
Federal Register

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## Part III

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**Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to Department of Transportation Final Rule; Proposed Rules**

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**RINs 2105–AC49, 2120–AH15, 2115–AG00, 2137–AD55, 2130–AB43, 2126–AA58, 2132–AA71**

## Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to Department of Transportation Final Rule

**AGENCIES:** Federal Aviation Administration, Coast Guard, Research and Special Programs Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration; Federal Transit Administration; Office of the Secretary, DOT.

**ACTION:** Notices of Proposed Rulemaking; Common Preamble.

**SUMMARY:** In a rule published December 19, 2000, the Department of Transportation has revised its drug and alcohol testing procedures regulation. The purposes of these proposed amendments is to make DOT agency drug and alcohol testing regulations consistent with the revised testing procedures regulation, avoid duplication and inconsistency, and make certain other changes to update and clarify the operating administration rules.

**DATES:** Comments should be submitted by June 14, 2001, except comments on the Coast Guard notice of proposed rulemaking, which should be submitted by June 29, 2001. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** See each individual DOT agency proposed rule for information on the docket number and address to use when commenting on each agency's proposed rule.

**FOR FURTHER INFORMATION CONTACT:** For information concerning the relationship of the proposed DOT agency amendments to the revised 49 CFR Part 40, Robert C. Ashby (400 7th St., SW., Washington DC, 20590; 202–366–9310). For information on the individual DOT agency proposed rules, see the **FOR FURTHER INFORMATION CONTACT** persons listed in each DOT agency proposed rule.

**SUPPLEMENTARY INFORMATION:** On December 19, 2000 (65 FR 79462), the Department of Transportation published a comprehensive revision to our drug and alcohol testing procedural rules (49 CFR part 40). The new Part 40 makes numerous changes in the way that drug and alcohol testing will be conducted in the future. While some provisions of the new rules will be made effective more quickly, as amendments to the existing Part 40, the entire revised part is scheduled to go into effect on August 1, 2001.

Part 40 is one element of a Department-wide set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. It is important that the six DOT agency rules that cover specific transportation industries be consistent with the revised Part 40, to avoid duplication, conflict, or confusion among DOT regulatory requirements. For these reasons, we are proposing amendments to each of the six DOT agency drug and alcohol testing regulations connected to Part 40. We intend to issue final versions of these ''conforming amendments'' in time to be effective on August 1, 2001, the same date that the revised Part 40 takes effect.

There are several actions that all or some of the DOT agencies propose to take in order to ensure consistency with the revised Part 40. The next section of this preamble discusses each of these items in turn. In addition, there are some provisions of the proposed rules that are DOT agency-specific. These items are discussed in a subsequent section of the preamble.

### Common Proposals

*Substance Abuse Professionals and the Return-to-Duty Process*

Currently, most of the DOT agency drug and alcohol testing rules have their own similar, but not identical, provisions concerning the return-to-duty (RTD) process for employees who have tested positive or otherwise violated the rules. These provisions also include (with the exception of the Coast Guard) material on the qualifications and role of the substance abuse professional (SAP).

The new Part 40 centralizes the material concerning the RTD process and the qualifications and role of SAPs. Among the provisions in new Part 40 are requirements for the qualification and training of SAPs, requirements for follow-up tests in all cases of violations, and clarification of the scope of the RTD process (i.e., that it applies following any violation, including a violation arising from a pre-employment test; that the RTD requirements follow an employee to subsequent employers).

To avoid potential duplication and inconsistency, we are proposing to remove RTD and SAP provisions from the six DOT agency rules. All six DOT agency programs would use the RTD and SAP provisions of Part 40 beginning August 1, 2001.

*Pre-Employment Alcohol Testing*

For several years, as the result of a court decision and subsequent legislation (§ 342 of the National Highway Systems Act of 1995), pre-employment alcohol testing requirements in the FTA, FMCSA, FRA, and FAA rules have been suspended. (Parallel pre-employment alcohol testing requirements did not exist in the RSPA and Coast Guard rules.) Section 342 deleted former provisions of the Omnibus Transportation Employee Testing Act of 1991 requiring pre-employment alcohol testing and substituted a sentence providing that ''The [Secretary of Transportation's] regulations shall permit [employers] to conduct pre-employment testing of such employees for the use of alcohol.''

The practical effect of the suspension of pre-employment alcohol testing requirements has been to give employers the discretion to conduct DOT pre-employment alcohol testing. However, the Department has never amended its rules to specifically reflect the legislation. In these proposed rules, we would formalize the existing situation and make the requirements consistent throughout all DOT agency rules. That is, in all six DOT agency programs, the proposed rules would authorize, but not require, employers to conduct pre-employment alcohol testing. If an employer chose to conduct pre-employment alcohol testing under Federal authority, the employer would have to conduct the testing in accordance with all Part 40 requirements.

*Split Specimen Testing*

At the present time, FTA, FMCSA, FRA, and FAA are required by statute to collect split specimens for drug testing. Employees have the right, within 72 hours of being notified of a verified positive test, to request a test of the split specimen at a second HHS-certified laboratory. The statute in question does not apply to the Coast Guard and RSPA programs, in which split specimen testing is currently discretionary with employers.

As noted in the Part 40 rulemaking, this situation has caused some confusion among employers, employees, and service agents. Consequently, the revised Part 40 requires split specimen testing for all DOT collections. In these proposed rules, RSPA and Coast Guard propose conforming to the Part 40 requirement to use split specimen collections in all cases. The split specimen testing rules of Part 40 (including their application to validity testing) would apply to all DOT collections, including those under RSPA and Coast Guard rules. RSPA would remove a provision allowing requests for split specimens to be made within 60 days, which is inconsistent with the 72-hour provision of Part 40 and the other operating administration rules.

*Stand-Down Waivers*

The new Part 40 permits employers to petition DOT agencies for a waiver allowing the employer to stand employees down following a report of a laboratory confirmed positive test or refusal, pending the outcome of the verification process. The stand-down provision contains the substantive requirements for obtaining a waiver, but does not include specific waiver procedures.

Each of the operating administrations has, or will add, its own process for granting waivers from its regulations. In each of today's proposed rules, the DOT agency involved proposes to connect its own waiver process with the stand-down waiver provision of new Part 40. Doing so will inform employers how they should frame stand-down waiver requests and to whom the requests should be sent.

*Definitions*

The revised Part 40 includes a number of new or altered definitions of terms. Examples of new terms are affiliate, adulterated specimen, consortium/third-party administrator (C/TPA), continuing education, designated employer representative, dilute specimen, initial and confirmatory validity test, error correction training, qualification and refresher training, service agent, stand-down, and substituted specimen. Other terms have altered definitions (e.g., employer, which now specifies that service agents are not employers).

In the interest of consistency and the convenience of having a definition in only one place, the DOT agencies are proposing to delete definitions of terms that duplicate terms defined in Part 40 (except where differences or greater specificity are needed in the agency rules). The DOT agency rules will make use of the terms defined in Part 40, and in some cases would be amended to use those terms.

*Qualifications and Training*

The revised Part 40 contains new or modified qualification and training requirements for testing personnel, such as collectors, breath alcohol technicians (BATs) and screening test technicians (STTs), medical review officers (MROs), and SAPs. These include requirements for qualification training, refresher training, continuing education, and error correction training.

The DOT agency rules do not need to retain provisions related to the qualifications and training of these personnel that are now covered in Part 40. Therefore, these proposed rules would delete any references to the qualifications and training of collectors, BATs and STTs, MROs, and SAPs.

*Enforcement Matters*

Each of the DOT agency rules incorporates Part 40 by reference. A violation of a Part 40 provision automatically becomes a violation of the DOT agency rule, and is subject to the same kinds of sanctions as other violations of the agency's rules. In some cases, the DOT agencies have predetermined sanctions for different kinds of rule violations (*e.g.*, a ''penalty table''). These agencies, as part of their proposed rules, will work Part 40 violations into their sanctions systems.

Each of the proposed rules would make clear that a violation of Part 40 is a violation of DOT agency rules. In some cases, existing DOT agency rule language says that in the event of inconsistency or conflict between Part 40 and the DOT agency rule, the latter controls. This language has created confusion about the enforceability of Part 40, and the proposed rules would delete it. Where there is a difference between Part 40 and another DOT agency rule (*i.e.*, one required by a special circumstance of a particular industry or agency program), the agency rule will state the difference explicitly.

*Role of C/TPAs, MROs, and Service Agents*

The new Part 40 makes a significant change in the role of C/TPAs, permitting them, for the first time, to transmit some test results and other information from MROs to employers and persons designated by an employer, as permitted by Part 40, to receive information on behalf of a specified employer. Some provisions of DOT agency rules are inconsistent with this new provision, and these proposed rules would change such provisions to be consistent with new Part 40. The new Part 40 also elaborates roles and responsibilities of service agents to a greater degree than the present Part 40, and the proposed rules, where necessary, alter DOT agency rules to be consistent with these provisions.

The new Part 40 also provides more details concerning the duties and responsibilities of MROs (*e.g.*, in the validity testing process, with respect to conflicts of interest and supervision of staff). To the extent that any DOT agency rule has provisions that are inconsistent or overlapping with these provisions, the agency proposals would make appropriate changes to ensure consistency.

*Employer Checks on Test Results of Applicants and Employees*

Previously, only FMCSA rules had a provision requiring employees to check on the previous drug and alcohol testing results of applicants for jobs involving safety-sensitive duties. The new Part 40 applies a requirement of this kind to all the DOT agency programs. The Part 40 provision is not identical to the current FMCSA rule. For example, the new provision requires employers to ask applicants whether there were any situations in which they tested positive on a pre-employment test for an employer that subsequently did not hire them. To ensure consistency, FMCSA would delete its current pre-employment check provision. The Part 40 provision would apply to employers by virtue of the incorporation of Part 40 in the DOT agency regulations. We seek comment on whether any additional reference to the Part 40 provision is needed in the DOT agency rules.

*C/TPA Reports of Refusals*

Section 40.355(i) of the revised Part 40 provides that, as a general matter, service agents, including C/TPAs, must not make a determination that an employee has refused a drug or alcohol test. Section 40.355(j)(1) creates an exception to this general prohibition, permitting a service agent to make a

determination that an employee has refused a drug or alcohol test if ''You are authorized by a DOT agency regulation to do so, you schedule a required test for an owner-operator, and the individual fails to appear for the test without a legitimate reason.''

This section was drafted in response to a situation that sometimes occurs, in which a C/TPA directs an owner-operator or other self-employed individual to appear for a random or other test and the individual is a ''no show.'' Because this individual is self-employed, there is usually no party (like an employer in a larger business) who can determine that the individual has refused to test and cause the individual to be removed from performing safety-sensitive functions. Section 40.355(j)(1) contemplates that, where DOT agency regulations permit, C/TPAs could make a refusal determination in this situation, since there basically is no one else in position to do it.

At present, DOT agency regulations do not address this issue. In some cases (*e.g.*, FRA, FTA), the provision is irrelevant, because these agencies do not regulate any owner-operators. The Department seeks comment, however, on whether DOT agencies that do regulate owner-operators or other self-employed safety-sensitive personnel should add a provision to their final conforming rules authorizing this action by C/TPAs. DOT agency rule provisions could also permit or require C/TPAs, in this situation, to report the refusals to the applicable DOT agency. The Department seeks comment on whether such a reporting authorization or requirement is advisable. Another alternative would be for Part 40 to authorize reporting of this kind on a Department-wide basis, obviating the need for amendments to individual operating administration rules.

*Rulemaking Process Matters*

In addition to these common provisions of the NPRMs, the individual DOT agencies, in some cases, have agency-specific provisions they wish to propose. These agency-specific provisions are discussed in the preambles to each DOT agency rule.

Each of the DOT agencies involved with this rulemaking will be reviewing one another's dockets, so that suggestions that may have been made in response to only one agency's proposed rule will be available to all the agencies. Any or all of the six agencies may make changes to their proposed rules based on comments that came into the docket of another of the agencies. In addition, in some cases one agency has proposed an idea (*e.g.*, an FMCSA proposal to issue notices concerning random testing rates only when there is a change, rather than every year) that, after reviewing the dockets, other agencies may choose to adopt.

**Regulatory Analyses and Notices**

These proposed rules have been designated as non-significant under Executive Order 12886 and the Department of Transportation's Regulatory Policies and Procedures. They are non-significant because they merely make conforming changes to the revised 49 CFR Part 40, which has already been subject to extensive comment and analysis. The proposed changes would not have any incremental economic impacts on their own. The economic impacts of the underlying Part 40 changes were analyzed in connection with the Part 40 rulemaking.

Because these proposals have no incremental economic impacts, the Department certifies, under the Regulatory Flexibility Act, that these proposals, if adopted, would not have a significant economic impact on a substantial number of small entities. These proposals likewise have no incremental Federalism impacts for purposes of Executive Order 13132, so no further analysis is needed for Federalism purposes. All the information collection requirements of Part 40 have been analyzed and approved by OMB. These proposed rules would impose no information collection requirements that have not already been reviewed in context of the Part 40 rulemaking, so no further Paperwork Reduction Act review is necessary.

There are a number of other Executive Orders that can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the context of this NPRM, and we believe that the proposed rules do not directly affect the matters that the Executive Orders cover.

Issued this 9th day of April 2001, at Washington, D.C.

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**R.C. North,**

*Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety and Environmental Protection.*

**Stacy L. Gerard,**

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*Acting Deputy Administrator, Federal Motor Carrier Safety Administration.*

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**Kenneth C. Edgell,**

*Acting Director, Office of Drug and Alcohol Policy and Compliance, Office of the Secretary.*

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 121

**[Docket No. FAA–2000–8431; Notice No. 00–14]**

**RIN 2120–AH15**

## Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes amendments to the industry drug and alcohol testing regulations to conform with the changes in the Department of Transportation's revision of its drug and alcohol testing procedures regulation, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. We also propose to change the antidrug and alcohol misuse prevention program regulations in light of the amendments that have been made to the medical standards and certification requirements. We further propose eliminating certain requirements under reasonable suspicion and post-accident alcohol testing because these requirements are outdated and no longer valid. These