



U.S. Department  
of Transportation  
**Federal Transit  
Administration**  
Office of Safety and Security

# FTA Drug And Alcohol Regulation *Updates*

Winter 2002

Issue 20

## Introduction....

The Federal Transit Administration (FTA) published its final rules on prohibited drug use (49 CFR Part 653) and the prevention of alcohol misuse (49 CFR Part 654) on February 15, 1994. Shortly thereafter, the FTA published the *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit* to provide a comprehensive overview of the regulations.

Since the *Guidelines* were published there have been numerous amendments, interpretations, and clarifications to the Drug and Alcohol testing procedures and program requirements.

This publication is being provided to update the *Guidelines* and inform your transit system of all of these changes. This Update is the twentieth in a series.

## Inside....

For Your Information.....	2 - 3
Post Accident Testing.....	4 - 5
Clarifications .....	6
Test Result Summary .....	7

## Keep Focused on Safety

We may not realize the full impact of the September 11 terrorist attacks for a long time. Our country, our society, and our lives have been changed in many different ways, some obvious and some subtle. One of the unfortunate outgrowths is an increase in substance and alcohol abuse as individuals attempt to cope with these events. In response to this concern the Department of Transportation issued the following statement encouraging employers to keep focused on safety:

*“The Department of Transportation realizes that many employers have been forced to refocus and reprioritize efforts and resources in light of the challenges caused by recent events—events that have effected our entire Nation. While changes may well be warranted, we ask that you consider the possible adverse impact upon public safety if appropriate attention is not paid to your ongoing safety efforts. As you know, a number of individuals may mistakenly turn to drug use and more frequent alcohol use in their attempts to cope with the stresses (both personal and professional) associated with the terrorist acts and continuing threats. Some of these people may work in safety-sensitive jobs within the transportation industry. Therefore, employers should not reduce their drug and alcohol testing efforts. In fact, employers may be wise to increase prevention-education and counseling opportunities for their employees.”*

## Part 655 Briefings Offered

The Federal Transit Administration is holding daylong briefing sessions on Part 655 at various locations throughout the country. The objective of the course is to update participants on the regulatory changes and provide them with the technical knowledge necessary to modify their drug and alcohol testing programs to ensure compliance with the new rules. The intended audience is Drug and Alcohol Program Managers.

The sessions are held free of charge, but advanced registration is necessary. Representatives from the FTA Office of Safety and Security and the FTA audit team will conduct the training sessions. Topics that will be addressed include the types of testing required by FTA, test outcomes, the role of the medical review officer, the role of the substance abuse professional, policy requirements, vendor compliance and contractor compliance.

You may register on-line at <http://transitsafety.volpe.dot.gov/training/Conferences.asp> or by calling Ms. Jennifer Whalley at (617) 494-3798. The remaining dates and locations are:

City	Location	Date
Columbus, Ohio	Ohio Department of Transportation Offices	January 15, 2002
Portland, Oregon	Kaiser Permanente	January 29, 2002
Amarillo, Texas	Amarillo Holiday Inn	January 31, 2002
Baton Rouge, Louisiana	Sheraton Baton Rouge	February 5, 2002
Tampa, Florida	Blaise F. Alfano Conference Center	February 7, 2002
Newark, New Jersey	Penn Plaza Newark	February 12, 2002

# FOR YOUR INFORMATION

## Where To Find?.....

49 CFR Part 655, Prevention of Alcohol  
Misuse and Prohibited Drug Use in  
Transit Operations

August 9, 2001  
Federal Register Vol. 66  
Pages 41996 - 42036

## 2002 Random Rates Established

The minimum random drug and alcohol testing rates for calendar year 2002 will remain the same for employers subject to the FTA drug and alcohol-testing rule (49 CFR Part 655). The minimum random test rate for drugs remains at fifty percent (50%) and the minimum random test rate for alcohol remains at ten percent (10%). The official FTA notice of the drug and alcohol random test rates for 2002 will soon be published in the Federal Register and on FTA's WEBSITE at <http://transit-safety.volpe.dot.gov>.

## Systems Selected To Submit MIS Reports

A new provision of 49 CFR Part 655 changes the reporting requirement for transit systems. Previously, all grantees, subrecipients, and safety-sensitive contractors were required to submit drug and alcohol test results on a Management Information System (MIS) report to FTA each year. Under the new rule, all covered employers are still required to complete an annual MIS report, but only those employers who are randomly selected are required to submit the reports to FTA.

The sampling procedure used stratified the population into four groupings: top 40 urban systems, other large urban transit agencies, small urban transit agencies, and rural transit agencies. Safety-sensitive contractors are included in the grouping for the type of transit agency they serve. All of the top 40 transit agencies and their safety-sensitive contractors are required to report every year and are not included in the sampling process. For the remaining agencies, a sampling method was used that rendered a 95 percent confidence interval at the +/- 0.5% precision level. As a result, 70 large urban agencies, 55 small urban agencies, and 188 rural agencies were randomly selected. Including the 40 largest systems, a total of 353 transit agencies were selected for reporting. Accounting for the corresponding safety-sensitive contractors, a total of 802 employers will be required to submit MIS reports for calendar year 2001.

Each of the selected employers was sent a notification and reporting package directly. Section 5311 subrecipients that have historically been notified through the state that administers the funding program are now contacted directly with a separate notification to the state. The selected employers are required to submit their reports using the revised forms published as Appendix A of Part 655. Employers may also submit their reports using the forms or CD-ROM

included in their notification package. The reports must be submitted to FTA no later than March 15, 2002. Responses should be submitted to Drug & Alcohol MIS Project Office, USDOT/Volpe Center, 55 Broadway Kendall Square, Cambridge, MA 02142-1093.

The accuracy of the data reported and the statistical validity of the sample selection method is critical as the information obtained will be the basis for establishing future minimum random drug and alcohol testing rates. Once the MIS reports are received from the employers selected, an average random positive test rate will be calculated for each of the four transit size groupings. The test rates will be weighted based on the estimated number of individual drug tests for each group. The overall weighted average will be the value used to determine the minimum random rate.

If the weighted average random rate for drugs is 1.0 percent or more, the minimum drug random test rate will remain at 50 percent. If the weighed average rate is less than 1.0 percent for two consecutive years, the minimum random rate will be lowered to 25 percent. If it subsequently, rises above 1.0 percent for any single year, the minimum drug random test rate will rise again to 50 percent.

If the weighted average rate for alcohol remains below 0.5 percent, the minimum alcohol random test rate will remain at 10 percent. If the weighed average rate exceeds 0.5 percent, but is below 1.0 percent for one year, the minimum alcohol random rate will be increased to 25 percent. If the weighed average rate for alcohol exceeds 1.0 percent for a single year, the minimum alcohol random rate will be established at 50 percent.



The information presented on this  
page should be used to update  
Chapter 9 of the *Implementation  
Guidelines*

## Validity Testing Rule Delayed

DHHS' final rule on validity testing is expected to be delayed while the testing regimens are further scrutinized. The accuracy of testing procedures currently used by laboratories to determine the validity of a specimen (i.e., adulteration, substitution) has come into question in several

recent cases. Most notably, on December 13, 2001, the National Transportation Safety Board (NTSB) invalidated nitrite test results conducted by Laboratory Corporation of America (LabCorp). The NTSB indicated that the nitrite testing process used was not "scientifically suitable." Nitrites

are commonly used by illicit drug users to mask positive test results for marijuana. According to the NTSB, LabCorp failed to adequately validate the process in the forensic setting; thereby, calling the test results into question.

## NTSB Recommends OTC & Prescription Drug Training

The National Transportation Safety Board (NTSB) called for nationwide changes in how transit agencies monitor their employee's medical and drug-related problems following the completion of investigations of two light rail accidents of the Maryland Transit Administration (MTA) in Baltimore.

The two accidents were similar in nature in that in both cases the operators failed to stop the train at the end of the rail line and slammed into a steel barrier at the Baltimore-Washington International Airport. The first accident, which injured eighteen people, was caused by an operator impaired by cocaine, prescription drugs

or both. The second accident, which injured seventeen people, was caused by an operator with an undiagnosed sleep disorder, which caused him to fall asleep at the controls.

Among other things, the NTSB recommended that all transit rail systems "*require employees in safety-sensitive positions to inform the system about the employees' use of prescription and over-the-counter medicines so that the rail system can have qualified medical personnel determine the medicine's potential effects on employee performance, and train employees about their responsibilities under policy.*"

## Dispatcher Case Appealed

On October 30, a decision was handed down by the U.S. District Court—Central District of California in favor of the plaintiffs in *Gonzalez v. Metropolitan Transportation Authority*. The case involved two Los Angeles County MTA (LACMTA) employees that were designated as safety-sensitive employees because they occasionally performed functions that "controlled the movement" of buses. One employee was a radio dispatcher and the other was an instructor.

The court ruled that in the specific circumstance of these two individuals they had

only "minimal and non-immediate impact on safety" and that if impaired by drugs or alcohol, "safety would not be compromised in any meaningful way."

The case is complicated with many



interrelated issues. The FTA takes exception to various issues within the decision and has subsequently joined LACMTA in its appeal.

The ruling in this case only impacts the two LACMTA employees involved in the case and does not have jurisdiction over any other transit systems. Therefore, all FTA grantees, subrecipients and safety-sensitive contractors must continue to implement FTA's drug and alcohol testing regulation and include those employees that control the movement of vehicles as safety-sensitive.

## Q & A

**Q:** Can an FTA pre-employment test be conducted for leaves of absence of 90 days or more, even though the employee has been in the random testing pool for a portion of the 90 day period?

**A:** No. Part 655.41 states that a pre-employment test following a 90-day or longer absence can only be conducted when the employee has not been in the employer's random selection pool during the 90 day period. Thus, employers must be diligent about removing employees from the testing pool when the employee is not expected to perform safety-sensitive functions during the testing period. The employer should use the best information available regarding anticipated absence of employees to update the pool prior to each random number draw.

The information presented on this page should be used to update Chapters 2 of the *Implementation Guidelines*

# POST ACCIDENT TESTING

## Where to Find? .....

49 CFR Part 40, Procedures for  
Transportation Workplace Drug  
Testing Programs

### Revised:

December 19, 2000

Federal Register Vol. 65,

Pages 79462 - 79579.

Primary Topic: Procedures for  
Transportation Workplace Drug and  
Alcohol Testing Program Revised Final  
Rule (49 CFR Part 40)

### Technical Amendments:

August 1, 2001

Federal Register Vol. 66

Pages 41943 - 41955

Primary Topic Clarifications  
and Collections to Part 40; Common  
Preamble to Modal Rules

### HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs Notice of Proposed Rulemaking:

August 21, 2001

Federal Register Vol. 66

Pages 43876-43882

The information presented on this  
page should be used to update  
Chapters 6 of the *Implementation  
Guidelines*.

## Requirement For Post-Accident Testing Clarified

The accident definition and post-accident testing requirement remained the same with the publication of FTA's new drug and alcohol testing rule (49 CFR Part 655). However, there continues to be confusion regarding when a test is required and when it is not.

An accident is defined (§655.4) as an occurrence associated with the operation of a vehicle in which:

- An individual dies;
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene of an accident;
- The mass transit vehicle is a bus, electric bus, van, or automobile in which one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. Look-alike historical trolley buses that operate on surface roads without a fixed guideway are considered buses for purposes of this definition. "Disabling Damage," means damage that precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated, but would have been further damaged if so operated.
- The mass transit vehicle involved is a railcar, trolley car, trolley bus (on a fixed guideway or overhead wire), or vessel and is removed from operation.

Whenever there is a loss of human life, each surviving safety-sensitive employee operating the mass transit vehicle at the time of the accident must be tested. Safety-sensitive employees not on the vehicle (e.g., maintenance personnel) whose performance could have contributed to the accident (as determined by the transit agency using the best information available at the time of the accident) must also be tested.

Following nonfatal accidents, employers shall test each safety-sensitive employee operating the mass transit vehicle at the time of the accident unless the employer determines that the covered employee's performance can be completely discounted as a contributing factor to the accident. The employer shall test any other safety-sensitive employee whose performance could have contributed to the accident. The decision must be made using the best information available at the time.

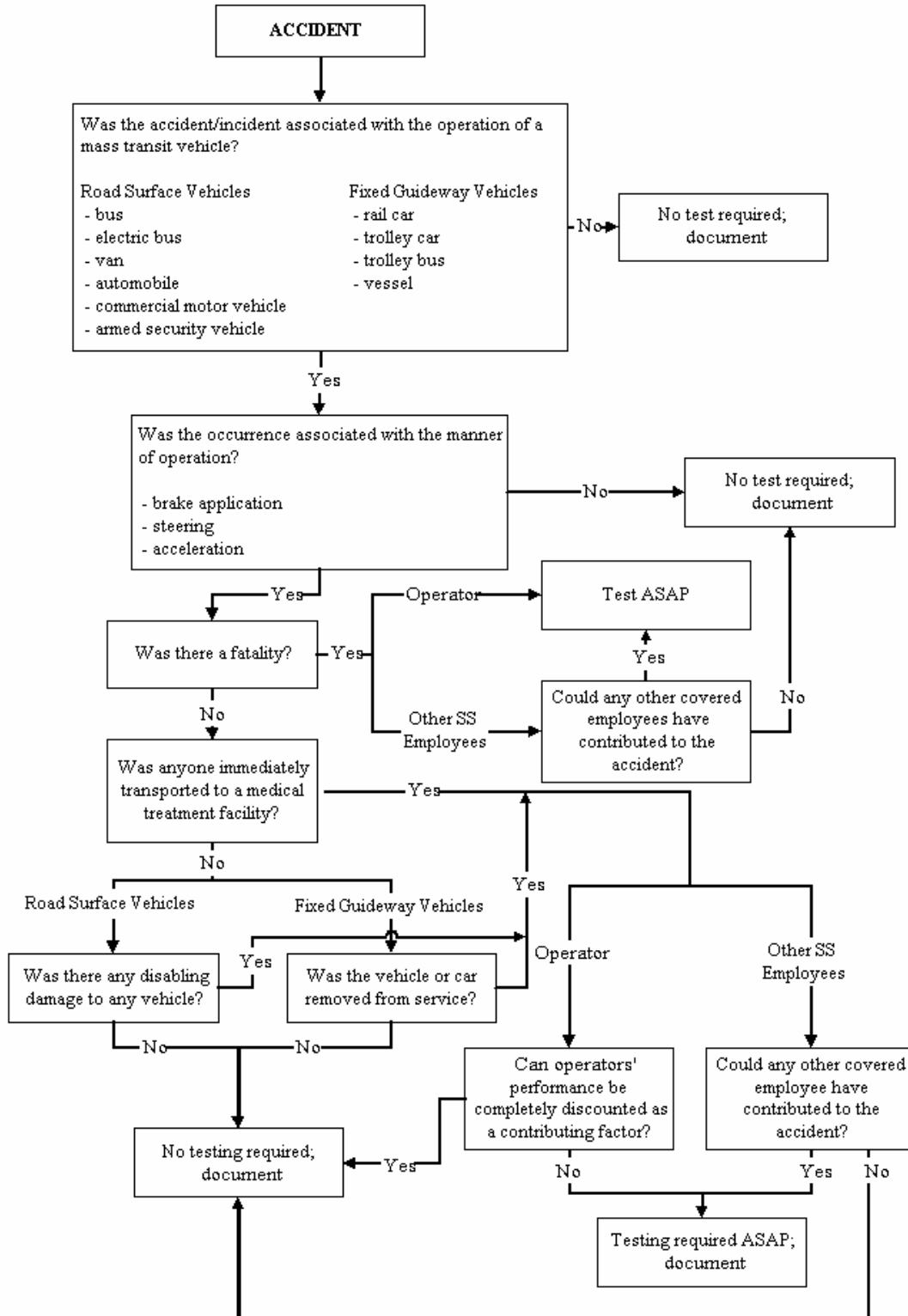
Non-fatal accidents involving a bus, electric bus, van, or automobile must meet the definition of an accident for these types of vehicles to be considered an accident. For these types of vehicles, "removal from operation" is not a criterion for a post-accident test. Thus, employers that take a vehicle out of service without meeting the other criteria (i.e., disabling damage or bodily injury that requires immediate medical treatment away from the scene) may not conduct a post-accident test under FTA authority. The portion of the definition that addresses "removal from operation" is the portion that deals only with vehicles on fixed guideways (i.e., rail car, trolley car, trolley bus) or vessels. The definition for these vehicles does not include disabling damage.

An "occurrence associated with the operation of a vehicle" means that the accident or incident must be directly related to the manner in which the driver applies the brake, accelerates, or steers the vehicle. Operation of a vehicle does not include operation of the lift. An accident could be the result of a collision with another vehicle or pedestrian or could be associated with an incident that occurs on the vehicle without any contact with another vehicle (i.e., a passenger falls on the bus due to the manner in which the vehicle was operated).

Vehicles covered include a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel that is used for mass transportation or for ancillary services. Ancillary services include non-revenue service commercial motor vehicles and vehicles used by armed security personnel. Thus, accidents involving supervisor or general manager vehicles that are not used to transport passengers do not meet this definition and do not justify an FTA post-accident test.

# POST ACCIDENT TESTING

## Post Accident Decision Tree



### Where to Find? .....

#### DHHS Labs

The current list of DHHS certified labs is published the first week of each month and is printed in the Federal Register under the Substance Abuse and Mental Health Services Administration heading (SAMHSA). Only those labs certified can be used for FTA drug testing. The list should be checked monthly as new labs are being added and others are being removed. Website location: <http://www.health.org/workplace>.

To verify the certification status of laboratory, DHHS has established a telephone HELPLINE (800) 843-4971.

The information presented on this page should be used to update Chapter 6 of the *Implementation Guidelines*

# CLARIFICATIONS

## Where to Find? .....

### Conforming Products List

Evidential Breath Testing (EBT)  
Devices

July 21, 2000

Federal Register Vol.65

Pages 45419 - 45423

Primary Topic: Conforming  
Products List (CPL)

Website location: [www.nhtsa.gov/  
people/injury/alcohol](http://www.nhtsa.gov/people/injury/alcohol)

**Note:** This list will be updated  
periodically.

### Non-evidential Testing Devices

May 4, 2001

Federal Register Vol.66

Pages 22639 - 22640

Primary Topic: Initial Alcohol  
Screening Devices

**Note:** This list will be updated  
periodically.

The information presented on  
this page should be used to  
update Chapter 2 of the  
*Implementation Guidelines.*

## Use of New Forms Required

The Department of Transportation (DOT) created a new version of the Alcohol Test Form (ATF) that is to be used for all alcohol tests administered under the DOT rule. A copy of the new, streamlined form is provided as Appendix G of Part 40. The new forms must be in use by February 1, 2002. Use of the expired forms should be halted and any remaining copies destroyed.

Following October 31, 2001 only the new version of the Federal Drug Testing Custody and Control Form (CCF) can be used for DOT tests. Use of an old form requires a corrective action that follows procedures outlined in 40.205 (b)(2). Use of an expired form without proper corrective action will result in a cancelled test.

## Role of the “DER” Clarified

As transit agencies implement internal policy and procedural changes within their organizations to reflect the regulatory changes set forth in the new Part 40 regulations, the assignment of Designated Employer Representative (DER) responsibilities has become a focus of attention. A DER is an employee that receives test results and other communication for the employer and is required to make decisions in the testing and evaluation process.

DERs must be knowledgeable about the DOT and FTA regulations, company policies and internal procedures. DERs must be immediately accessible to collection site personnel, Breath Alcohol Technicians (BAT), and Medical Review Officers (MRO) and be prepared to address drug and alcohol testing issues, make decisions, and provide direction in a timely manner. DERs must have the authority to take necessary and immediate actions (directly or through the employee's direct supervisor) to remove employees from safety-sensitive duties, send employees for retests, and to direct the actions of service agents.

To assist the DER perform his/her function effectively, employers should provide training and procedural guidelines that address the major issues that might be encountered. Specifically, DERs should know what to do in the following cases:

- A collection site representative or BAT calls to inform the employer of an employee with insufficient volume, suspicion of tampering or adulteration, test refusal, observed collections, and/or an employee's late arrival to the collection site.
- The DERs is called upon to verify employee identification when an employee fails to provide proper identification.
- The DER must notify an employee that the MRO needs to speak to him/her immediately.
- The DER is notified of a positive drug test, positive alcohol test or test refusal and must ensure that the employee is immediately removed from safety-sensitive functions.
- The MRO instructs the DER to schedule a retest for an employee.
- The DER is called upon to assist with decisions to test following accidents/reasonable suspicion occurrences.
- The DER receives a written report and follow-up testing plan for an employee that has been determined ready to return to work.

Typically, employers have more than one DER to ensure coverage during all times testing is occurring. Some employers have split the DER responsibilities into “real time” functions that require immediate attention and administrative functions. Real time activities that include direct contact with collection site representatives or BATs during or immediately following collection attempts are usually assigned to first-line supervisors or operations managers that are on duty during all hours of operation. Administrative functions are often performed by the employer's primary DER or Drug and Alcohol Program Manager (DAPM) during normal business hours and include contacts with MROs, SAPs, and other company personnel as appropriate.

# TEST RESULT SUMMARY

FTA Drug and Alcohol Regulation  
*Updates*  
 Issue 20, page 7

## Test Result Summary & Corresponding Employer Action

With the publication of the new DOT rule on the Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR Part 40), the wide range of test results and corresponding employer actions have been more clearly defined and standardized. The following summary is provided as a quick reference. For more explanation, the regulatory text should be consulted.

Test Result	Verified Result	Employer Action
Negative	Negative	No Action
Negative—Dilute [§40.197]	Negative	No Action; or Employer May Retest
Temperature Out of Range [§40.67]	Inconclusive	Retest Under Direct Observation
Evidence at Collection of Specimen Tampering/Substitution/Adulteration	Inconclusive	Retest Under Direct Observation
Positive [40.23]	Positive—Rule Violation	Removal From Duty Employer Consequence
Positive—Dilute [40.197]	Positive—Rule Violation	Removal From Duty Employer Consequence
Test Refusal/Adulteration/Substitution [§40.23; §40.191]	Test Refusal—Rule Violation	Removal From Duty Employer Consequence
Insufficient Volume With Medical Explanation (Random, Reasonable Suspicion, Post Accident) [§40.193]	Cancelled	No Action
Insufficient Volume With Disability—No Evidence of Illegal Drug Use (Pre-employment, Return to Duty, Follow Up) [§40.195]	Negative	No Action
Insufficient Volume With No Medical Explanation [§40.193]	Test Refusal—Rule Violation	Removal From Duty Employer Consequences
Fatal Flaw/Rejected for Testing [§40.199]	Cancelled	No-Action
Invalid Result With Medical Explanation [§40.159]	Cancelled	No Action
Invalid Result With No Medical Explanation [§40.159]	Cancelled	Retest Under Direct Observation
Primary Positive—Split Fails to Reconfirm Drug [§40.187]	Cancelled	Employer/MRO Notifies ODAPC
Primary Adulterated/Substituted—Split Fails to Reconfirm [§40.187]	Cancelled	Employer/MRO Notifies ODAPC
Primary Invalid—Split Fails to Reconfirm [§40.187]	Cancelled	Retest Under Direct Observation
Primary Non-negative—Split Unavailable for Testing [§40.187]	Cancelled	Retest Under Direct Observation
Primary Positive—Split Fail to Reconfirm but is Adulterated [§40.187]	Test Refusal	Employee May Request Test of Primary for Adulterant

### Where to Find? .....

**Urine Specimen Collection Guidelines Office of Drug and Alcohol Policy and Compliance**  
 United States Department of Transportation  
 Version 1.0  
 August 2001  
[www.dot.gov/ost/dapc](http://www.dot.gov/ost/dapc)  
 Fax on Demand  
 (800) 225-3784

**Substance Abuse Professional Guidelines Office of Drug and Alcohol Policy and Compliance**  
 United States Department of Transportation  
 August 2001  
[www.dot.gov/ost/dapc](http://www.dot.gov/ost/dapc)  
 Fax on Demand  
 (800) 225-3784

The information presented on this page should be used to update Chapter 7 of the *Implementation Guidelines*.

# Resource Materials

## Who Should Be Receiving This Update?

In an attempt to keep each transit system well informed, we need to reach the correct person within each organization. If you are not responsible for your system's Drug and Alcohol program, please forward this update to the person (s) who is and notify us of the correct listing. If you know of others who would benefit from this publication, please contact us at the following address to include them on the mailing list. This publication is free.

RLS & Associates, Inc.  
3131 South Dixie Hwy., Ste. 545  
Dayton, Ohio 45439  
Phone: (937) 299-5007  
FAX: (937) 299-1055  
risasc@mindspring.com

**FTA home page:** [www.fta.dot.gov](http://www.fta.dot.gov)

*FTA Office of Chief Counsel:* [www.fta.dot.gov/office/counsel](http://www.fta.dot.gov/office/counsel)

*FTA Office of Safety & Security:* <http://transit-safety.volpe.dot.gov>

*FTA Letters of Interpretation:* [www.fta.dot.gov/library/legal](http://www.fta.dot.gov/library/legal)

*DHHS-Certified Laboratories: Center for Substance Abuse Prevention:* [www.health.org/labs/index.htm](http://www.health.org/labs/index.htm)

**FTA, Office of Safety and Security: (202) 366-2896**

*Drug and Alcohol Consortia Manual*

*Drug and Alcohol Testing Results: 1995, 1996, 1997, 1998, and 1999 Annual Reports*

*Random Drug Testing Manual*

*Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit*

*Identification of Drug Abuse and/or Alcohol Misuse in the Workplace: An Interactive Training Program*

**USDOT Drug and Alcohol Documents FAX on Demand: 1 (800) 225-3784**

**USDOT, Office of Drug and Alcohol Policy and Compliance: (202) 366-3784**

*Urine Specimen Collection Procedures Guideline*

*Substance Abuse Professional Guidelines*

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FTA - Office of Safety and Security 400 7th Street SW Washington, DC 20590	USDOT-John A. Volpe National Transportation Systems Center Kendall Square Cambridge, MA 02142	RLS & Associates, Inc. 3131 South Dixie Highway Suite 545 Dayton, OH 45439	Dan Muko

RLS & Associates, Inc.  
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