

■ 3. Section 73.202(b), the Table of FM Allotments under Nebraska, is amended by removing Channel 293C1 and by adding Channel 294C1 at Ogallala.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket OST-2006-24112]

RIN 2105-AD57

#### Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Revision of Substance Abuse Professional Credential Requirement; Technical Amendments

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** The Department of Transportation is adding state-licensed or certified marriage and family therapists to the list of credentialed professionals eligible to serve as substance abuse professionals under subpart O of 49 CFR part 40. The Department is also making a series of technical amendments to its drug and alcohol testing procedural rule. The purpose of the technical amendments is to clarify certain provisions of the rule as well as address omissions and typographical errors which have been called to our attention since the publication of the final rule in December 2000.

**DATES:** This rule is effective September 22, 2006.

**FOR FURTHER INFORMATION CONTACT:** Bohdan Baczara, Office of Drug and Alcohol Policy and Compliance, 400 Seventh Street, SW., Washington, DC 20590; 202-366-3784 (voice), 202-366-3897 (fax), or [bohdan.baczara@dot.gov](mailto:bohdan.baczara@dot.gov) (e-mail).

#### SUPPLEMENTARY INFORMATION:

##### Background and Purpose

The Omnibus Transportation Employee Testing Act of 1991 required that an opportunity for treatment be made available to employees required by the regulations to undergo workplace drug and alcohol testing (*i.e.*, covered employees). To implement this requirement in its alcohol and drug testing rules issued in February 1994,

the Department of Transportation (DOT) established the role of the “substance abuse professional” (SAP). The Department’s regulation, 49 CFR part 40, requires an employer to provide a covered employee, who engages in conduct prohibited by DOT agency drug and alcohol regulations, a listing of qualified SAPs. In addition, the regulation requires the employee to be evaluated by a SAP and to demonstrate successful compliance with the SAP’s evaluation recommendations for education and/or treatment prior to being considered for returning to any DOT safety-sensitive position.

The Department considers the SAP to be the “Gatekeeper” of safety for the return-to-duty process. The SAP represents the major decision point an employer may have in choosing whether to return an employee to safety-sensitive duties following a DOT regulation violation. The SAP is responsible for several duties important to the evaluation, referral and treatment of employees who have engaged in prohibited drug and alcohol related conduct. The job a SAP accomplishes provides vital help to the employee, the employer and to the traveling public. To be permitted to act as a SAP in the DOT drug and alcohol testing program, a SAP must meet basic knowledge, training and examination and continuing education requirements. In addition, a person must have one of the following credentials:

- (1) Licensed physician;
- (2) Licensed or certified social worker;
- (3) Licensed or certified psychologist;
- (4) Licensed or certified employee assistance professional; or
- (5) Drug and alcohol counselor certified by the National Association of Drug Abuse Counselors Certification Commission (NAADAC); or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC); or by the National Board for Certified Counselors, Inc. and Affiliates/Master Addiction Counselor (NBCC).

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) [PL 109-59]. That law required, among many things, that the Secretary conduct a rulemaking that would make state-certified or licensed marriage and family therapists (MFTs) eligible to become SAPs. The Department has been in discussions with the American Association of Marriage and Family Therapists (AAMFT) and notes the significant strides MFTs have made in obtaining state licensure or certification recognition, as well as, their significant

education requirements. Based on the SAFETEA-LU Legislation and discussions with the AAMFT, the Department issued a notice of proposed rulemaking (NPRM) on March 10, 2006 [71 FR 12331], asking for comments and suggestions for adding state-licensed and certified MFTs as a credential eligible for becoming a SAP.

Over the years, the Department met several times with the AAMFT but had not considered MFTs to be an acceptable professional credential for SAPs for one reason—MFTs were not licensed or certified to practice in all 50 States. Currently, except Montana and West Virginia, all states provide licensure or certification for MFTs. Because of the SAFETEA-LU legislation, the Department proposed in the NPRM not to wait until MFTs are licensed or certified to practice in all 50 states as we have for other professions (*i.e.*, physicians, social workers, and psychologists). Therefore, MFTs in states that provide them licensure or certification will become eligible. As soon as Montana and West Virginia offer licensure or certification, MFTs in those states will also become eligible to become SAPs.

There were 14 commentors to the NPRM, which included individuals, labor organizations, third-party administrators and associations. This final rule responds to their comments.

In addition, this rule makes technical amendments to clarify a certain provision of the rule and addresses typographical errors and omissions which have been called to our attention since the publication of the Department’s final rule in 2000. There was no NPRM with respect to these amendments.

##### Discussion of Significant Comments to the Docket

*Comment:* Five commentors supported the Department’s decision to include being a state-licensed or certified MFT as an acceptable credential to become a SAP, citing the general need for more SAPs. One commenter, however, found it unfair that the licensed or certified MFTs were not required to meet the licensing requirements for all 50 States before being included in the list of acceptable credentials. This commenter suggested that the DOT maintain a consistent standard for all licensing boards and not take shortcuts.

*DOT Response:* Because of the legislative requirement to conduct this rulemaking, the expectation that MFTs will meet the licensing requirements for all 50 States in the near future, and the value of including another profession

eligible to become SAPs, the Department believes there is no need to delay including state-licensed or certified MFTs to the list of credentials available to become SAPs. With the appropriate knowledge, training and qualifications, these therapists have the potential—as do all credentialed groups—to increase the number of qualified SAPs available to the transportation industry.

*Comment:* Five commenters were opposed to adding MFTs to the list of eligible credentials to act as SAPs because they believed MFTs did not have the necessary qualifications to diagnose substance-related disorders. Two commenters agreed with the NPRM but only if MFTs met a requirement for education or expertise in substance abuse issues—competencies which the commenters believe MFTs lacked.

*DOT Response:* Current regulations require those with the appropriate credentials to be SAPs to have knowledge about and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders before they can become qualified to act as SAPs. Degrees and certificates alone do not confer this knowledge. This is why the Department had made it a requirement in its regulation, specifically 40.281(b)(1), that an individual *must* meet this requirement regardless of his or her credential before becoming a SAP. This has been a longstanding requirement of part 40 [FR 61 37222, July 17, 1996], and an essential component of the SAP qualifications that should not be taken lightly.

## Discussion of Technical Amendments

### *Nomenclature Change*

To reflect the February 2005 reorganization of the Research and Special Programs Administration (RSPA), the DOT Agency name will be changed from RSPA to Pipeline and Hazardous Materials Safety Administration (PHMSA). The change will be made throughout part 40, including the MIS Data Collection Form and its accompanying instruction sheet.

### *Section 40.23 What actions do employers take after receiving verified results?*

The Department is amending paragraph (c) of this section to correct the typographical error of “.39” printed in the final rule of December 2000 to read “.039.”

### *Section 40.73 How is the collection process completed?*

While completing the CCF, the collector is to complete Step 4 and not

Step 5 as indicated in paragraph (a)(2) of this section. The change will correct this typographical error.

### *Section 40.83 How do laboratories process incoming specimens?*

Paragraphs (b)(2) and (4) of this section, which deal with re-designating the primary and split specimens, should refer the reader to paragraph (h) of this section and not (g). The changes will correct these typographical errors.

### *Section 40.191 What is a refusal to take a DOT drug test, and what are the consequences?*

When a MRO is looking to establish whether there is clinical evidence of unauthorized use of opiates, section 40.139 states that the MRO may require a face-to-face examination of the employee as part of the verification process for opiates. In a pre-employment testing situation, if the employee fails to undergo the examination and there was a contingent offer of employment, the employee is deemed to have refused to test (see 40.191(a)(7)). If no contingent offer of employment was made and the employee refused to undergo the examination, the MRO cannot verify the test as a refusal. Therefore under the current regulation, in a pre-employment situation where a MRO cannot verify the test as a positive or a refusal, the MRO is left with one choice—to call it negative. For a MRO to verify an opiate test result as negative because the MRO was unable to conduct a medical examination is inappropriate. Safety goals are not served nor does the finding factually represent the events. Therefore, in this limited situation, the Department is adding language permitting the MRO to report the test as “cancelled.”

### *Section 40.267 What problems always cause an alcohol test to be cancelled?*

Paragraph (c)(5) of this section should reference 40.233(a)(1) and (c)(3) and not 40.233(a)(1) and (d). There is no paragraph (d) in the section to reference. Correcting the reference will keep the intent of the section consistent with the 1999 NPRM [FR 69076]. The change will correct this typographical error.

### *Section 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?*

Paragraph (b) of this section should reference 40.255(a)(3) and not 40.255(a)(2). The change will correct this typographical error.

### *Section 40.281 Who is qualified to act as a SAP?*

When the Department published its rule in 2000, the word “alcohol” was inadvertently omitted when identifying that the SAP is permitted to act in the Department’s drug and alcohol testing program. The change will correct this omission.

## Regulatory Analyses and Notices

The statutory authority for this rule derives from the Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

This rule is not significant for purposes of Executive Order 12866 or the DOT’s regulatory policies and procedures. It makes minor modifications to our procedures to increase the number of qualified SAPs available to employees and employers, and corrects or clarifies existing regulatory provisions. Except for providing some additional potential sources of income to some MFTs, it should not have an economic impact, let alone a significant one, on anyone. Consequently, under the Regulatory Flexibility Act, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This rule imposes no information collection requirements for which Paperwork Reduction Act approval is needed. It has no Federalism impact that would warrant a Federalism assessment. With respect to the technical amendments that were not part of the NPRM, the Department has determined that under Section 553 of the Administrative Procedure Act that prior notice and opportunity for public comment would be unnecessary, impracticable or contrary to the public interest. The amendments do not make substantive changes to part 40, and the Department does not anticipate the receipt of meaningful comments on them. The amendments make largely ministerial changes such as a change of address for an agency office, the change of the name of an agency and corrections of citations.

## List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR subtitle A

Authority and Issuance

Dated: August 14, 2006.

Maria Cino,

Acting Secretary of Transportation.

For reasons discussed in the preamble, the Department of Transportation amends part 40 of Title 49, Code of Federal Regulations, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for 49 CFR part 40 is revised to read as follows:

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 et seq.; 49 U.S.C. 322.

2. PART 40—[Nomenclature change] In part 40, revise all references to “RSPA” to read “PHMSA”.

§ 40.3 [Amended]

3. Amend § 40.3 as follows:
a. In the definition of “Laboratory”, remove the words “5600 Fishers Lane, Rockwall II Building, Suite 815, Rockville, MD 20857”, and add, in their place, the words “1 Choke Cherry Road, Room 2–1035, Rockville MD 20587”.
b. In the definition of “DOT, The Department, DOT agency”, remove the words “Research and Special Projects Administration (RSPA)” and add, in

their place, the words “Pipeline and Hazardous Material Safety Administration (PHMSA)”.

§ 40.23 [Amended]

4. § 40.23 (c) is amended by revising “0.39” to read “0.039”.

§ 40.73 [Amended]

5. § 40.73 (a)(2) is amended by revising “Step 5” to read “Step 4”.

§ 40.83 [Amended]

6. § 40.83 (c)(2) and (4) are amended by revising “(g)” to read “(h)”.

7. § 40.191 is amended by revising paragraph (a)(7) to read as follows:

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

- (a) \* \* \*
(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment. If there was no contingent offer of employment, the MRO will cancel the test; or

§ 40.267 [Amended]

8. § 40.267 (c)(5) is amended by revising the words “(see § 40.233(a)(1)

and (d))” to read “(see § 40.233(a)(1) and (c)(3))”.

§ 40.269 [Amended]

9. § 40.269 (b) is amended by revising the words “(see § 40.255(a)(2))” to read “(see § 40.255(a)(3))”.

10. § 40.281 is amended by redesignating paragraph (a) (5) as (a) (6), by removing the word “or” at the end of (a) (4) and by adding a new (a) (5) to read as follows:

§ 40.281 Who is qualified to act as a SAP?

- \* \* \* \* \*
(a) \* \* \*
(5) You are a state-licensed or certified marriage and family therapist; or
\* \* \* \* \*

11. § 40.283 (a) is revised to read as follows:

§ 40.283 How does a certification organization obtain recognition for its members as SAPs?

(a) If you represent a certification organization that wants DOT to authorize its certified drug and alcohol counselors to be added to § 40.281(a)(6), you may submit a written petition to DOT requesting a review of your petition for inclusion.