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see 121-221A

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Part 121

[Docket No. 25148; Amdt. No. 121-221]

Anti-Drug Program for Personnel
Engaged in Specified Transportation
Activities

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule; extension of
compliance dates; request for comments.

SUMMARY: The FAA announces an
extension of the dates by which certain
persons performing services as
contractor employees for parts 121 and
135 certificate holders or other aviation
employers subject to the requirements of
appendix I of part 121 must be covered
by an anti-drug program approved by
the FAA. This rulemaking action is
necessary to facilitate implementation
and administration of the final rule and
is intended to provide the FAA with
sufficient time to review an anticipated
late submission of anti-drug plans and to
prevent a potential disruption in the
provision of contract aviation services
to parts 121 and 135 certificate holders.

DATES: This final rule is effective on
December 11, 1990. Comments must be
received not later than January 28, 1991.

FOR FURTHER INFORMATION CONTACT:
Diane Wood, Acting Manager, Drug
Abatement Branch (AAM-220), Office of
Aviation Medicine, Federal Aviation
Administration, 400 Seventh Street SW.,
room 2336, Washington, DC 20591,
telephone (202) 366-6710.

ADDRESSES: Comments may be mailed
or delivered in duplicate to: Federal
Aviation Administration, Office of the
Chief Counsel, Attention: Rules Docket
(AGC-204), Docket No. 25148, 800
Independence Avenue SW.,
Washington, DC 20591.

SUPPLEMENTARY INFORMATION:

Comments Invited

The amendments contained in this
final rule extend certain compliance
dates for drug testing contractor
employees under the FAA anti-drug rule.
It is needed immediately to delay the
compliance deadlines, the first of which
is imminent, previously specified in the
final rule. Since the amendment imposes
no additional burden on any person, it is
being adopted without prior notice and
prior public comment. However, the
Regulatory Policies and Procedures of
the Department of Transportation (44 FR
11034; February 26, 1979) provide that to
the maximum extent possible, operating

administrations of the Department of
Transportation (DOT) should provide an
opportunity for public comment on
regulations issued without prior notice.

Accordingly, interested persons are
invited to participate in the rulemaking
by submitting such written data, views,
or arguments as they may desire.
Comments must include the regulatory
document number of the amendment
number identified in this final rule.
Comments must also be submitted in
duplicate to the address listed under the
caption "Address" above. All comments
received will be available for
examination by interested persons in
the Rules Docket. This amendment may
be changed in light of the comments
received on this final rule.

Commenters who want the FAA to
acknowledge receipt of comments
submitted on this final rule must submit
with those comments a self-addressed,
stamped postcard on which the
following statement is made:
"Comments to Docket No. 25148." The
postcard will be date/time stamped and
returned to the commenter. A report
summarizing each substantive public
contact with FAA personnel concerned
with this rulemaking will be filed in the
public docket.

Background

On November 11, 1988, the FAA
issued a final rule, "Anti-Drug Program
for Personnel Engaged in Specified
Aviation Activities," requiring specified
aviation employers and operators to
submit and to implement anti-drug
programs for personnel performing
sensitive safety- and security-related
functions (53 FR 47024; November 21,
1988). These "covered" functions are set
forth in section III of appendix I of the
final rule. After issuance of the rule, the
Air Transport Association (ATA) and the
Regional Airline Association (RAA)
petitioned the FAA to, among other
things, extend the effective date of the
final rule as it applied to the required
testing of contractor employees
performing covered functions and to
have the FAA and the aviation industry
use the period of the extension to
determine the most effective way to
include such contractor employees in an
anti-drug plan. In particular, the ATA
and RAA requested that the FAA
reconsider whether contractors
performing covered functions for parts
121 and 135 certificate holders should be
able to file their own drug testing plans
directly with the FAA rather than
having to be included under the plans of
their part 121 or part 135 employers as
required by the final rule.

The FAA considered the petitions
and, on April 11, 1989, issued an

amendment to the final rule which
included an extension of the compliance
dates for drug testing of contractor
employees and permitted contractors
and consortiums (which may be
composed of a combination of
contractors, employers or operators) to
submit drug testing plans directly to the
FAA for approval (54 FR 15148; April 14,
1989). The compliance date extensions
included in this amendment permitted
parts 121 and 135 certificate holders
with more than 50 employees to delay
the testing of contractor employees for
360 days from the date which drug
testing of the certificate holders' direct
employees was initiated. The final
compliance date for testing of contractor
employees was delayed until no later
than December 11, 1990. In addition, the
compliance dates in the final rule for
testing contractor employees performing
covered functions for part 135 certificate
holders with 11-50 covered employees,
part 135 certificate holders with 10 or
fewer covered employees, other
operators as defined in § 135.1 (c) and
air traffic control facilities not operated
by, or under contract with the FAA or
the U.S. military, were similarly
extended by the April 1989 amendment
for a period of 360 days from the
compliance date indicated in the final
rule.

Discussion

The FAA has recently received letters
from the ATA and the RAA expressing
concern on behalf of their members
regarding the ability of a substantial
number of their members' contractors to
have anti-drug plans approved by the
FAA prior to December 11, 1990, the
date on which drug testing of contractor
employees under an FAA-approved
anti-drug program must begin. Further,
the ATA believes that because the FAA
did not include a plan submission
deadline for contractors in the amended
anti-drug rule, a significant number of
contractors will submit anti-drug plans
to the FAA shortly before December 11.
The ATA also suggests that few such
plans will be adequate to receive
immediate approval. The ATA feels that
while such a situation would not be the
fault of the airline industry or the FAA,
the airline industry will suffer the
consequences of a wide-spread service
disruption precipitated by an inability to
continue to use contractors performing
key, covered functions for its members.

Both the ATA and the RAA have
recommended that the FAA resolve
what they feel to be a potentially
disruptive situation by permitting parts
121 and 135 certificate holders with
more than 50 covered employees to

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continue to use employees of contractors who have not implemented FAA-approved anti-drug plans by December 11, 1990, as long as those contractors have permitted plans to the FAA by December 11. The ATA suggests that an 8-week extension be given to aviation employers to permit them to use contractors who submitted plans to the FAA by the December 11, 1990, compliance date, but who have not yet received approval. The RAA similarly requested relief in circumstances where contractors' previously submitted plans are pending approval.

Although a significant number of contractors have submitted anti-drug plans to the FAA beginning in early 1990, other contractors have not submitted plans or have only recently submitted plans due to confusion over the applicability of the FAA anti-drug rule to their particular activities. This situation has developed despite efforts of certificate holders to educate contractors regarding the need to obtain coverage under an FAA-approved anti-drug plan or face the consequences of the certificate holder ceasing to do business with them. Many contractors have submitted plans to the FAA which have been so significantly deficient in their content as to require the FAA to disapprove the plans.

For those plans which have only recently been submitted or which were submitted earlier but require modification prior to approval, additional time is necessary in order for the FAA to review and process them. Based on this situation, the FAA shares the concern of the ATA and RAA that a significant disruption in the aviation industry may occur if part 121 certificate holders and part 135 certificate holders with more than 50 covered employees must cease using contractor employees who are not subject to drug testing under an approved anti-drug plan after December 11, 1990, where the contractors have attempted to obtain approval by submitting a plan prior to the compliance date for initiating drug testing under an approved anti-drug program.

The FAA further recognizes the potential for the development of a similar disruption when the remaining groups of part 135 certificate holders and other operators in the later phases of rule implementation must ensure that their contractor employees are covered by an FAA-approved anti-drug program. Therefore, the FAA is amending the rule to permit part 121, part 135, other operators as defined in § 135.1(c), and covered air traffic control facilities to

continue to use contractor employees to perform covered functions for a period not to exceed 90 days after the compliance date specified in the final rule for employers to implement anti-drug programs for their contractor employees, provided the contractor employee or such contractor employee's company has submitted an anti-drug plan to the FAA for approval prior to such compliance date. Thus, a contractor whose employees perform covered functions for a part 121 or a larger part 135 certificate holder must submit its anti-drug program to the FAA by December 11, 1990, to be covered by the extension. The FAA believes the 90-day extensions will provide sufficient time for the FAA to process any additional plan submissions and provide the industry with adequate temporary relief from the anticipated disruption. It should be noted that this amendment does not affect the compliance dates for contractor employees who are included under the anti-drug plan of a covered employer (e.g., a part 121 certificate holder). Drug testing of such contractor employees included in the covered employer's program for the first phase of rule implementation must begin no later than December 11, 1990.

Reason for No Notice and Immediate Adoption

This amendment merely extends the time period for compliance with the provisions of the existing rule and imposes no additional burden on any person. For this reason, notice and public comment procedures are impracticable, unnecessary, and contrary to public interest. Moreover, this amendment is needed immediately to delay the compliance deadlines previously specified in the final rule, the first of which is imminent. Under the implementation schedule published in the *Federal Register* on April 14, 1989, certain aviation employers would have been required to ensure that contractor employees performing specified functions were subject to drug testing under an FAA-approved anti-drug plan by December 11, 1990. To avoid disruption in the aviation industry and to facilitate the efficient implementation of the final anti-drug rule, the FAA has determined that good exists to make this final rule effective in less than 30 days.

Economic Assessment

Holding to the December 11 deadline to begin drug testing for contractor employees under an FAA-approved anti-drug program could result in substantial dislocations to air carrier operations and to the economic viability of these contractors. Hence, this final

rule to extend the compliance date by 90 days is cost relieving and does not impose any additional costs on aviation employees or their contractors whose employees perform covered functions. The foregone potential benefits of postponing the compliance date by 90 days would not have been realized due to the fact that plans are being submitted so close to the December 11 deadline by which testing must begin under an FAA-approved plan that the FAA does not have adequate time to review and approve these plans to permit testing in accordance with the rule.

A similar situation is anticipated for later phases of implementation. In view of the foregoing, a full regulatory evaluation is therefore unnecessary for this rule.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 requires a Federal agency to review any final rule to assess its impact on small business. The amendment contained in this final rule only extends compliance date; consequently, the FAA has determined that this amendment to the final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities.

Paperwork Reduction Act Approval

The recordkeeping and reporting requirements of the final anti-drug rule, issued on November 14, 1988, previously were submitted to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1980. OMB approved those requirements on February 2, 1989. Because this final rule does not amend the recordkeeping and reporting requirements, it is not necessary to amend the prior approval received from OMB.

Federalism Determination

The amendment set forth herein would not have substantial 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, it is determined that such a preparation does not have federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

The adoption of this amendment serves to extend currently existing compliance dates. The amendment

imposes no additional burden by any party. Therefore, the FAA has determined that this amendment is not a major rule under Executive Order 12291 but is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). In addition, it is certified that under the criteria of the Regulatory Flexibility Act, this rule will not have a significant impact, positive or negative, on a substantial number of small entities, and the rule does not warrant preparation of a full regulatory evaluation as the overall impact on the aviation industry will be minimal.

List of Subjects in 14 CFR Part 121

Aircraft, Air Safety, Air transportations, Aviation safety, Drug abuse, Drugs, Narcotics, Safety, Transportation.

The Amendments

Accordingly, the FAA amends part 121 of the Federal Aviation Regulations (14 CFR part 121) as follows:

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).

Appendix I—[Amended]

2. By revising paragraphs A(3), A(4)a, and A(4)b of section IX of appendix I to part 121 by adding the following sentence to the end of each paragraph:

* * * * *

However, notwithstanding the preceding sentence, an employer may continue to use contractor employees who are not subject to drug testing under an FAA-approved anti-drug program to perform a function listed in section III of this appendix for 90 days after the compliance date specified in this paragraph for implementation of the employer's anti-drug program for its contractor employees, provided that each such contractor employee or contractor employee's company has submitted, in accordance with the provisions of either paragraph A(6) or A(7) of this section IX, an anti-drug plan to the FAA for approval not later than such compliance date.

Issued in Washington, DC on December 11, 1990.

James B. Busey,
Administrator.

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