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**OMNIBUS TRANSPORTATION EMPLOYEE  
TESTING ACT OF 1991**

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**REPORT**

**OF THE**

**SENATE COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION**

**ON**

**S. 676**



**MAY 2, 1991.—Ordered to be printed**

Filed under authority of the order of the Senate of April 23 (legislative  
day, April 9), 1991

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Mr. HOLLINGS, from the Committee on Commerce, Science, and  
Transportation, submitted the following

REPORT

[To accompany S. 676]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 676) to provide for testing for the use, in violation of law or Federal regulation, of alcohol or controlled substances by persons who operate aircraft, trains, and commercial motor vehicles, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The bill, as reported, would require the Secretary of Transportation (Secretary), in the interest of safety, to issue rules within twelve months of enactment to establish drug and alcohol testing programs for certain individuals employed in safety-sensitive positions in the aviation, rail, motor carrier, and mass transit industries.

The bill would provide for five types of testing, including random, pre-employment, post-accident, periodic recurring, and upon reasonable suspicion. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by the Department of Health and Human Services (HHS) and the Department of Transportation (DOT), require that all laboratories involved in testing for drugs have the capability of performing

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screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods. It also would require the Secretary to mandate the development of rehabilitation programs for certain employees who are found to have used illegal drugs or alcohol.

The bill would establish a statutory mandate for the drug testing rules issued by DOT in 1988 for the aviation and motor carrier industries, and in 1985 and 1988 for the rail industry. In addition, it would enable the Urban Mass Transit Administration (UMTA) to restore its drug testing rules, which it was forced to suspend as a result of a court decision, *Amalgamated Transit Union v. Skinner*, 894 F. 2d 1362 (D.C. Cir. 1990). It also would require DOT to supplement all these rules with requirements for alcohol testing.

## BACKGROUND AND NEEDS

### SUBSTANCE ABUSE IN TRANSPORTATION

Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. According to a Department of Justice estimate based on 1987 data, these symptoms in workers have resulted in lost productivity for American businesses of as much as \$100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism.

In the transportation sector, the costs of drug and alcohol use are clearly magnified. Whenever individuals board an airplane, train, or motor vehicle, they put their lives into the hands of those who are being paid to ensure safe passage. This trust relies upon the vigilance of trained employees to remain alert to any possible occurrence that might endanger the safety of the traveling public. The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety-sensitive transportation positions mandates that every effort be made to eliminate the cause of that threat.

At no time was this made more evident than after the January 1987 accident in Chase, MD, between an Amtrak passenger train and a Conrail freight train, which resulted in 16 fatalities and 170 injuries. The Conrail train's engineer and brakeman subsequently testified that they had been smoking marijuana in the cab of the Conrail locomotive prior to the fatal accident. The National Transportation Safety Board (NTSB) further found that a probable cause of the accident was the engineer's failure, as a result of impairment from marijuana, to stop the train in compliance with cab and wayside signals. In addition, testing indicated the brakeman had traces of the hallucinogenic drug PCP in his urine. Given the results of recent research which shows that certain drugs, such as marijuana, can impair an individual's performance up to 24 hours after consumption, substance abuse remains a serious matter of concern.

The problem of drugs and alcohol in the rail industry has continued. In 1988, there were 29 rail accidents in which either drugs or alcohol were involved—one accident involving drugs or alcohol every 12½ days. Eight rail workers were killed in these accidents, and 41 others were injured. During 1989, there were 21 accidents in the rail industry following which one or more workers tested positive for drugs or alcohol in post-accident testing. The Federal Railroad Administration (FRA) reported 16 rail accidents involving drug or alcohol abuse in 1990.

A recent incident involving substance abuse in the aviation industry was the August 1990 sentencing of three Northwest Airlines pilots who had flown while intoxicated between Fargo, ND, and Minneapolis, MN, on March 8, 1990. Two hours after the flight ended, the blood alcohol content (BAC) of the captain of the crew was 0.13 percent. He testified that he drank 20 rum-and-cokes the night prior to the 6:00 a.m. flight. It was only because airport authorities called for testing under Minnesota law that the pilots were found to be legally intoxicated. Federal Aviation Administration (FAA) officials were notified by a bar patron that the pilots had been drinking excessively, but did not have the authority to require pre-flight alcohol testing in order to determine the pilots' condition.

Other examples involving drugs or alcohol in aviation include the January 1988 crash of a commuter plane near Durango, Colorado, in which 9 persons died and about which NTSB ruled that a pilot's cocaine use was a contributing cause. Also, the Inspector General of DOT reported that 10,300 active airmen certified by the FAA had their auto driver's licenses suspended or revoked for driving while intoxicated between 1980 and 1987. Under the FAA's random drug testing program, 117 safety-sensitive employees, including 83 air traffic controllers, tested positive for drug use between September 1987 and September 1989. During 1990, the first year that private sector drug testing was conducted under DOT's aviation drug testing rules, 120,642 drug tests were conducted and 571 airline workers tested positive, 178 in random tests.

With respect to the commercial motor carrier industry, the number of alcohol and drug-related accidents has been high. Substance abuse by truck drivers first was highlighted to the Committee when the Insurance Institute for Highway Safety released the results of a 1986 study showing that of a random sample of 300 truck drivers, and among those 88 percent who agreed to be tested, 18 percent tested positive for the presence of controlled substances or alcohol. Additionally, representatives of the trucking industry testified at a July 1986 Committee hearing that illegal drugs are bought and sold with the aid of the CB radio at virtually every truck stop in the country. That this practice continues has been confirmed by a number of television and newspaper investigative reports, and by undercover sting operations, conducted in August 1988 and May 1989 by the California Attorney General at California truck stops, which resulted in the drug arrest of 180 people, including 40 drivers of 80,000 pound trucks.

On February 5, 1990, the NTSB announced the results of a one-year study of fatal accidents in eight States: 33 percent of the fatally injured drivers tested positive for alcohol and other drugs of

abuse. In addition, over the past three years, the NTSB has conducted a study of 189 tractor-trailer accidents, 26 of which were directly attributable to alcohol or drug use. These accidents include the following.

On April 1, 1986, in Dumas, AR, a tractor-trailer driver failed to brake for a passenger car in front of him that was slowing down to turn off the highway. The 34-ton truck smashed into the back of the car, instantly killing all five occupants. The NTSB report notes that the driver's BAC was over the legal limit and that he had a previous record for driving while intoxicated.

That same month, a truck driver in Chino, CA, ignored a red light signal and crashed into two passenger cars. The collision killed the driver of one of the cars and injured a passenger in the truck. Police found a pipe used for smoking marijuana in the cab of the truck. In addition, a blood analysis revealed a BAC level of 0.21 percent—twice the then existing legal limit of 0.10 percent and five times the newly established BAC limit of 0.04 for commercial drivers.

On March 7, 1987, in Diamond Bar, CA, a tractor-trailer driver set off a series of collisions by failing to stop for traffic backed up from a previous accident—15 persons were injured and two were killed. In addition to having a BAC level of 0.15 at the time of the accident, the driver was experiencing withdrawal symptoms from his self-confessed heroin addiction.

In June 1987, NTSB investigators studied an accident in which a tractor-trailer collided with a passenger train, causing a derailment and injuring 28 rail passengers. The coroner's examination of the truck driver found his blood alcohol level at two and one-half times that allowed by law.

Not every motor carrier accident involving substance abuse was considered by the NTSB. For example, on May 19, 1988, a truck driver rammed into more than two-dozen vehicles on a Los Angeles freeway, but miraculously caused only minor injuries. Police found amphetamines, a hypodermic syringe, and a partly smoked marijuana cigarette in his cab. In October 1988, near Fort Hancock, TX, a truck driver forced several motorists off the highway, injuring seven persons and killing a woman. After shooting a police officer, the driver tried to run the officer down with his tractor-trailer. The police on the scene said the driver was apparently driving under the influence of drugs.

There was a similar tragedy in late 1988. The driver of a tractor-trailer rig went on an 80-mile long rampage down Interstate 10 through rush-hour traffic in San Antonio, TX. During this rampage, the tractor-trailer crashed into more than 20 other vehicles and seriously injured two people. When the driver was arrested, he did not seem to know that he had done anything wrong. Police later found cocaine in the cab of the truck and filed drug charges against the driver.

The drivers themselves recognize that there is a problem with substance abuse. The 1986 Annual Motor Carrier Safety Survey of commercial drivers revealed that 40 percent of them believe that at least half of their colleagues sometimes drive under the influence of drugs. The 1987 Motor Carrier Safety Survey further found that

73 percent of commercial drivers supported mandatory random alcohol and drug testing of all commercial motor vehicle drivers.

In the 1988 Motor Carrier Safety Survey, drivers responded that they believe that 29 percent of their fellow drivers regularly drive under the influence of illegal drugs. Seventy-eight percent of all union member drivers said they supported mandatory random drug and alcohol testing, compared to 67 percent of non-union drivers. Sixty-one percent of those drivers who support testing believe it would be most appropriate for employers to conduct drug and alcohol tests as opposed to government officials at roadside inspections.

Commercial drivers responding to the 1989 Motor Carrier Safety Survey indicated that they believe about one in four of their fellow drivers regularly drive under the influence of illegal drugs. Driver approval of drug testing was 68 percent in favor of random testing, 76 percent for reasonable suspicion testing, 84 percent for pre-employment testing, 89 percent in favor of testing in conjunction with required physical examinations, and 90 percent for post-accident testing.

The May 29, 1988, "Transport Topics" reported that 88 percent of the people questioned during a recent straw poll taken at the East Coast Truck Show in Baltimore stated that they support drug testing of truck drivers. Ninety-three percent said that they would be willing to be tested. (Eighty-four percent of the people surveyed said that they drove trucks for a living.)

Substance abuse is also a problem in the bus industry. In April 1987, a bus struck a bridge on the George Washington Parkway in Alexandria, VA, killing one and injuring 32 passengers. The driver tested positive for cocaine, valium, and marijuana. In July 1988, a bus driver was arrested for drug use after veering off the freeway into a grove of trees near Egg Harbor, NJ. Three of the 43 church group members on board were seriously injured.

During a November 1983 strike, Greyhound took applications from a group of experienced intercity bus drivers. Greyhound found that 30 percent of the applicants' urine samples tested positive for marijuana. Without testing, it is possible that many of these individuals might now be operating interstate buses.

The need for drug and alcohol testing of mass transit employees recently was highlighted by a December 28, 1990, accident in Boston, MA, where a mass transit operator, with a BAC above 0.10 percent, crashed a trolley car into another trolley car, injuring 33 people. In addition, the Committee's report on S. 2434 (Rpt No. 101-374), the Transit Employee Testing Act of 1990, noted that in Philadelphia alone, transit operators have tested positive for drug or alcohol use in six major accidents between 1986 and 1990, involving at least 183 injuries and 3 deaths. Other transit accidents involving drug or alcohol use that were cited included the following: (1) a March 7, 1990, derailment of a Southeastern Pennsylvania Transit Authority subway train; (2) a Cleveland, OH transit incident on January 17, 1990, when a supervisor and a driver/trainee both tested positive for illegal drug use after smashing a transit vehicle into construction equipment; (3) a 1988 Bronx, NY incident in which a Metro-North commuter train crashed into a stationary train and in which the engineer, who was killed, tested positive for marijuana, and four other transit employees tested positive for

morphine, marijuana, and butalbital; (4) a February 1987 Metro-North incident when an empty train crashed into a fully occupied train, injuring 30 people, and when the engineer tested positive for marijuana use; and (5) a 1985 incident in Miami, Florida in which 16 people were injured when two trains collided, and one operator tested positive for marijuana, cocaine, and valium use.

This legislation is intended to deter the use of alcohol and drugs by those in these safety-sensitive positions through increased alcohol and drug testing. The bill promotes deterrence by requiring the testing of such employees in several situations: prior to employment, after an accident, upon reasonable suspicion, and on a random basis. The bill also authorizes testing during recurring situations such as physical examinations.

The Committee believes that testing is necessary to deter the use of illegal drugs and alcohol by employees in safety-sensitive positions. There are several instances where testing programs have acted as successful deterrents to the abuse of illegal drugs and alcohol. Within DOT, the Coast Guard, which randomly tests its uniformed personnel, has found that the number of individuals testing positive has declined from 10.3 percent in fiscal year 1983, when the testing began, to 0.41 percent in fiscal 1990. After the Department of Defense instituted a random testing program, drug use in the military was cut by 82 percent, with the percentage of military personnel using illegal drugs dropping from 27 percent in 1980 to 4.8 percent in 1988, the last year for which figures are available.

Large numbers of transportation employees in safety-sensitive positions work in an environment with little, if any, direct supervision. Therefore, a strong deterrent, such as the threat of being detected and sanctioned for drug and alcohol use, is particularly needed. While several types of testing are needed to address specific situations, the key to deterrence is random testing. Under random testing, transportation employees in safety-sensitive positions will have no advance warning of when they might be tested. With an increased likelihood of detection, they will consider carefully using illegal drugs or drinking on the job. It is the resultant elimination of drug and alcohol usage by such employees that this legislation is intended to effectuate.

#### ACCURACY OF TESTING

In any drug and alcohol testing program, accuracy is essential. This is necessary both to ensure that individuals do not escape detection, and most importantly, to ensure against erroneous positive test results.

Given the Committee's commitment to accuracy in testing and in protecting employees, it is important to address the issue of so-called "false positives." Opponents of drug testing often will cite the number of "false positives," particularly in initial screenings, as evidence against the accuracy of testing. It is true that in initial screenings the presence of drugs and alcohol can be indicated and that in subsequent confirmation tests a "negative" can be shown, leading to the conclusion that the first test constituted a "false positive." This inconsistency would be cause for significant concern if a second test were not required by the bill to confirm any initial

screening which suggested a positive reading, and if any conclusion were attached to the results of the initial screening. The Committee has taken great care, however, to protect employees both by requiring that a second test of high laboratory quality be administered to confirm any initial screening which indicates the use, in violation of law or Federal regulation, of alcohol or a controlled substance, and by requiring confidential treatment of the initial screening. No conclusion can be reached from the initial screening, and any specimen testing negative on confirmation shall be reported as negative, without disclosure of the results of the screening test. By incorporating laboratory certification and testing procedures developed by HHS and DOT and by providing for the subdivision of specimens and the opportunity for an independent test of positive samples, the Committee has taken affirmative steps to ensure accuracy.

Estimates as to the level of accuracy in the initial screenings vary, although the Congressional Research Service, in a report entitled "Constitutional Analysis of Proposals to Establish a Mandatory Public Employee Drug Testing Program," dated April 12, 1988, has stated that initial drug screening tests can be between 95 and 99 percent effective. At present, Gas Chromatography/Mass Spectrometry (GC/MS) is the method most widely used for confirmation testing. GC/MS is considered by technical experts and the Federal courts to be virtually 100 percent accurate when performed properly by knowledgeable lab personnel. This legislation requires that either GC/MS or another equally accurate test be used to confirm any initial screening which indicates the use, in violation of law or Federal regulation, of alcohol or a controlled substance.

The safeguards included in the bill are intended to ensure accuracy by protecting the integrity of samples, providing for a proper chain of custody, and ensuring that laboratories are properly equipped and meet Federal accreditation and proficiency standards necessary to provide for accurate test results.

#### THE CONSTITUTIONALITY OF DRUG AND ALCOHOL TESTING

The Committee has looked carefully at the issue of the constitutionality of drug and alcohol testing, as have many courts. In the reports accompanying S. 561 and S. 2434 (S. Rpt. 101-172 and S. Rpt. 101-374, respectively), the Committee detailed its view that the drug and alcohol testing of safety sensitive transportation employees complies with the Fourth Amendment. In addition, the Committee concluded that the proposed drug and alcohol testing program does not constitute an unreasonable search and seizure in violation of the Fourth Amendment. The Committee, in previous reports, has relied on U.S. Supreme Court decisions such as *Skinner v. National Railway Executives' Association*, 489 U.S. 602 (1989), (*Skinner*), and *National Treasury Employees Union v. Von Raab*, (*Von Raab*), 489 U.S. 656 (1989).

The Committee's conclusions recently were bolstered further when the U.S. Supreme Court let stand the FAA regulations that require drug testing of persons holding safety-sensitive positions in the aviation industry. *Blustein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), cert. denied, 111 S. Ct. 954 (1991). This on-going FAA pro-

gram includes random, post-accident, reasonable suspicion, pre-employment and periodic drug testing. In addition, the Supreme Court affirmed a Federal appellate court decision upholding the constitutionality of the DOT internal random drug testing program for those agency employees in safety-sensitive positions, which includes the same types of testing as the FAA program. *American Federation of Government Employees v. Skinner*, 885 F.2d 884, (D.C.Cir. 1989), cert. denied, 110 S.Ct. 1969 (1990).

Thus, the Supreme Court either has upheld or has let stand testing for transportation workers in two industries and for government employees. Therefore, the question of whether drug testing along the lines detailed in the proposed legislation is consistent with the Constitution, in the Committee's view, a settled matter.

The proposed legislation statutorily requires the Secretary, and the Administrators of FAA, UMTA, and FRA to publish regulations regarding drug and alcohol testing procedures. The testing procedures should ensure that the individual's due process rights and privacy rights are respected, assuming that employees are:

- (1) informed that a random testing program will be established;
- (2) provided an opportunity to be heard prior to completion of the rulemaking;
- (3) not subjected to direct surveillance while producing a specimen for the test;
- (4) chosen for random tests by a nondiscriminatory and impartial methods; and
- (5) given a second high-quality confirmatory test for all positive screening tests.

While existing judicial precedent supports the view that constitutional challenges to such programs will be rejected, some additional challenges to transportation worker drug and alcohol programs may be forthcoming. Future challenges most likely will focus on the scope of the rules issued by DOT and its modal administrators. S. 676 provides discretion to tailor the programs to include those persons who have the appropriate safety responsibilities that could pose a risk to the traveling public. Since this particular legislation is narrowly tailored to include only those engaged in tasks which have a direct relation to public safety, the Committee believes that the legislation will withstand any and all challenges.

Finally, the Committee affirms existing mechanisms in law or agreement through which employees may have an opportunity to challenge testing procedures or proposed disciplinary actions resulting from testing. It is the Committee's expectation that the Secretary will address the issue of hearing opportunities for affected individuals.

In conclusion, the Committee recognizes that individuals must be protected from unreasonable searches and seizures. However, the Committee recognizes that a paramount interest exists in ensuring that transportation personnel entrusted with safety-sensitive responsibilities remain free from the effects of illegal drug use and alcohol abuse. The public trust in the country's transportation system must not be compromised. With regulations to protect the individual's due process rights, any intrusion considered to occur

from the proposed testing methods is reasonable in view of the governmental goals to be furthered by this legislation.

#### LEGISLATIVE HISTORY

On March 14, 1991, Senator Hollings introduced S. 676, legislation to require drug and alcohol testing in the rail, aviation, motor carrier, and mass transportation industries. The bill is cosponsored by 25 Senators, including Senators Danforth, Exon, Burns, Gorton, Lott, McCain, Stevens, and Breaux on the Committee.

The rail, aviation, and motor carrier provisions of S. 676 are similar to S. 1041, legislation introduced in the 100th Congress, and S. 561, legislation introduced on the 101st Congress. The mass transit testing section of S. 676 is identical to the language of S. 2434, reported by the Committee during the 101st Congress.

The Committee held a number of hearings during the 99th, 100th, and 101st Congresses on the need for legislation to combat drug and alcohol abuse in the transportation industries. The most recent of these hearings, chaired by Senator Hollings, was held on S. 561 on June 15, 1989, and included testimony by the Secretary, and representatives of industry, labor, and public interest groups.

During the 100th Congress, S.1041 was reported by the Committee by a vote of 19-1, and its text was adopted by the Senate on two separate occasions. Senate action during the 100th Congress included adoption of testing provisions as an amendment to H.R. 3051, the Air Passenger Protection Act, and as part of an amendment to H.R. 5210, the omnibus drug bill at the end of the Congress. A provision on mass transit drug and alcohol testing also was included in the Senate's omnibus drug bill. None of the drug or alcohol testing provisions in H.R. 3051 and H.R. 5210 ultimately were enacted. The aviation consumer bill failed in conference. Differences with the House over these testing provisions resulted in deletion of the Senate's testing provisions from the final drug bill.

During the 101st Congress, S. 561, a bill containing rail, motor carrier, and aviation drug and alcohol testing provisions was reported by the Committee, without objection, on August 1, 1989. Subsequently, S. 561 and its text were approved by the Senate three times and included in four House/Senate Conferences but never enacted because of a lack of agreement with the House. On September 27, 1989, the provisions of S. 561 were added as an amendment to H.R. 3015, the DOT Appropriations Act but not agreed to in conference with the House. On October 5, 1989, anti-drug abuse provisions previously contained in H.R. 3015, including those pertaining to drug and alcohol testing, passed the Senate as part of S. 1735. On November 15, 1989, the Senate amended four separate House bills with the text of S. 1735: H.R. 3611, affecting drug enforcement activities in Peru and Bolivia; H.R. 3614, related to drug and alcohol abuse education; H.R. 3630, involving drug treatment programs; and H.R. 3550, affecting the use of assets seized during anti-drug activities. Four House/Senate Conferences were convened, and Conference Reports were finalized on H.R. 3611 and H.R. 3614 but without any agreement on the drug and alcohol testing provisions. Negotiations on H.R. 3550 and H.R. 3630 were inconclusive.

On April 5, 1990, Senator Dole, on behalf of Senator D'Amato, introduced S. 2434, a bill to permit the implementation of the DOT anti-drug program rule for recipients of Federal mass transit assistance. As introduced, S. 2434 would have provided statutory authority for the Secretary to issue DOT's final rule entitled "Control of Drug Use in Mass Transportation Operations," originally issued on November 21, 1988. This rule was overturned by the U.S. Court of Appeals for the District of Columbia on the basis that UMTA's enabling statute did not provide the authority for UMTA to issue "uniform national criteria" for local transit authorities. As reported by the Committee on May 22, 1990, S. 2434 would have provided a statutory mandate, as S. 561 would have provided, for DOT to issue drug and alcohol testing rules. The Senate did not consider S. 2434.

On March 19, 1991, the Committee met in open executive session to consider S. 676. Without objection, the Committee ordered the bill to be reported favorably.

#### SUMMARY OF MAJOR PROVISIONS

The legislation would require the Secretary to issue rules within 12 months of the date of enactment of the legislation for aviation, rail, motor carrier, and mass transportation testing and rehabilitation programs.

##### AVIATION

1. The FAA Administrator (Administrator) would be required to prescribe regulations to require commercial air carriers and the FAA to conduct pre-employment, reasonable suspicion, random, and post-accident drug and alcohol testing. The Administrator also would be authorized to require periodic, recurring testing in conjunction with required physical examinations. Employees covered include flight crews, flight attendants, mechanics, air traffic controllers and airport screening contract personnel, as well as any other airline employees responsible for safety-sensitive functions, as determined by the Administrator.

2. The Administrator would have discretion to suspend or revoke the certificate of any individual testing positive for the unlawful use of alcohol or a controlled substance, or to disqualify or dismiss such an individual.

3. No individual who tests positive shall be allowed to return to his or her position unless he or she completes a program of rehabilitation. If an individual tests positive and refuses to undertake, or fails to complete, a rehabilitation program, has completed a rehabilitation program and tests positive again, or has used alcohol or drugs while on the job, he or she would be prohibited from returning to his or her safety-sensitive position.

4. The Administrator shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol. Air carriers are not prohibited from establishing rehabilitation programs in cooperation with other air carriers.

5. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, require that

all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

6. Inconsistent State and local laws would be preempted. Existing DOT testing regulations would continue in force until implementation of the requirements of this legislation.

##### RAILROADS

1. The Secretary would be required to prescribe regulations to require railroads to conduct pre-employment, reasonable suspicion, random, and post-accident drug and alcohol testing. The Secretary also would be authorized to require periodic, recurring testing in connection with required physical examinations. Railroad employees covered include those responsible for safety-sensitive functions, as determined by the Secretary. Existing testing requirements include employees covered by the Hours of Service Act (which include employees in train and engine service, dispatchers, operators, signal maintainers, and some yard masters).

2. The Secretary shall consider disqualification or dismissal of any employee determined to have used or been impaired by alcohol while on duty and to have used a controlled substance, whether on duty or not, except for medical purposes.

3. The Secretary shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol. This would not result in a change in current programs in the rail industry which provide rehabilitation without disciplinary action when employees step forward on their own initiative or are referred to rehabilitation by a co-worker. Railroads are not precluded from establishing rehabilitation programs in cooperation with other railroads.

4. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

5. Inconsistent State laws would be preempted, as provided for under current Federal law. Existing DOT testing regulations would continue in force until implementation of the requirements of this legislation.

##### MOTOR CARRIERS

1. The Secretary would be required to prescribe regulations to require motor carriers to conduct pre-employment, reasonable suspi-



cion, random, and post-accident drug and alcohol testing. The Secretary also would be authorized to require periodic, recurring testing in conjunction with required physical examinations. Operators of commercial motor vehicles not subject to carrier-administered testing also would be tested under these provisions. Post-accident testing would be required where there is a fatality or other serious accident involving bodily injury or significant property damage.

2. Operators would be subject to the penalties applicable under the Commercial Motor Vehicle Safety Act of 1986, which provides that a driver is disqualified from operating a commercial motor vehicle for a period of not less than one year if found to have operated such a vehicle while under the influence of alcohol or a controlled substance, and is disqualified for life if there is more than one such violation of driving while under the influence. The Secretary would be given discretion under this legislation to determine appropriate penalties for operators who are determined to have unlawfully used, but who were not under the influence of, alcohol or a controlled substance.

3. The Secretary shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol and determine the circumstances under which operators shall be required to participate in such programs. Motor carriers are not precluded from establishing rehabilitation programs in cooperation with other motor carriers.

4. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

5. Inconsistent State and local laws would be preempted. Existing DOT regulations would continue in force until implementation of the requirements of this legislation.

6. The Secretary would be required to design and implement, in four interested and representational States, a pilot program for random testing of the operators of commercial motor vehicles. An amount of \$5,000,000 from funds for fiscal year 1992 under the Motor Carrier Safety Assistance Program (MCSAP) would be available for carrying out this pilot program. This addresses a situation unique to the motor carrier industry and would provide the basis for a report to Congress on the effectiveness of such a program in identifying individuals, such as owner-operators, who might avoid detection through the carrier-administered testing established under this legislation.

#### MASS TRANSIT

1. The Secretary would be required to prescribe regulations to require mass transit operators to conduct pre-employment, reasona-

ble suspicion, random, and post-accident drug and alcohol testing. Post-accident testing would be required where there is a fatality or other serious accident involving bodily injury or significant property damage. The Secretary also would be authorized to require periodic, recurring testing in conjunction with required physical examination. Employees covered include those responsible for safety-sensitive functions, as determined by the Secretary. Mass transit operators covered include recipients of Federal financial assistance under sections 3, 9, or 18 of the Urban Mass Transportation Act of 1964 or section 103(e)(4) of title 23, U.S. Code.

2. The Secretary shall consider disqualifications or dismissal of any employee determined to have used or have impaired by alcohol while on duty and to have used a controlled substance, whether or duty or not, except for medical purposes.

3. The Secretary shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol. Mass transit operations are not precluded from establishing rehabilitation programs in cooperation with other operations.

4. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

5. Inconsistent State and local laws would be preempted. Any existing DOT regulations would continue in force until implementation of the requirements of this legislation.

#### ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

CONGRESSIONAL BUDGET OFFICE,  
U.S. CONGRESS,  
Washington, DC, April 4, 1991.

HON. ERNEST F. HOLLINGS,  
Chairman, Committee on Commerce, Science, and Transportation,  
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 676, the Omnibus Transportation Employee Testing Act of 1991, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, March 19, 1991.

S. 676 would require commercial airlines, railroads, mass transportation systems receiving federal assistance, and motor carriers to test employees for drugs and alcohol and to offer employees op-



portunities to participate in rehabilitation programs. The Department of Transportation (DOT) currently has regulations in place that require drug, but not alcohol, testing for most of these workers. CBO estimates that enactment of this bill would result in one-time costs to the federal government of \$6 million to \$8 million, mostly in 1992, and recurring costs of \$2 million to \$3 million annually thereafter, assuming appropriation of the necessary funds. Because S. 676 would not affect direct spending or receipts of the federal government, there would be pay-as-you-go scoring. Local governments would incur additional costs totaling \$25 million to \$30 million a year for drug and alcohol testing of vehicle operators they employ.

#### FEDERAL COSTS

The bill would direct DOT to issue regulations requiring employers in the specified transportation industries to conduct preemployment, reasonable suspicion, random and post-accident testing of employees in safety-sensitive positions. The DOT would incur some costs for developing, implementing and enforcing these new regulations. Assuming enactment before the end of fiscal year 1991, CBO expects that the cost of developing and implementing new regulations would be \$1 million to \$3 million, primarily in fiscal year 1992. The DOT would also incur costs for enforcement of the new testing requirements. While CBO lacks sufficient information to estimate these costs with precision, additional enforcement efforts could cost several million dollars annually, depending on the degree of enforcement desired.

In addition, the Federal Aviation Administration (FAA) would be required to implement such a testing program for its own workers who perform safety-sensitive functions and to offer its employees opportunities to participate in rehabilitation programs. The FAA already conducts drug testing of all safety-sensitive employees, but does not perform alcohol testing. Costs to the federal government to conduct alcohol testing of all safety-sensitive employees would depend primarily on the type of test used. Based on information provided by the DOT, CBO estimates that any additional costs would likely be less than \$1 million annually.

The Secretary also would be required to design and implement a pilot program for random testing of commercial motor vehicle operators, with the participation of four states. The bill would set aside \$5 million from funds made available for motor carrier safety grants in fiscal year 1992 for this pilot program. Budget authority of \$60 million is available for the current year for such grants but no funds have yet been authorized for fiscal year 1992.

#### STATE AND LOCAL COSTS

S. 676 would require testing of the operators of commercial motor vehicles, as defined by the Commercial Motor Vehicle Safety Act of 1986. While current drug testing regulations apply only to drivers of motor vehicles in interstate commerce, this provision would extend federal drug-testing requirements to intrastate drivers, including those operated directly by or under contract for local governments. Included would be operators of school buses, sanita-

tion trucks and road maintenance trucks. In addition, the bill would require testing of these drivers for alcohol and would require drug and alcohol testing for mass transportation employees not covered by current regulations.

The testing requirement of S. 676 would apply to approximately 600,000 local government employees—primarily mass transportation employees and drivers of school buses and garbage trucks. The additional cost to local governments to comply with S. 676 would depend on the type of alcohol test performed and on the number of drivers tested. We estimate that the cost would be \$25 million to \$30 million per year, assuming that random tests would reach 50 percent of the relevant drivers each year, which is the level required by current DOT regulations for interstate drivers. In addition to testing, local governments might also incur costs for litigation relating to collective bargaining and constitutional issues, and could bear some costs for rehabilitation programs.

State governments also operate some heavy vehicles, and therefore would incur some increased costs if this bill is enacted. CBO estimates that state costs would not be significant, because the number of drivers affected would be much smaller than for local governments. Some costs initially borne by local governments, however, might be reimbursed by the states.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mitchell Rosenfeld and Marjorie Miller, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,  
*Director.*

#### REGULATORY IMPACT STATEMENTS

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

##### NUMBER OF PERSONS COVERED

This legislation covers several modes of commercial transportation, each affecting varying numbers of employees. In aviation, the Committee estimates that approximately 538,000 domestic air carrier employees and approximately 31,816 FAA employees, including air traffic controllers, will be covered by this legislation. The Committee estimates that in the railroad industry, approximately 90,000 individuals will be affected by this legislation. In the motor carrier industry, approximately five and one-half million individuals employed as operators of commercial motor vehicles will be covered by the legislation. The number of persons covered in the mass transportation industry could include approximately 195,000 individuals.

##### ECONOMIC IMPACT

The major areas of economic impact upon the FAA for its employees and the respective transportation industries include testing costs, rehabilitation program costs, and employee assistance program costs. Generally, these costs are applicable to each of the four

modes of transportation. They will, however, vary according to the number of affected employees, the frequency with which employees are tested, and the number of employees in need of rehabilitation. Total transportation sector costs are difficult to estimate, because the reported bill does not establish a minimum number of times any individual or class of employees must be tested, or require rehabilitation for employees who test positive.

Preliminary figures have placed the cost of initial screening and confirmatory tests, as well as the related administrative costs, at between \$23-100 per employee, depending on the type of test used, the number of drugs tested, and the sensitivity of the test. In addition, testing costs often can be reduced through the joint purchasing power of trade associations or other organizations. Similarly, as testing becomes more widespread, it is possible that the cost of testing will be lowered by the new volumes of testing required.

Rehabilitation program costs vary considerably based upon the type, location, and length of the program. Employee assistance program costs associated with the education, counseling, and training of employees after rehabilitation are estimated to be \$20-30 per employee.

#### PRIVACY

Testing of transportation employees in safety-sensitive positions will create some intrusion into the privacy of these individuals, which the Committee believes is justified, given the overwhelming public interest in safe transportation, and which is constitutional given the scope of the problem, the safeguards in the legislation, and the diminished expectation of privacy of safety-sensitive employees.

#### PAPERWORK

With respect to paperwork requirements, the Committee recognizes that compliance with the regulations to be promulgated pursuant to this legislation potentially could be significant assuming that carriers and mass transportation operations will be required to certify to the Secretary that their testing and rehabilitation programs are operative and being properly administered, and that testing safeguards are being adhered to. This legislation is not expected to impose substantial reporting requirements beyond those that are anticipated under DOT's current testing regulations. The Committee expects, whether through statutory or administrative requirements for testing, that the Secretary will seek to minimize additional paperwork requirements wherever possible, through "piggyback" reporting, random auditing, or other appropriate methods.

### SECTION-BY-SECTION ANALYSIS

#### SECTION 1—SHORT TITLE

This section states that the short title of the bill is the "Omnibus Transportation Employee Testing Act of 1991."

### SECTION 2—FINDINGS

This section contains the statement of Congressional findings emphasizing the need to eliminate alcohol abuse and illegal drug use throughout the country, and in particular, among those who are responsible for the safe movement of aircraft, trains, commercial motor vehicles, and mass transit vehicles. In this regard, increased testing, including the use of random testing, has been found successful in deterring the continued abuse of alcohol and drug use. Congress also finds that safeguards can be implemented to protect individual privacy, reduce the potential for harassment, and ensure against undue harm to a person's reputation or career. Finally, there is a recognition that rehabilitation is an important part of any testing program and should be made available, as appropriate.

#### SECTION 3—TESTING TO ENHANCE AVIATION SAFETY

Section 3 of the reported bill would add a new section 614 to the Federal Aviation Act of 1958. Subsection (a)(1) of new section 614 would require that, within 12 months after enactment, the Administrator issue regulations requiring air carriers and foreign air carriers to conduct pre-employment, reasonable suspicion, random, and post-accident testing of airmen, crew members, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions, as determined by the Administrator, for use of alcohol or a controlled substance in violation of law or Federal regulation. The Administrator also is authorized to prescribe regulations, as appropriate in the interest of safety, for the conduct of periodic, recurring testing of safety-sensitive employees for such use.

The alcohol and drug testing programs to be established under this subsection of new section 614 would apply to major domestic airlines, as well as commuter air carriers, air taxis, and certain fixed-base operations, such as tour flights. Coverage does not extend to operators of general aviation aircraft or to other aircraft privately owned or operated and not held out for business. With respect to foreign air carriers, the bill is designed to cover those airlines that provide service to and from the United States. As provided in a later section, these testing requirements are to be consistent with the international obligations of the United States, with consideration given to any applicable laws and regulations of the foreign nation. The Committee believes that, while there may be difficulties in implementation, it is necessary to ensure the testing of those individuals employed by foreign carriers who are responsible for the safety of U.S. citizens. Testing of these individuals, within the scope of international treaties, is important to the Committee's efforts to enhance aviation safety.

The reported bill would mandate the testing of a number of categories of employees, as well as those selected by the Administrator because of their employment in safety-sensitive positions. Those groups of employees required to be covered by the new testing programs include airmen, crew members, and airport security screening contract personnel. As defined in statute and regulation, this would require testing of the flight crews, flight attendants, air traffic controllers, mechanics, safety inspectors, and flight dispatchers.

The Committee intends that the Administrator be very selective in extending the coverage of this provision to other categories of air carrier and FAA employees. While it is critical that, in the interest of safety, personnel responsible for the safety of passengers or employees be deterred from allowing drugs and alcohol to affect their ability to perform, new section 614 should not be treated as an open authorization to test all aviation industry employees.

This subsection of new section 614 also specifies the conditions under which employees must be tested. Pre-employment and post-accident testing are self-evident. Testing also will be required when there is reasonable suspicion to believe that an individual is currently under the influence of or impaired by alcohol or a controlled substance. Reasonable suspicion, as envisioned by this bill, does not require a showing of probable cause, as that term typically is defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing will be similar to that under the current FAA rule which requires specific, personal observations concerning the appearance, behavior, or performance of the employee.

With respect to random testing, the Committee does not believe that it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Administrator the discretion to determine how specific programs should be administered. In determining how the programs are to be administered, the Administrator should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of alcohol abuse and the use of illegal drugs by safety-sensitive employees. Finally, as noted in subsection (d) of new section 614, relating to testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The reported bill authorizes, but does not require, the Administrator to mandate testing on a periodic, recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the airline industry. However, in order to provide the Administrator with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic, recurring basis.

New subsection (a)(2) requires the Administrator to establish a program of testing for FAA employees whose duties include responsibility for safety-sensitive functions. Such a program is required to include pre-employment, reasonable suspicion, random, and post-accident testing for use of alcohol or a controlled substance in violation of law or Federal regulation. The Administrator is also authorized to prescribe regulations for the conduct of periodic, recurring testing of safety-sensitive FAA employees for the use of alcohol or a controlled substance.

New subsection (a)(3) requires that in prescribing regulations, the Administrator shall require, as the Administrator considers appro-

prate, the suspension or revocation of any certificate, or the disqualification or dismissal of an individual, in any instance where an individual has been tested and confirmed to have used alcohol or a controlled substance in violation of law or Federal regulation. This subsection is designed to provide the Administrator with the authority to sanction individual employees on a discretionary basis. It would not require that any employee who tests positive for drug or alcohol use necessarily be dismissed or have his or her certificate revoked. Rather, it would allow the Administrator to take such a step directly, or to require an air carrier to do so, if such action were believed warranted by the Administrator.

New subsection (b)(1) would prohibit the use of alcohol or a controlled substance by such safety-sensitive individuals, as provided in subsection (a)(1), in violation of law or Federal regulation. This affirmative prohibition is intended to clarify that individuals in safety-sensitive positions are prohibited from using alcohol or a controlled substance in a manner that violates law or Federal regulation.

New subsection (b)(2) prohibits any such individual who is determined to have used alcohol or a controlled substance in violation of law or Federal regulation from serving in a safety-sensitive position unless that individual has completed a program of rehabilitation described in subsection (c) of new section 614. This provision does not mandate that every individual who tests positive be admitted into a rehabilitation program. If a carrier chooses to do so, it can remove an employee who tests positive from that safety-sensitive position. However, this proposed subsection would prohibit an individual who tests positive from returning to his or her safety-sensitive position unless he or she had completed a program of rehabilitation. The objective of this provision is to keep employees from returning to positions of critical importance unless they have successfully completed a program designed to end their abuse of illegal drugs or alcohol.

New subsection (b)(3) prohibits any such individual who is determined to have used alcohol or a controlled substance in violation of law or Federal regulation from returning to his or her safety-sensitive position if such individual: (A) engaged in such use while on duty; (B) had previously undertaken or completed a program of rehabilitation described in new subsection (c); (C) refuses to undertake such a rehabilitation program; or (D) fails to complete a rehabilitation program. This provision is explicitly intended to preclude an employee serving in a safety-sensitive position who tests positive while on duty from returning to that position. It also would prohibit an employee who refuses to undertake a rehabilitation program, fails to complete such a program, or tests positive for a second time from returning to his or her safety-sensitive position.

New subsection (c)(1) requires the Administrator to issue regulations setting forth requirements for rehabilitation programs which, at a minimum, provide for the identification and opportunity for treatment of employees referred to in new subsection (a)(1) in need of assistance in resolving problems with the use of alcohol or controlled substances. The Committee envisions that the Administrator would establish requirements for programs that provide information for employees about the availability of different programs

and treatment facilities as part of the "identification" requirement. The provision does not mandate rehabilitation, but instead requires companies to offer an opportunity for rehabilitation. Each carrier is encouraged under this subsection to make a program available to all of its employees, in addition to those safety-sensitive employees identified in subsection (a)(1). The Administrator is directed to determine the circumstances under which such safety-sensitive employees shall be required to participate in such a rehabilitation program. Nothing in this subsection precludes any air carrier or foreign air carrier from establishing a rehabilitation program in cooperation with other air carriers or foreign air carriers. This subsection also does not prohibit carriers from establishing a rehabilitation program in conjunction with other industries affected by this legislation, or from using other legitimate rehabilitation programs.

New subsection (c)(2) requires the Administrator to establish and maintain a rehabilitation program, which, at a minimum, provides for the identification and opportunity for treatment of FAA employees whose duties include direct responsibility for safety-sensitive functions and who are in need of assistance in resolving problems with the use of alcohol or controlled substances.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

New subsection (d) requires the Administrator, in establishing a testing program under subsection (a) of new section 614, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

2. incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which: (A) establish comprehensive standards for all aspects of laboratory-controlled substances testing and procedures to be applied in carrying out new section 614, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for the certification and revocation of certification of laboratories to perform controlled substances testing in carrying out new section 614;

3. require that all laboratories involved in the controlled substances testing of any individual under new section 614 shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. provide that all tests which indicate the use of alcohol or a controlled substance by any individual, in violation of law or Federal regulation, shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

5. provide that each specimen sample be subdivided, secured, and labeled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained assayed by a test done independently at a second certified laboratory if the individual requests such an independent test within three days after being advised of the results of the confirmation test;

6. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriate sanctions under new section 614; and

8. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to carefully review the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be used in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as proposed by the reported bill and as DOT has done in part 40 of title 49, Code of Federal Regulations (CFR), as it exists at this writing, is an essential component of the procedural safeguards specified in new subsection (d). Realizing that these guidelines possibly are subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect are to be mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a

minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends that testing for alcohol be conducted according to regulations to be developed by the Administrator in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life. The Committee notes that DOT has issued an advance notice of proposed rulemaking (54 Fed. Reg. 46326, November 2, 1989), which considers a variety of methods, including possible new technologies, for determining the use or abuse of alcohol in transportation. If such methods are determined to be reliable and accurate, the Committee would not object to their use to augment the requirements of this legislation. However, anticipation of such methods must not delay implementation of this legislation.

Among the employee safeguards included in new subsection (d) is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the reported bill directs that a portion of each sample be retained as a control in the event that any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with an opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. The Committee intends to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee also is seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Administrator will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosures of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also are intended to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar cir-

cumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method of minimizing the potential for harassment.

New subsection (e)(1) provides that no State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under this section, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Administrator to ensure effective implementation of this section, and therefore the Committee is acting to preempt those restrictions.

New subsection (e)(2) states that nothing in this section shall be construed to restrict the discretion of the Administrator to continue in force, amend, or further supplement any regulations issued before the date of enactment of this section that govern the use of alcohol and controlled substances by those safety-sensitive individuals specified in new subsection (a)(1). These include, but are not limited to, rules prohibiting drug and alcohol use, prescribing alcohol and drug testing requirements, and establishing employee assistance and rehabilitation programs.

New subsection (e)(3) directs the Administrator, in prescribing regulations under this section, only to establish requirements applicable to foreign air carriers that are consistent with the international obligations of the United States. The Administrator is further directed to take into consideration any applicable laws and regulations of foreign countries. The Secretary of State and the Secretary, jointly, shall call on the member nations of the International Civil Aviation Organization to strengthen and enforce existing standards to prohibit the use of alcohol or a controlled substance in violation of law or Federal regulation by crew members in international civil aviation.

New subsection (f) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act specified by the Administrator. The Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs of all drugs on a widespread basis. The intention of this provision is to provide the Administrator with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under this section.

#### SECTION 4—TESTING TO ENHANCE RAILROAD SAFETY

Section 4 of the reported bill amends section 202 of the Federal Railroad Safety Act of 1970. New subsection (r)(1) of section 202 would require that, within 12 months after enactment, the Secretary issue rules, regulations, standards, and orders relating to alcohol and drug use in railroad operations. Such regulations shall establish a program which: (A) requires railroads to conduct pre-em-



ployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions, as determined by the Secretary, for use of alcohol or a controlled substance in violation of law of federal regulation; (B) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used or to have been impaired by alcohol while on duty; and (C) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law and any rules, regulations, standards, or orders issued under the legislation.

These provisions are designed to provide the Secretary with the authority to sanction individual employees on a discretionary basis. The bill would not require that any employee who tests positive for drug or alcohol use necessarily be dismissed or disqualified by either the Secretary or the railroad. Rather, it would allow the Secretary to take such a step directly, or to require a railroad to do so, if such action were believed warranted by the Secretary. The Secretary also is authorized under this new subsection to issue rules, regulations, standards, and orders requiring railroads to conduct periodic, recurring testing of safety-sensitive railroad employees for use of alcohol or a controlled substance in violation of law or federal regulation.

Nothing in this new subsection is to be construed as restricting the discretion of the Secretary to continue in force, amend, or further supplement any rules, regulations, standards, and orders issued before the date of enactment of this subsection that govern the use of alcohol and controlled substances in railroad operations. These include, but are not limited to, rules prohibiting drug and alcohol use, prescribing alcohol and drug testing requirements, and establishing employee assistance and rehabilitation programs.

This new subsection also specifies the conditions under which employees must be tested. Pre-employment and post-accident testing are self-evident. Testing also will be required when there is reasonable suspicion to believe that an individual is currently under the influence of or impaired by alcohol or a controlled substance. Reasonable suspicion, as envisioned by this bill, does not require a showing of probable cause, as that term typically is defined in a legal sense. Rather, the Committee anticipates the continuation of reasonable testing currently conducted by FRA, which requires specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee.

With respect to random testing in the railroad industry, as in the aviation, motor carrier, and mass transportation industries, the Committee does not believe that it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Secretary the discretion to determine how specific programs should be administered. In determining how the programs should be administered, the Secretary should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program

provide adequate coverage to ensure effective deterrence of alcohol abuse and the use of illegal drugs by safety-sensitive employees. Finally, as is noted in new subsection (r)(2), relating to testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The reported bill authorizes, but does not require, the Secretary to mandate testing on a periodic, recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the railroad industry. However, in order to provide the Secretary with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic, recurring basis.

New subsection (r)(2) requires the Secretary, in establishing a testing program under this subsection, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;
2. incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which: (A) establish comprehensive standards for all aspects of laboratory-controlled substances testing and procedures to be applied in carrying out this subsection, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;
3. require that all laboratories involved in the controlled substances testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;
4. provide that all tests which indicate the use of alcohol or a controlled substance by any individual, in violation of law or federal regulation, shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;
5. provide that each specimen sample be subdivided, secured, and labeled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a test done independently at a second certified laboratory if the indi-



vidual requests such an independent test within three days after being advised of the results of the confirmation test;

6. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriate sanctions under this section; and

8. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to carefully review the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be used in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as proposed by the reported bill and as DOT has done in part 40 of title 49, CFR, as it exists at this writing, is an essential component of the procedural safeguard specified in this new subsection (r)(2). Realizing that these guidelines possibly are subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect are mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends that testing for alcohol be conducted according to regulations to be developed by the Secretary in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that

has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life. The Committee notes that DOT has issued an advance notice of proposed rulemaking (54 Fed. Reg. 46326, November 2, 1989), which considers a variety of methods, including possible new technologies, for determining the use or abuse of alcohol in transportation. If such methods are determined to be reliable and accurate, the Committee would not object to their use to augment the requirements of this legislation. However, anticipation of such methods must not delay implementation of this legislation.

Among the employee safeguard included in this subsection is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the reported bill directs that a portion of each sample be retained as a control in the event that any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with an opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards include in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. The Committee intends to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee also is seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings, may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also are intended to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (r)(3) requires the Secretary to issue rules, regulations, standards, or orders setting forth requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of railroad employees responsible for safety-sensitive functions, as determined by the Secretary, in need of assistance in resolving problems with the use of alcohol or a controlled substance. The Committee envisions that the Secretary would establish requirements for programs that provide information for employees about the availability of different programs and

treatment facilities as part of the "identification" requirement. The provision does not mandate rehabilitation, but instead requires companies to offer an opportunity for rehabilitation. Each railroad is encouraged to make such a program available to all of its employees in addition to those responsible for safety-sensitive functions. The Secretary is directed to determine the circumstances under which such safety-sensitive employees shall be required to participate in such a rehabilitation program. Nothing in this paragraph precludes a railroad from establishing a rehabilitation program in cooperation with any other railroad. This subsection also does not prohibit railroads from establishing a rehabilitation program in conjunction with other industries affected by this legislation, or from using other legitimate rehabilitation programs.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

New subsection (r)(4) requires the Secretary, in carrying out the provisions of this subsection, only to establish requirements that are consistent with the international obligations of the United States. The Secretary is further directed to take into consideration any applicable laws and regulations of foreign countries.

New subsection (r)(5) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act specified by the Secretary. The Committee is aware that the Controlled Substance Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to provide the Secretary with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under new subsection (r).

Finally, the omission of a specific preemption provision in new subsection (r) is intended to recognize provisions in current law which provide that no State shall adopt or have in effect any law, rule, regulation, order, or standard that is incompatible with the regulations promulgated under the Federal Railroad Safety Act of 1970, including the amendments made by the reported bill. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of this section, and therefore the Committee reaffirms the provisions of current law which would serve to preempt such State or local government restrictions. As in other sections of this legislation, the Committee does not intend for this to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property.

#### SECTION 5—TESTING TO ENHANCE MOTOR CARRIER SAFETY

Section 5 of the reported bill would create a new section 12020 of the Commercial Motor Vehicle Safety Act of 1986. Subsection (a) of new section 12020 would require that, within 12 months after enactment, the Secretary to issue regulations requiring motor carriers to conduct pre-employment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for the use of alcohol or a controlled substance in violation of law or Federal regulation. The Secretary also is authorized to issue regulations for the conduct of periodic, recurring testing of such operators for such use.

The reported bill limits testing to operators only. For purposes of this bill, a commercial motor vehicle is defined as it is in the Commercial Motor Vehicle Safety Act of 1986. As was contemplated under the provisions of that Act, this term could include trucks and buses operated by municipalities and States.

This subsection also specifies the conditions under which operators must be tested. Pre-employment testing is self-evident. Testing also will be required when there is reasonable suspicion to believe that an individual is currently under the influence of or impaired by alcohol or a controlled substance. Reasonable suspicion as envisioned by this bill does not require a showing of probable cause as that term typically is defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing will be similar to that conducted under the current Federal Highway Administration rule which requires specific, personal observations concerning the appearance or conduct of a commercial motor vehicle driver.

With respect to random testing, the Committee does not believe that it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Secretary the discretion to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of drug and alcohol abuse by commercial motor vehicle operators. Finally, as is noted in new subsection (d), in the section on testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The reported bill authorizes, but does not require, the Secretary to mandate testing on a periodic, recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the motor carrier industry. However, in order to provide the Secretary with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic, recurring basis.

New subsection (b)(1) provides that post-accident testing shall be required in the case of any accident in which occurs a loss of

human life, or, as determined by the Secretary, other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a motor carrier. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or significant property damage for which testing for drugs and alcohol would be warranted.

New subsection (b)(2) states that the Secretary is not precluded from providing that testing be conducted as part of the biennial medical examination required of the operators of commercial motor vehicles for federal certification.

New subsection (c) requires the Secretary to promulgate regulations setting forth requirements for rehabilitation programs which provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are determined to have used alcohol or a controlled substance in violation of law or Federal regulation. The Committee envisions that the Secretary would establish requirements for programs that provide information for employees about the availability of different programs and treatment facilities as part of the "identification" requirement. The provision does not mandate rehabilitation, but instead requires companies to offer an opportunity for rehabilitation. The Secretary is directed to determine the circumstances under which operators shall be required to participate in such a program before that person can be authorized to operate a motor vehicle subsequent to being found in violation of such law or Federal regulation. Nothing in this section precludes a motor carrier from establishing a rehabilitation program in cooperation with another motor carrier. This subsection also does not prohibit motor carriers from establishing a rehabilitation program in conjunction with other industries affected by this legislation, or from using other legitimate rehabilitation programs.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

New subsection (d) requires the Secretary, in establishing a testing program under subsection (a) of new section 12020, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;
2. incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which: (A) establish comprehensive standards for all aspects of laboratory-controlled substances testing and procedures to be applied in carrying out new section 12020, including standards which require the use of the

best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out new section 12020;

3. require that all laboratories involved in the controlled substances testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. provide that all tests which indicate the use of alcohol or a controlled substance by any individual, in violation of law or federal regulation, shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

5. provide that each specimen sample be subdivided, secured, and labeled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a test done independently at a second certified laboratory if the individual requests such an independent test within three days after being advised of the results of the confirmation test;

6. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of tests results for the orderly imposition of appropriate sanctions under this section; and

8. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to carefully review the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be used in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive

screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as provided by the reported bill and as DOT has done in part 40 of title 49, CFR, as it exists at this writing, is an essential component of the procedural safeguards specified in this subsection. Realizing that these guidelines may be subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect are mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends that testing for alcohol be conducted according to regulations to be developed by the Secretary in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life. The Committee notes that DOT has issued an advance notice of proposed rulemaking (54 Fed. Reg. 46326, November 2, 1989), which considers a variety of methods, including possible new technologies, for determining the use or abuse of alcohol in transportation. If such methods are determined to be reliable and accurate, the Committee would not object to their use to augment the requirements of this legislation. However, anticipation of such methods must not delay implementation of this legislation.

Among the employee safeguards included in this subsection is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the reported bill directs that a portion of each sample be retained as a control in the event that any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with the opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. The Committee intends to protect individual privacy by ensuring that specimens may be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose.

The Committee also is seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also are intended to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (e) provides that no State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under new section 12020, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of this section, and therefore the Committee is acting to preempt those restrictions.

New subsection (e)(2) provides that nothing in this section shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations issued before the date of enactment of this section that govern the use of alcohol or controlled substances by commercial motor vehicle employees.

The Secretary is directed, in issuing regulations under new subsection (e)(3), to establish requirements that are consistent with the international obligations of the United States. The Secretary is further directed to take into consideration any applicable laws and regulations of foreign countries.

New subsection (f) states that nothing in this section shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under the Commercial Motor Vehicle Safety Act of 1986 or any other provision of law. The Secretary is directed to determine appropriate sanctions for commercial motor vehicle operators who are determined, as a result of tests conducted and confirmed under new section 12020, to have used alcohol or a controlled substance in violation of law or Federal regulation, but are not under the influence of alcohol or a controlled substance, as provided in the 1986 Act.

New subsection (g) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act, specified by the Secretary. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to admin-

ister testing programs on a widespread basis. The intention of this provision is to provide the Secretary with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under new section 12020.

Section 5(b)(1) of the reported bill requires the Secretary to design, within nine months after enactment, and implement, within 15 months after enactment, a pilot test program for the purpose of State testing of the operators of commercial motor vehicles on a random basis to determine whether an operator has used alcohol or a controlled substance in violation of law or Federal regulation. This pilot test program is to be administered as a part of MCSAP. While it is envisioned that all operators of commercial motor vehicles would be subject to random testing in the States participating in this pilot program, the Committee intends that this program will serve as a test of, and establish a record on, the effectiveness of State-administered testing in detecting individuals, such as independent owner-operators and independent drivers, who might otherwise avoid detection through the carrier-administered testing directed by the reported bill.

Subsection (b)(2) requires the Secretary to solicit the participation of States interested in participating in such a program, from which four States should be selected for participation.

Subsection (b)(3) requires the Secretary to ensure that the selection of participating States is representative of varying geographical and population characteristics and takes into consideration the historical geographical incidence of commercial motor vehicle accidents involving loss of human life. This should ensure a balanced pilot program through a geographical mix of States within the Nation and a mix of States which have a high incidence of deaths resulting from commercial motor vehicle accidents.

Subsection (b)(4) provides that this pilot program is to continue for a period of one year and requires the Secretary to consider alternative methodologies for implementing a system of random testing of operators of commercial motor vehicles.

Subsection (b)(5) specifies that, not later than 30 months after enactment, the Secretary is to report to Congress the results of the pilot program, including any recommendations concerning the desirability and implementation of a system of random testing of operators of commercial motor vehicles. It is the Committee's intent that this report both will address the results of the pilot program and will include recommendations concerning random testing administered by means other than the carrier-administered random testing envisioned in section 5(a) of the reported bill. The Committee intends for this report to address specifically the feasibility and advisability of random testing by State enforcement agencies and address funding for such programs, including the use of MCSAP or other funds for such purpose. The Committee does not intend to preclude consideration in the report of Federal or local testing and other methods that could be effective in detecting operators who might otherwise avoid detection in the carrier-administered program established in this section.

Subsection (b)(6) provides that, for purposes of carrying out this pilot program, there is to be available to the Secretary up to \$5,000,000 of funds from MCSAP for fiscal year 1992.

Subsection (b)(7) defines "commercial motor vehicles" as that term is defined in the Commercial Motor Vehicle Safety Act of 1986. The Committee also intends that "Secretary" is defined as the Secretary of Transportation. For the purposes of this section, the Committee intends that the term "motor carrier" encompasses persons who employ individuals who operate commercial motor vehicles in commerce as that term is defined in section 12019(3) of the Commercial Motor Vehicle Safety Act of 1986.

#### SECTION 6—TESTING TO ENHANCE MASS TRANSPORTATION SAFETY

Subsection (a)(1) of section 6 defines the term "controlled substances" to mean any substance under section 102(6) of the Controlled Substances Act whose use the Secretary has determined poses a risk to transportation safety. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to provide the Secretary with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under this section.

Subsection (a)(2) defines the term "person" to include any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of the United States, or any State, territory, district, or possession thereof, or the laws of any foreign country.

Subsection (a)(3) defines the term "Secretary" to mean the Secretary of Transportation.

Subsection (a)(4) defines the term "mass transportation" to mean all forms of mass transportation except those forms that the Secretary determines are covered adequately, for purposes of employee drug and alcohol testing, by either the Federal Railroad Safety Act of 1970 or the Commercial Motor Vehicle Safety Act of 1986.

Subsection (b)(1) of section 6 provides that, within 12 months after the date of enactment, the Secretary is to establish a program which requires mass transportation operations to conduct pre-employment, reasonable suspicion, random, and post-accident testing of mass transportation employees responsible for safety-sensitive functions, as determined by the Secretary, for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Secretary is authorized to prescribe regulations, as appropriate in the interest of safety, for the conduct of periodic, recurring testing of such employees for the use of alcohol or a controlled substance.

This subsection also specifies the conditions under which safety-sensitive employees must be tested. Pre-employment testing is self-evident. Testing also will be required when there is reasonable suspicion to believe that an individual is currently under the influence of or impaired by alcohol or a controlled substance. Reasonable suspicion as envisioned by this bill does not require a showing of probable cause as that term typically is defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing would require specific, personal observations by one or more supervisory personnel concerning the appearance or conduct of a safety-sensitive employee.



With respect to random testing, the Committee does not believe that it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Secretary the discretion to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and their likely financial impact on carriers of different sizes. While it is important that each program provide adequate coverage to ensure effective deterrence of drug and alcohol abuse, it is also important to ensure that programs are tailored carefully to eliminate the expense of unnecessary testing and minimize the financial impact on mass transportation operations and the burden on employees.

The Committee is aware of concerns raised with regard to the difficulties some believe may be faced by small transit operations located in rural areas in complying with UMTA drug and alcohol testing requirements. If, after notice and opportunity for comment, the Secretary determines that a waiver for certain operations from such requirements would not be contrary to the public interest and would not diminish the safe operation of rural transit conveyances, the Committee would not object to a waiver, in whole or in part, of the application of regulations issued pursuant to this bill with regard to recipients of funds under section 18 of the Urban Mass Transportation Act of 1964.

Finally, as noted in subsection (d), on testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The reported bill authorizes, but does not require, the Secretary to mandate testing on a periodic, recurring basis. The Committee believes that a vigorous random testing program will provide adequate deterrence against alcohol abuse and illegal drug use in the mass transportation industry. However, in order to provide the Secretary with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic, recurring basis.

Subsection (b)(2) provides that post-accident testing of a safety-sensitive employee shall be required in the case of any accident in which occurs a loss of human life, or, as determined by the Secretary, other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a mass transportation operation. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or significant property damage for which testing for drugs and alcohol would be warranted.

Subsection (c) requires the Secretary to promulgate regulations setting forth requirements for rehabilitation programs which provide, at a minimum, for the identification and opportunity for treatment of mass transportation employees who are determined to

have used alcohol or a controlled substance in violation of law or Federal regulation. The Committee envisions that the Secretary would establish requirements for programs that provide information for employees about the availability of different programs and treatment facilities as part of the "identification" requirement. The provision does not mandate rehabilitation, but instead requires companies to offer an opportunity for rehabilitation. The Secretary is directed to determine the circumstances under which such employees will be required to participate in such a program. Nothing in this section is to preclude a mass transportation operation from establishing a rehabilitation program in cooperation with any other such operation. This subsection also does not prohibit mass transportation operations from establishing a rehabilitation program in conjunction with other industries affected by this legislation, or from using other legitimate rehabilitation programs.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

Subsection (d) requires the Secretary, in establishing a testing program, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

2. incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which: (A) establish comprehensive standards for all aspects of laboratory-controlled substances testing and procedures to be applied in carrying out this section, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

3. require that all laboratories involved in the controlled substances testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;



5. provide that each specimen sample be subdivided, secured, and labeled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a test done independently at a second certified laboratory if the individual requests such an independent test within three days after being advised of the results of the confirmation test;

6. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriate sanctions under this section; and

8. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to review carefully the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be used in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation will be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as provided by the reported bill and as DOT has done in part 40 of title 49, CFR, as it exists at this writing, is an essential component of the procedural safeguards specified in this section. Realizing that these guidelines possibly are subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect are mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends that testing for alcohol to be conducted according to regulations to be developed by the Secretary in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life. The committee notes that DOT has issued an advance notice of proposed rulemaking (54 Fed. Reg. 46326, November 2, 1989), which considers a variety of methods, including possible new technologies, for determining the use or abuse of alcohol in transportation. If such methods are determined to be reliable and accurate, the Committee would not object to their use to augment the requirements of this legislation. However, anticipation of such methods must not delay implementation of this legislation.

Among the employee safeguards included in this subsection is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the reported bill directs that a portion of each sample be retained as a control in the event that any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with the opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. The Committee intends to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee also is seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also are intended to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

Subsection (e)(1) provides that no State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under this section, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of this section, and therefore the Committee is acting to preempt those restrictions. At the same time, the Committee is concerned that existing programs to curb drug and alcohol abuse, which have been developed through collective bargaining between State and local agencies and their employees, and which have survived legal challenge, are not disrupted by their lack of strict "consistency" to UMTA regulations. It is not the Committee's intention to disrupt aggressive drug testing programs which have survived the collective bargaining and legal process.

Subsection (e)(2) provides that nothing in this section shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations issued before the date of enactment that govern the use of alcohol or controlled substances by mass transportation employees.

Subsection (e)(3) provides that, in issuing regulations under this section, the Secretary only is to establish requirements that are consistent with the international obligations of the United States. The Secretary is further directed to take into consideration any applicable laws and regulations of foreign countries.

Subsection (f) of section 6 establishes provisions for disqualification of mass transportation employees determined to have used drugs or alcohol in violation of law or Federal regulations. Subsection (f)(1) provides that, as the Secretary considers appropriate, the Secretary is to require disqualification for an established period of time or dismissal of any employee who is determined to have used or to have been impaired by alcohol while on duty; and disqualification for an established period of time or the dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law or any regulation. Subsection (f)(2) provides that nothing in this section shall be construed to supersede any penalty applicable to a mass transportation employee under any other provision of law.

Subsection (g) provides that a person shall not be eligible for Federal financial assistance under sections 3, 9, or 18 of the Urban Mass Transportation Act of 1964 or section 103(e)(4) of title 23, U.S. Code, if such person: (1) is required, under regulations prescribed by the Secretary, to establish a program of alcohol and controlled substances testing; and (2) fails to establish such a program in accordance with such regulations.

## CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

### FEDERAL AVIATION ACT OF 1958

#### Title VI of that Act

#### TITLE VI—SAFETY REGULATION OF CIVIL AERONAUTICS

SECS. 601 THROUGH 613 \* \* \*

#### SEC. 614. ALCOHOL AND CONTROLLED SUBSTANCES TESTING.

##### (a) TESTING PROGRAM.—

(1) PROGRAM FOR EMPLOYEES OF CARRIERS.—*The Administrator shall, in the interest of aviation safety, prescribe regulations within twelve months after the date of enactment of this section. Such regulations shall establish a program which requires air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator) for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Administrator may also prescribe regulations, as the Administrator considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such employees for such use in violation of law or Federal regulation.*

(2) PROGRAM FOR FAA EMPLOYEES.—*The Administrator shall establish a program applicable to employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive functions. Such program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Administrator may also prescribe regulations, as the Administrator considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such employees for such use in violation of law or Federal regulation.*

(3) SUSPENSION; REVOCATION; DISQUALIFICATION; DISMISSAL.—*In prescribing regulations under the program required by this subsection, the Administrator shall require, as the Administrator considers appropriate, the suspension or revocation of any certificate issued to such an individual, or the disqualification or dismissal of any such individual, in accordance with the provisions of this section, in any instance where a test conducted and confirmed under this section indicates that such individual has used, in violation of law or Federal regulation, alcohol or a controlled substance.*

##### (b) PROHIBITION OF SERVICE.—

(1) **PROHIBITED ACT.**—It is unlawful for a person to use, in violation of law or Federal regulation, alcohol or a controlled substance after the date of enactment of this section and serve as an airman, crewmember, airport security screening contract personnel, air carrier employee responsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions.

(2) **EFFECT OF REHABILITATION.**—No individual who is determined to have used, in violation of law or Federal regulation, alcohol or a controlled substance after the date of enactment of this section shall serve as an airman, crewmember, airport security screening contract personnel, air carrier employee responsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions unless such individual has completed a program of rehabilitation described in subsection (c) of this section.

(3) **PERFORMANCE OF PRIOR DUTIES PROHIBITED.**—Any such individual determined by the Administrator to have used, in violation of law or Federal regulation, alcohol or a controlled substance after the date of enactment of this section who—

(A) engaged in such use while on duty;

(B) prior to such use had undertaken or completed a rehabilitation program described in subsection (c);

(C) following such determination refuses to undertake such a rehabilitation program; or

(D) following such determination fails to complete such a rehabilitation program, shall not be permitted to perform the duties relating to air transportation which such individual performed prior to the date of such determination.

(c) **PROGRAM FOR REHABILITATION.**—

(1) **PROGRAM FOR EMPLOYEES OF CARRIERS.**—The Administrator shall prescribe regulations setting forth requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of employees referred to in subsection (a)(1) in need of assistance in resolving problems with the use, in violation of law or Federal regulation, of alcohol or controlled substances. Each air carrier and foreign air carrier is encouraged to make such a program available to all of its employees in addition to those employees referred to in subsection (a)(1). The Administrator shall determine the circumstances under which such employees shall be required to participate in such a program. Nothing in this subsection shall preclude any air carrier or foreign air carrier from establishing a program under this subsection in cooperation with any other air carrier or foreign air carrier.

(2) **PROGRAM FOR FAA EMPLOYEES.**—The Administrator shall establish and maintain a rehabilitation program which at a minimum provides for the identification and opportunity for treatment of those employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive

functions who are in need of assistance in resolving problems with the use of alcohol or controlled substances.

(d) **PROCEDURES FOR TESTING.**—In establishing the program required under subsection (a), the Administrator shall develop requirements which shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—

(A) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

(B) establish the minimum list of controlled substances for which individuals may be tested; and

(C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

(3) require that all laboratories involved in the controlled substances testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(4) provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(5) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within three days after being advised of the results of the confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the

orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(e) **EFFECT ON OTHER LAWS AND REGULATIONS.—**

(1) **STATE AND LOCAL LAW AND REGULATIONS.—**No State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under this section, except that the regulations promulgated under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to employees of an air carrier or foreign air carrier, or to the general public.

(2) **OTHER REGULATIONS ISSUED BY ADMINISTRATOR.—**Nothing in this section shall be construed to restrict the discretion of the Administrator to continue in force, amend, or further supplement any regulations issued before the date of enactment of this section that govern the use of alcohol and controlled substances by airmen, crewmembers, airport security screening contract personnel, air carrier employees responsible for safety-sensitive functions (as determined by the Administrator), or employees of the Federal Aviation Administration with responsibility for safety-sensitive functions.

(3) **INTERNATIONAL OBLIGATIONS.—**In prescribing regulations under this section, the Administrator shall only establish requirements applicable to foreign air carriers that are consistent with the international obligations of the United States, and the Administrator shall take into consideration any applicable laws and regulations of foreign countries. The Secretary of State and the Secretary of Transportation, jointly, shall call on the member countries of the International Civil Aviation Organization to strengthen and enforce existing standards to prohibit the use, in violation of law or Federal regulation, of alcohol or a controlled substance by crew members in international civil aviation.

(f) **DEFINITION.—**For the purposes of this section, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Administrator.

FEDERAL RAILROAD SAFETY ACT OF 1970

Section 202 of that Act

SEC. 202. RAIL SAFETY REGULATIONS.

(a) through (q) \* \* \*

(r)(1) In the interest of safety, the Secretary shall, within twelve months after the date of enactment of this subsection, issue rules, regulations, standards, and orders relating to alcohol and drug use

in railroad operations. Such regulations shall establish a program which—

(A) requires railroads to conduct preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions (as determined by the Secretary) for use, in violation of law or Federal regulation, of alcohol or a controlled substance;

(B) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used or to have been impaired by alcohol while on duty; and

(C) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law and any rules, regulations, standards, or orders issued under this title.

The Secretary may also issue rules, regulations, standards, and orders, as the Secretary considers appropriate in the interest of safety, requiring railroads to conduct periodic recurring testing of railroad employees responsible for such safety sensitive functions, for use of alcohol or a controlled substance in violation of law or Federal regulation. Nothing in this subsection shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any rules, regulations, standards, and orders governing the use of alcohol and controlled substances in railroad operations issued before the date of enactment of this subsection.

(2) In carrying out the provisions of this subsection, the Secretary shall develop requirements which shall—

(A) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(B) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—

(i) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this subsection, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

(ii) establish the minimum list of controlled substances for which individuals may be tested; and

(iii) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this subsection;

(C) require that all laboratories involved in the controlled substances testing of any employee under this subsection shall

have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(D) provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any employee shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(E) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within three days after being advised of the results of the confirmation test;

(F) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

(G) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this subparagraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this subsection; and

(H) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(3) The Secretary shall issue rules, regulations, standards, or orders setting forth requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of railroad employees responsible for safety-sensitive functions (as determined by the Secretary) in need of assistance in resolving problems with the use, in violation of law or Federal regulation, of alcohol or a controlled substance. Each railroad is encouraged to make such a program available to all of its employees in addition to those employees responsible for safety sensitive functions. The Secretary shall determine the circumstances under which such employees shall be required to participate in such program. Nothing in this paragraph shall preclude a railroad from establishing a program under this paragraph in cooperation with any other railroad.

(4) In carrying out the provisions of this subsection, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries.

(5) For the purposes of this subsection, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Secretary.

COMMERCIAL MOTOR VEHICLE SAFETY ACT OF 1986

Section 12019 of that Act

SEC. 12019. DEFINITIONS. \* \* \*

SEC. 12020. ALCOHOL AND CONTROLLED SUBSTANCES TESTING.

(a) REGULATIONS.—The Secretary shall, in the interest of commercial motor vehicle safety, issue regulations within twelve months after the date of enactment of this section. Such regulations shall establish a program which requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Secretary may also issue regulations, as the Secretary considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such operators for such use in violation of law or Federal regulation.

(b) TESTING.—

(1) POST-ACCIDENT TESTING.—In issuing such regulations, the Secretary shall require that post-accident testing of the operator of a commercial motor vehicle be conducted in the case of any accident involving a commercial motor vehicle in which occurs loss of human life, or, as determined by the Secretary, other serious accidents involving bodily injury or significant property damage.

(2) TESTING AS PART OF MEDICAL EXAMINATION.—Nothing in subsection (a) of this section shall preclude the Secretary from providing in such regulations that such testing be conducted as part of the medical examination required by subpart E of part 391 of title 49, Code of Federal Regulations, with respect to those operators of commercial motor vehicles to whom such part is applicable.

(c) PROGRAM FOR REHABILITATION.—The Secretary shall issue regulations setting forth requirements for rehabilitation programs which shall provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are determined to have used, in violation of law or Federal regulation, alcohol or a controlled substance. The Secretary shall determine the circumstances under which such operators shall be required to participate in such program. Nothing in this subsection shall preclude a motor carrier from establishing a program under this subsection in cooperation with any other motor carrier.

(d) PROCEDURES FOR TESTING.—In establishing the program required under subsections (a) of this section, the Secretary shall develop requirements which shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—

(A) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory pro-

cedures to be applied in carrying out this section, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

(B) establish the minimum list of controlled substances for which individuals may be tested; and

(C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

(3) require that all laboratories involved in the testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(4) provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(5) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within 3 days after being advised of the results of the confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(e) **EFFECT ON OTHER LAWS AND REGULATIONS.**—

(1) **STATE AND LOCAL LAW AND REGULATIONS.**—No State or local government shall adopt or have in effect, any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations issued under this section, except that the regulations issued under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury,

or damage to property, whether the provisions apply specifically to commercial motor vehicle employees, or to the general public.

(2) **OTHER REGULATIONS ISSUED BY SECRETARY.**—Nothing in this section shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations governing the use of alcohol or controlled substances by commercial motor vehicle employees issued before the date of enactment of this section.

(3) **INTERNATIONAL OBLIGATIONS.**—In issuing regulations under this section, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries.

(f) **APPLICATION OF PENALTIES.**—

(1) **EFFECT ON OTHER PENALTIES.**—Nothing in this section shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under this title or any other provision of law.

(2) **DETERMINATION OF SANCTIONS.**—The Secretary shall determine appropriate sanctions for commercial motor vehicle operators who are determined, as a result of tests conducted and confirmed under this section, to have used, in violation of law or Federal regulation, alcohol or a controlled substance but are not under the influence of alcohol or a controlled substance, as provided in this title.

(g) **DEFINITION.**—For the purposes of this section, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Secretary.