses the need to revise the final rule's inclusion of the § 135.1(c) operators. As proposed, the scope of the anti-drug rule would continue to include all part 121 and 135 certificate holders and air traffic control facilities (ATCS) not operated by the FAA or the U.S. military. With the exception of sightseeing flights for compensation or hire, the scope of the rule would not include the current § 135.1(c) operators.

The NPRM

The section of the final anti-drug rule that addresses the issue of aviation entities whose operations do not require either part 121 or part 135 certificates would be amended by the action proposed in this notice. Part 121 is concerned with requirements affecting domestic, flag and supplemental air carriers and commercial operators of large aircraft. Part 135 is concerned with

the requirements affecting air taxi operators and other commercial operators. Traditionally, the FAA regulatory scheme has distinguished those operators not holding part 121 or part 135 certificates as only tangentially related to the commercial air transportation sector and as operationally separate from air carriers with regard to aviation safety issues. This demarcation is so comprehensive that § 135.1(c) operators are excluded from all part 135 requirements, with the sole exception of the requirement to establish a drug testing program.

Parts 121 and 135 were designed to regulate the carriage by aircraft of persons or property for compensation or hire. In contrast, rather than including § 135.1(c) operations under part 135, the general operating and flight rules of part 91 were determined to be sufficient to ensure that the requisite level of aviation safety would be maintained. Except for sightseeing operations, the FAA does not believe that § 135.1(c) operations pose a potential public safety risk sufficient to necessitate the imposition of drug testing, especially when compared to other operations covered by the drug testing requirements.

The FAA is not proposing to delete sightseeing flights from the § 135.1(c) definition of operator. Thus, aviation entities conducting sightseeing flights with airplanes and helicopters would continue to be under the drug testing rule. It is the opinion of the FAA that such sightseeing flights pose a potential public safety risk sufficient to warrant their continued inclusion under the drug testing rule.

The FAA continues to believe that a drug-free aviation industry is a vital necessity. Upon further review, however, it has become apparent that § 135.1(c) operations, other than sightseeing flights conducted with airplanes and helicopters, warrant exclusion from the drug testing rule.

In this respect, application of the drug testing regulations would be no different from the other aspects of aviation safety regulation that reasonably vary in applicability and scope by type of operation. The FAA believes that excluding the § 135.1(c) operators other than those conducting sightseeing flights would have no significant impact on aviation safety and security. Rather, the proposed amendment is consistent with the focus of the rule on sensitive safety- and security-related positions in commercial aviation transportation.

Moreover, under this proposed rulemaking, the limited resources of the Federal Government and the aviation industry would be concentrated on

successful implementation of comprehensive and effective anti-drug programs by those portions of the aviation industry where the potential effect on safety is greatest.

Paperwork Reduction Act Approval

The recordkeeping and reporting requirements of the final anti-drug rule, issued on November 14, 1988, were previously submitted to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1980. The OMB approval is under control number 2120-0535. Because this proposed amendment would reduce the recordkeeping and reporting requirements, it is not necessary to amend the prior approval received from OMB.

Economic Evaluation

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if the potential benefits to society for the regulatory change outweigh the potential costs to society.

This proposed rulemaking would eliminate aviation entities currently defined as § 135.1(c) operators, except those conducting sightseeing flights, from being covered by and needing to be in compliance with the requirements of the anti-drug rule.

The original analysis of the anti-drug rule included the costs and benefits for all affected entities and concluded that the overall rule had a positive cost-benefit ratio. This proposed rulemaking would exclude some of those entities (i.e., most § 135.1(c) operators). While the potential public safety risk for those now being excluded would be less than for those remaining under the anti-drug rule, because of the size and nature of their operations, the compliance costs for those now being excluded could have been expected to be higher. As a result, the FAA expects that, for those remaining covered by the rule, the benefits will exceed the costs by an even greater amount.

Regulatory Flexibility Determination

FAA believes that most of the § 135.1(c) operators are small entities that employ few affected employees. The exclusion of some of these operations from compliance with the anti-drug rule would not have a significant impact on these entities. FAA has determined that this rulemaking would not have a significant economic impact on a substantial number of small entities. The maximum cost savings to

any operator is estimated to be \$950 per year per affected employee, which is well below the \$3,800 threshold set by DOT for significant economic impact. Less than one-third of the small entities subject to the proposed rulemaking would meet the threshold for significant impact.

Trade Impact Statement

This proposed rulemaking would affect only a limited number of domestic aviation operations performed under the provisions of the FAR; therefore, it would have no impact on trade opportunities for United States firms doing business overseas or foreign firms doing business in the United States.

Federalism Implications

The rulemaking action proposed herein would 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. Therefore, in accordance with Executive Order 12612, the FAA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Conclusion

This notice proposes modifying the scope of the anti-drug rule with respect to certain operators who do not hold a part 121 or part 135 certificate. This modification would provide an overall benefit to public safety by imposing the requirements of the rule only on those sectors of commercial aviation which have the greatest impact on safety.

Pursuant to the terms of the Regulatory Flexibility Act of 1980, the FAA certifies that the proposed modification may have a moderate positive economic impact on a

substantial number of small entities. In addition, the modification would not result in an annual effect on the economy of \$100 million or more and would not result in a significant increase in consumer prices; thus, the proposed amendment is not a major action pursuant to the criteria of Executive Order 12291. However, because the anti-drug rule involves issues of substantial interest to the public, the FAA has determined that this notice is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

List of Subjects

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

14 CFR Part 135

Air carriers, Air taxi, Air transportation, Aircraft, Airmen, Airplanes, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

For the reasons set forth in the preamble, the Federal Aviation Administration proposes to make the following amendments to parts 121 and 135 of the Federal Aviation Regulations (14 CFR parts 121 and 135):

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

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

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1472, 1485, and 1502; 49

U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983).

2. By revising the first sentence of paragraph A.(5) under section IX of appendix I to part 121 to read as follows:

Appendix I to Part 121—Drug Testing Program

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Section IX. * * *

A. * * *

(5) Each employer or operator who becomes subject to the rule as a result of the FAA's issuance of a part 121 or 14 CFR part 135 certificate or as a result of beginning sightseeing operations listed in 14 CFR 135.1(b)(2) for compensation or hire shall submit an anti-drug plan to the FAA for approval, within the timeframes of paragraphs (2), (3), or (4) of this section according to the type and size of the category of operations. * * *

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PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

3. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421-1431, and 1502; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983).

4. By revising § 135.1(c) to read as follows:

§ 135.1 Applicability.

* * * * *

(c) For the purpose of §§ 135.249, 135.251, and 135.353 "operator" means any person or entity conducting an operation listed in paragraph (b)(2) of this section for compensation or hire.

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Issued in Washington, DC, on February 12, 1991.

Jon L. Jordan,

Acting Federal Air Surgeon.

[FR Doc. 91-3707 Filed 2-12-91; 2:01 pm]

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